

(1998) 12 MAD CK 0116
In the Madras High Court

Shanmugham and Others

APPELLANT

Vs

Tamil Nadu Wakf Board and Others

RESPONDENT

Date of Decision : 13-12-1998

Acts Referred:

Citation : (1999) 2 MLJ 294

Hon'ble Judges : A. Ramamurthi, J

Bench : Division Bench

Judgement

A. Ramamurthi, J.—The unsuccessful legal representatives of the 4th defendant viz., defendants 6 to 13 have preferred the second appeal aggrieved against the judgment and decree in A.S.No. 117 of 1972 on the file of Sub Court, Chidambaram.

2. The case in brief is as follows:

The plaintiffs filed a suit for recovery of possession from the 4th defendant. One Haji Yaqoob Sahib son of Mohamed Ghouse Sahib dedicated the plaint schedule property as Wakf-alal-aulad by a registered wakf deed dated 2.8.1944. Under the document, a family wakf was created and the son Mohamed Musa Sahib and the descendants are entitled to enjoy the income from the suit property as beneficiaries without any power of alienation. The 1st plaintiff is the Mutavalli of the said wakf and the 2nd plaintiff is the State Wakf Board represented by its Secretary. The 2nd plaintiff has filed the suit as co-plaintiff u/s 15(i) of the Wakf Act, 1954. Defendants 1 to 3 got possession of the property under the partition deed dated 27.3.1947 and they, in turn, sold the properties to the 4th defendant on 7.8.1952 under a registered document. The partition as well as the subsequent alienation are void ab initio and the plaintiffs sent a registered notice, calling upon the 4th defendant to surrender possession, but it was not done and, hence, the suit.

3. The 4th defendant alone registered the suit, stating that no wakf was created by virtue of the document dated 2.8.1944 and it is not valid under law. He had

purchased 2 acres and 22 cents under a registered document for a valid consideration of Rs. 1,000. The 4th defendant and his predecessors-in-title have enjoyed the same without any interruption and perfected the title by adverse possession/The plaintiff are not entitled to get recovery of possession and their claim is also barred by limitation. Further more, the property was not dedicated for any pious religious or charitable purpose and, hence, it cannot be construed as a wakf created in accordance with law.

4. The trial court framed six issues and on behalf of the plaintiffs, Exs.A-1 to A-7 were marked and P.Ws.1 and 2 were examined. On the side of the defendants, Exs.B-1 to B-19 were marked and D.Ws 1 and 2 were examined. The trial court came to the conclusion that the property is a wakf property, but ultimately dismissed the suit on the ground that the suit is barred by limitation. Aggrieved, the plaintiffs preferred A.S.No. 117 of 1972 on the file of Sub Court, Chidambaram and the appeal was allowed and the judgment and decree of the trial court were set aside and the legal heirs of the 4th defendant viz., defendants 6 to 13 were directed to deliver possession of the property and aggrieved against this, the legal heirs of the 4th defendant have come forward with the present second appeal.

5. At the time of admission of the second appeal, the following substantial questions of law were framed.

(1) Whether the lower appellate court was right in restoring the appeal on the basis of the provisions of Tamil Nadu Act 34 of 1982?

(2) Whether the lower appellate court was right in its conclusion that the suit "properties were wakf properties?

6. The points that arise for consideration are:

(1) Whether the suit property is a wakf property?

(2) Whether the plaintiffs are entitled to recovery of possession of the property from the legal heirs of the 4th defendant?

(3) Whether the suit filed by the plaintiffs is barred by limitation?

(4) Whether the 4th defendant and his heirs have prescribed title by adverse possession? and

(5) To what relief?

7. Point: Ex.A-1 is the registration copy of the wakf deed dated 2.8.1944. Ex.A-2 is the application made by one Ali Hussain to the State Wakf Board. Ex.A-3 is the certified copy of the decree in O.S.No. 226 of 1944 on the file of District Munsif's Court, Chidambaram. The plaintiffs have come forward with a specific case that in view of Ex.A-1, a Wakf is created and the beneficiaries were not given any power of alienation of the property and under the circumstance, the subsequent partition in the family of defendants 1 to 3 and sale deed in favour of the 4th

defendant under Ex.B-1 are void ab initio and, as such, the plaintiffs are entitled to recovery of possession of the property from the legal heirs of the 4th defendant.

8. The learned Counsel for the appellants contended that the lower appellate court failed to consider the recital in Ex.A-1, which provides that Mohammed Musa Sahib must pay the kist and other things and he can utilise the rest of the income for his own expenses and there is no dedication for any pious, religious or charitable purposes to constitute it as a wakf property. There cannot be any consent with reference to the legal position and, as such, the restoration of appeal in A.S.No. 117 of 1972 is also not proper and correct. The provisions of Act 34 of 1982 is not applicable to the case of the plaintiffs. But, on the other hand, the contesting defendants have prescribed the title by adverse possession. The plaintiffs have not come forward with the suit well within time. The decisions relied on by the contesting defendants were also not considered properly which resulted in miscarriage of justice. The 4th defendant purchased the property in the year 1952, whereas the suit was filed after a period of 12 years in 1967 and, as such, the suit is barred by limitation.

9. The learned Counsel for the respondents contended that there is a clear finding even by the trial court that it is a wakf property and the contesting defendants have not chosen to question the same in appeal and they have also not chosen to file any memorandum of objections in A.S.No. 117 of 1972 filed by the plaintiffs. In short, it is stated that the appellants cannot question the finding already arrived at by the courts below with reference to the nature of the property. However, the learned Counsel for the appellants relied upon a decision in Deva Ram and Another Vs. Ishwar Chand and Another, , wherein it is observed that, "an appeal does not lie against mere "findings" recorded by a court unless the findings amount to a "decree" or "order". Where a suit is dismissed, the defendants against whom an adverse finding might have come to be recorded on some issue has no right of appeal and he cannot question those findings before the appellate court". They also relied upon another decision of this Court in R. Maria Siluvai Vs. B. Sreekumari Amma and three others, , wherein it is observed that, "No appeal shall lie if statute prohibits that the successful party has no right of appeal on finding against him." These decisions are applicable to the case on hand. It is seen from the judgment of the trial court that although there is a finding to the effect that it is a wakf property, ultimately the suit was dismissed and, hence, there was no necessity for the contesting defendants to prefer an appeal since the ultimate decision was in their favour. Hence it is open to the contesting defendants to agitate the points again before this Court with reference to the nature of the property.

10. The learned Counsel for the appellants contended that the recital under Ex.A-1 would go a long way to show that no wakf was created and under the circumstances, the plaintiffs are not entitled to recover possession of the property. The defendants relied on Irfan Ali and Others Vs. Bhagwant Kishore

and Others, , wherein it is observed that, "The mere use of the word "Wakf" or the making of a "Wakf in favour of one"s descendants does not necessarily predicate an ultimate dedication in favour of the poor or some other meritorious object." For the same proposition, they relied upon Mahomed Bi Bi Vs. N.P. Sulaiman Ahmed and Others, . They further relied upon Mahammad Ali Vs. Dinesh Chandra Roy Choudhury and Others, , wherein it is observed that, "In the case of a wakf for the maintenance of the family and children an ultimate gift for religious, pious or charitable purposes is essential for its validity as a wakf and the intention to make such a gift cannot be inferred from the mere use of the word "Wakf. They also relied upon Tamil Nadu Wakf Board v, Ebrahim Musuee Muthavalli, Bayan Bat"s Wakf 92 L. W. 355, that, "under Section 3(I) of the Wakf Act, the legislature contemplates that for a wakf-alal-aulad to be a wakf under the Act, there must be a dedication for any purpose recognised by Muslim Law as pious, religious or charitable. That assumes that the purpose of a wakf-alal-aulad a simpliciter will not be considered to be a purpose recognised by the Muslim Law as pious, religious or charitable" There is no dispute about the proposition in all these decisions and the applicability of the same depends upon the facts and circumstances in each case. In order to appreciate and find out the real nature of the property, the recitals in the document and the subsequent legal position assumes greater significance.

11. The Musalman Wakf Validating Act, 1913 was introduced on 7.3.1913 and it is in Act to declare the rights of Mussalman to make settlement of properties by way of wakf in favour of their families, children and descendants, The reason and purpose are also made out as follows:

Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes.

12. Section 2 of the said Act defines as Wakf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman Law as religious, pious or charitable.

13. Section 4 reads as follows:

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.

No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

It is necessary to state that by virtue of Section 4, it is manifestly clear that even assuming that the religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the children or descendants in Ex.A-1, the wakf will not be invalid by reason of remoteness of the benefit to poor. There is

no dispute that a wakf-alal-aulad is created under Ex.A-1. But the learned Counsel for the defendants would contend that no benefit is given in prasenti to the poor and under the circumstance, it cannot be construed as a wakf. I am unable to agree with this contention. It is entitled position of law that a wakf substantially created for the family is called as family wakf or wakf-alal-aulad. The word "Family" was intended to be used in the section in a very large and extensive sense. The object of the Act was to validate the creation of the wakf in perpetuity in favour of persons, who happened to be the members of the family according to the popular acceptance of the term. Section 3(L) of the Wakf Act, 1954 also provides that a wakf includes a wakf-alal-aulad, a life interest in the user of the property may also be created in a family wakf. According to the Proviso to Section 3 of the Act of 1913, which reads as follows:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or any other purpose of a permanent character.

14. The learned Counsel for the plaintiffs also relied upon a decision of the Apex Court in Radhakanta Deb v. Commissioner of Hindu Religious Endowments (1982) 2 S.C.C. 226, wherein it is observed that, "even the Mohamedan Law recognises the existence of a private trust which is also of a charitable nature and which is generally called wakf-alal-aulad, where the ultimate benefit is reserved to God but the property vests in the beneficiaries and the income from the property is used for the maintenance and support of the family of the founder and his descendants. In case the family becomes extinct, then the wakf becomes a public wakf, the property vesting in God". This decision is applicable to the case on hand.

15. Reliance was also placed upon a Full Bench decision in Moattar Raza and Others Vs. Joint Director of Consolidation, U.P. Camp at Bareilly and Others, , wherein it is observed that, "The creation if a wakf is essentially based upon a legal fiction, the fiction being that the property vests in God and in perpetuity, but income from the property is permitted to be utilised for certain specified purposes, which under the Muslim Law are recognised as pious or religious. Under the Mussalman Wakf Validating Act, this fiction appears to have been extended to cases of private wakfs or wakfs-alal-aulad, i.e., wakfs of which the object is inprasenti and for an indefinite period in future, to confer benefits on the members of the wakfs family or his descendants. As soon as the wakf is created the legal fiction comes into existence and ensures a permanent dedication by vesting the proprietary title in God, at the same time making the income or profit of the wakf property available to the beneficiaries so long as they exist and then for charitable and religious purposes". This decision is also applicable to the case on hand. From what has been stated above, it necessarily follows that in every case of a wakf, whether public or private the wakf property vests in God Almighty or in the wakf itself as an institution or a foundation eo nomine and not in the Mutavalli or the beneficiary.

16. Learned Counsel for the defendants also relied on a Bench decision of this

Court in Tamil Nadu Wakf Board v. Ebrahim Musee Muthavalli Bayam Bat's Wakf 92 L.W. 355, wherein it is observed that, "even with regard to a private Wakf there may be two kinds. One is a wakf- alal-aulad simpliciter, Where the public in the form of the poor will come into the picture only when the line of the wakf becomes completely extinct at some future uncertain point of time. The second is a wakf in which there is a dedication or gift in praesenti in the sense that a portion of the income from the wakf property is reserved for being spent on strangers and other objects of piety or charity and the other portion being spent for the benefit of the wakfs relations and member's of the family".

17. It has been held in G.M.A. Bhaimia, Muthavalli "Wakf Estate A.M. Bhaimia" and Others Vs. The Madras State Wakf Board and Another, , that,

in the case of private wakf or wakf-alal-aulad, only the corpus of the property vests in God immediately, and the enjoyment of the usufruct is postponed till after the extinction of the Wakf, his family and descendants.... Such a private wakf was made legal and valid under Muslim Law by the Mussalman Wakf Validating Act of 1913.... The wakf has tied down the properties and the properties are vested in God, and on account of the express dedication, the entire properties have become wakf properties, though in the case of private wakf, i.e., wakf-alal-aulad, the charitable, religious and pious purposes are only postponed until after the happening of the contingency namely the extinction of the founder's family but the character of the property is not changed.

This decision is also applicable to the case on hand in order to give a finding relating to the nature of the property. Similar view has also been reiterated in V. Mohamed Mahib v. The Madras State Wakf Board (1967) 1 M.L.J. 65.

18. It is, therefore, clear from the aforesaid decisions as well as the provisions of the Mussalman Wakf Validating Act, 1913, there is no difficulty in coming to the conclusion that Ex.A-1 has created a Wakf and the recitals in the document also established that it is only a family wakf or Wakf-alal-aulad and by virtue of Section 4 of the Validating Act, 1913, it can be concluded that it is a wakf property although the permanent nature is postponed until after the extinction of the family which created the wakf.

19. The next contention put forward by the appellants is that the lower appellate court was not right in restoring the appeal on the basis of the provisions of Tamil Nadu Act 34 of 1982 and, as such present suit is also barred by time and the plaintiffs are not entitled to get recovery of possession. It is seen from the records that A.S.No. 17 of 1972 was dismissed for default on 13.12.1972 and thereafter, the plaintiffs filed I.A.No. 34 of 1983 in the lower appellate court u/s 5 of the Limitation Act to condone the delay of 44 days in filing the application to restore the appeal under the provisions of Act 34 of 1982, Notices were given to the parties and for counter, number of adjournments were also given. Ultimately, on 11.2.1985, two counsel made an endorsement as "no objection". But, however, the final order allowing the application was passed on 27.6.1985,

wherein it is clearly stated that after hearing the parties by allowing the application, no prejudice will be caused to the parties and, as such, the application was allowed. Now, the learned Counsel for the defendants appellants contended that simply because no objection endorsement was made in the lower appellate court, the appellate court ought not to have restored the appeal, which was dismissed for default and any concession by the counsel on a question of law would not be valid. In support of the contention, the learned Counsel for the defendants relied on *The Canara Bank Ltd. Vs. The Warden Insurance Co. Ltd.*, and also *K.A. Achutan Nair v. M.M. Kuppa Sah* (1959) 1 M.L.J. 148. The defendants also relied on *Uptron India Limited Vs. Shammi Bhan and Another*, wherein it is observed that, "wrong concession made by counsel on a question of law, held not binding on his client". These decisions have no application to the case on hand. After giving enough time, no doubt, there was an endorsement of no objection". But, however, a perusal of the order indicates that I.A.No. 34 of 1983 was allowed on merits and if really aggrieved, the parties could have preferred revision against such an order passed on 27.6.1985. However, no such revision was filed by the aggrieved party and later the appeal was restored to file and the appeal was disposed of on merit. It is only now in the second appeal, the defendants have taken a stand that the appeal ought not to have been restored on 27.6.1985 and, hence it cannot be given much credence.

20. The learned Counsel for the plaintiffs relied on a decision of the Apex Court in *Mangu Ram Vs. Municipal Corporation of Delhi*, wherein it is observed that, "since under the Limitation Act, 1963, Section 5 is specifically made applicable by Section 29, Sub-section (2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law, if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation." It is only if the special or local law expressly excludes the applicability of Section 5, that it would stand displaced." There is no dispute in this proposition.

21. It is relevant to look into the Tamil Nadu Act 34 of 1982 (The Wakf (Tamil Nadu) Amendment Act). Sections 59-A and 59-B were introduced Section 59-A reads as follows:

Properties and funds of Wakfs not to vest under the law of limitation after the 14th August, 1947 and suits not barred- Nothing contained in any law of limitation for the time being in force-

(i) shall be deemed to vest or ever to have vested in any person the property or funds of any wakf which had not vested in such person or his predecessor-in-title on or before the 14th August, 1947.

22. Section 59-B relates to extension of period of limitation for suits to recover rent and mesne profits of wakfs. Section 3 of Act 34 of 1982 relates to restoration of suits and proceedings, which reads as follows:

Notwithstanding anything to the contrary contained in the Limitation Act, 1963

(Central Act 36 of 1963) or in any other law for the time being in force, where any suit or proceeding for the recovery of the property or funds of any wakf or for the recovery of rent or mesne profits in respect of the property of any wakf has been dismissed or before the date of the publication of this Act in Tamil Nadu Government Gazette, by any court or other authority and if such suit or proceeding would not have been dismissed if Section 2 of this Act had been in force at the relevant time, such court or other authority shall, on an application made within six months from the date of the publication of this Act in the Tamil Nadu Government Gazette, by any party aggrieved by such dismissal, make an order setting aside its decree or order and shall proceed with the suit or other proceeding from the stage reached immediately before the dismissal of such suit or other proceeding.

23. It is admitted that Act 34 of 1982 was published in the Gazette on 22.6.1982 and the period of six months would come to an end on 21.12.1982. The application to restore the appeal was filed in I.A.No. 34 of 1983 on 5.2.1983 invoking Section 5 of the Limitation Act with a delay of 44 days. Because of this only, the learned Counsel for the defendants contended that Section 5 of the Limitation Act is not applicable for invoking the provisions under Act 34 of 1982 and, as such, the allowing of I.A.No. 34 of 1983 is not proper and correct and under the circumstances, the defendants have perfected the title by adverse possession. Even assuming that I.A.No. 34 of 1983 ought not to have been allowed, there are other circumstances to come to the conclusion that the present suit filed by the plaintiffs is not barred by time and, as such, much weight need not be attached to the allowing of I.A.No. 34 of 1983.

24. It has been held in *K.S. Viswam Iyer v. State Wakf Board*, wherein it is observed that Article 96 of the Limitation Act, 1963 alone is applicable in respect of claim relating to suits for recovery of possession filed by the Wakf Board and in such circumstances, computation of limitation will commence not from the death of the transferor, but from the time of the constitution of the Wakf Board. There is no dispute that the suit is governed by Article 96 of the Limitation Act, 1963 and if the suit is filed within 12 years of the constitution of the Wakf Board, it can be safely concluded that the suit is filed within the time. It is also clear from Section 96 of the Limitation Act that the time from which the period begins to run will commence from the date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment, whichever is latter. It is not in dispute that the plaintiff wakf Board was constituted in 1958 and the present suit was filed in 1967 and, as such, there is no difficulty in coming to the conclusion that the present suit is well within time. This decision is exactly applicable to the case on hand.

25. Reliance was also placed upon a decision of this Court in *The State Wakf Board, Madras Vs. Subramanyam and Others*, , wherein it is observed that,

the combined effect of Section 15(1) and 15(2) of the Wakfs Act would certainly be sufficient to designate the Wakf Board as a manager for the purpose of

recovery possession of wakf property and consequently the Board could certainly be termed as "Manager" contemplated by the third column to Article 96 of the Limitation Act, 1963 and if so construed, the constitution of the Wakf Board under the statute could certainly be construed to the appointment of the Wakf Board as "Manager" of the wakf in question, because even the word "appointment" just like the word "Manager" was not a term of art and, therefore, had to receive its ordinary, natural and normal meaning.

This decision only supports the case of the plaintiffs. Under the circumstance, when the Wakf Board has come into existence in 1958 and the suit has been instituted in 1967, the suit is well within the time according to the Article 96 of the Limitation Act, 1963 and, as such, there is no force in the contention of the appellants.

26. The lower appellate court correctly appreciated the position of law not only with reference to the nature of the property but also with reference to the law of limitation and rightly came to the conclusion that the Wakf Board is entitled to get recovery of possession of the property from the legal heirs of the 4th defendant. The learned Counsel for the appellants could not substantiate their contention and there is absolutely no infirmity in the judgment passed by the lower appellate court and under the circumstance, I am of the view that no interference is called for.

27. For the reasons, stated above, the second appeal fails and is dismissed with costs, Time for delivery two months.