

(2008) 06 KAR CK 0028

In the Karnataka High Court

Case No : Civil Revision Petition No. 521 of 2008

St. Gregorious Orthodox Cathedral

APPELLANT

Vs

Aga Ali Asgar Wakf and Karnataka State Board of Wakfs

RESPONDENT

Date of Decision : 02-06-2008

Acts Referred:

Waqf Act, 1995 — Section 83, 83 (1), 83 (9)

Citation : (2008) 6 KarLJ 358 : (2008) 4 KCCR 2216

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

**Advocate : M. Birdy Aiyappa, for Sreevatsa Associates, for the Appellant;
Prabhuling K. Navadgi, for R1 and R2, for the Respondent**

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—This revision petition u/s 83(9) of the Wakf Act, 1995 [for short "the Act"] gives rise to an interesting question of law regarding the scope of the jurisdiction of the tribunal, a "Tribunal" constituted in terms of Section 83 of the Act and the limits of jurisdiction being in terms of Sections 83 1) and 83(2) of the Act.

2. The revision is by the first defendant in OS No. 6 of 2005 before the Wakf Tribunal, Bangalore Division, Bangalore, a suit that had been filed by Aga Ali Askar Wakf, a Wakf registered with the Karnataka State Board of Wakfs under the provisions of the Wakf Act, 1995. The plaintiff had sought for the relief of permanent injunction to restrain the first defendant in the suit, a Church which had owned the suit schedule property, its men and agents from interfering with the right of way of the members of Shia Muslims to reach Asurkhana, the property belonging to the plaintiff which was a wakf property and to reach which property the members of Shia Muslims were to pass through a passage ABCD [as described in the suit schedule] owned by the first defendant

3. The plaintiff had also sought for further relief of restraint order on the

defendants from putting up a gate at the beginning of the passage and for incidental prayers and for temporary injunction.

4. While an ex parte ad interim order of injunction had been granted initially, an application filed by the first defendant to vary this order of temporary injunction through an application under Order XXXIX Rule 4 of the CPC came to be dismissed in terms of the impugned order dated 10.6.2005.

5. It is aggrieved by this order, the present revision petition by the first defendant.

6. The first defendant had pleaded, inter alia, that the tribunal lacks jurisdiction to entertain the suit, particularly, as the property in question admittedly belonged to the first defendant; that it was not a wakf property and therefore the subject suit could not have been laid before the tribunal which is a tribunal which had the jurisdiction to exclusively deal with the wakf properties and matters relating to wakf and not with other properties.

7. The preliminary objection was that the subject matter of the suit did not come within the scope of either Sub-sections (1) or (2) of Section 83 of the Act and therefore the tribunal cannot entertain the suit for granting any relief temporary or on regular basis.

8. The tribunal had formulated the question regarding the maintainability as a preliminary point and having answered this in favour of the plaintiff and against the first defendant, had proceeded to examine the feasibility for granting the relief sought for and at that stage confirmed the ad interim order which had been granted ex parte earlier.

9. Civil revision petition had been admitted. The respondents had been put on notice. The plaintiff - wakf and the Karnataka State Board of Wakfs which was the second defendant in the suit are represented by Sri. Prabhuling K. Navadgi, learned Counsel.

10. The matter having been set down for hearing, I have heard Ms. Birdy Aiyappa, learned Counsel for the petitioner and Sri Prabhuling K Navadgi, learned Counsel for the respondents.

11. The contention of learned Counsel for the petitioner is that the tribunal lacked jurisdiction to entertain a suit of the present nature; that the property admittedly belonged to the first defendant; that the plaintiff if at all had only a right of easement which is also not disputed; that the defendant was not in any way interested in causing any obstruction or preventing the plaintiff from making use of the pathway as an approach to their property located interior, that while there was no cause of action, assuming a cause of action arose, a dispute of such nature to determine the easementary right of the plaintiff, vis-a-vis the liability of the defendants' property cannot be made subject matter of a suit before the tribunal in terms of Section 83 of the Act and therefore the tribunal could not have entertained the suit itself.

12. In this regard, learned Counsel for the petitioner has drawn the attention of the court to the provisions of Section 83 of the Act which reads as under:

83. Constitution of Tribunals, etc,-

(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and Jurisdiction under this Act of each of such Tribunals.

(2) Anyk mutawalli person interested in a wakf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make and application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the wakf.

(3) Where any application made under Sub-section (1) relates to any wakf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallis of the wakf actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter:

Provided that the State government may, if it is of opinion that it is expedient in the interest of the wakf or any other person interested in the wakf or the wakf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such wakf or wakf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of Justice to deal with the application afresh.

(4) Every Tribunal shall consist of one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I and the appointment of every such person may be made either by name or by designation.

(5) 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.

(6) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the

application and it shall have the force of a decree made by a civil court.

(8) The execution of any decision of the Tribunal shall be made by the civil court to which such decision is set for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal.

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit.

and submits that matters which go before the tribunal and in respect of which the jurisdiction of civil courts is ousted in terms of Section 85 of the Act are such matters which are explicitly enumerated in Sub-sections (1) and (2) of Section 83 of the Act

13. Submission of learned Counsel for the petitioner proceeds on the premise that it is only when the subject property is wakf property and the disputes relate to the wakf or property claimed as a wakf property that the Tribunal gets jurisdiction and the scope of the subject matter which can go before the tribunal in terms of Section 83 can be gathered by an examination of provisions of Sections 6, 7, 32 and 54 of the Act; that the emphasis all along has been as to whether the particular property is a wakf property or otherwise; that in the present case, admittedly, the property being not the property belonging to the wakf, but a property owned by the first defendant, the plaintiff-waif could not have laid a suit before the tribunal for the relief that it had claimed in the suit.

14. Further submission is that the scope of the words for the determination of any dispute relating to a wakf or wakf property" as occurring in Sub-section (1) of Section 83 of the Act and question or other matter relating to the wakf as it occurs towards the end of Sub-section (2) of Section 83 of the Act should be understood in the background of the provisions of Sections 6, 7, 32(3) and 54(3) of the Act which all read as under:

6. Disputes regarding wakfs.

(1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final:

Provided that no such suit shall be entertained by the Tribunal after the expiry of

one year from the date of the publication of the list of wakfs.

Explanation. - For the purposes of this Section and Section 7, the expression "any person interested therein", shall, in relation to any property specified as wakf property in the list of wakfs published after the commencement of this Act, shall include also every person who, though not interested in the wakf concerned, is interested in such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry u/s 4.

(2) Notwithstanding anything contained in Sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under Sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of wakf shall, unless it is modified in pursuance of a decision or the Tribunal under Sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a court in that State in relation to any question referred to in Sub-section (1).

7. Power of Tribunal to determine disputes regarding wakf.-

(1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:

Provided that-

(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs; and

(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.

(2) Except where the Tribunal has no Jurisdiction by reason of the provisions of

Sub-section (5), no proceeding under this Section in respect of any wakf shall be stayed by any court, tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be made a party to any application under Sub-section (1).

(4) The list of wakfs and where any such list is modified in pursuance of a decision of the Tribunal under Sub-section (1), the list as so modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under Sub-section (1) of Section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

32. Powers and function of the Board.-

(3) Where the Board has settled any scheme of management under Clause (d) or given any direction under Clause (e) of Sub-section (2), any person interested in the wakf or affected by such settlement or direction may institute a suit in a Tribunal for setting aside such settlement or directions and the decision of the Tribunal thereon shall be final.

54. Removal of encroachment from wakf property.-

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is wakf property and that there has been an encroachment on any such wakf property, he may, by an order, require the encroacher to remove such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the wakf.

and if so understood, dispute if at all if there exists concerning a right of easement of the plaintiff-waif in a property admittedly belonging to the first defendant cannot be construed as a dispute within the scope of either Sub-sections (1) or (2) of Section 83 of the Act and therefore submitted that it is only the civil court which has the jurisdiction to examine a dispute of such nature if one exists and not the tribunal and as such the tribunal should not have entertained the suit.

15. In this regard, learned Counsel for the petitioner has placed reliance on the following two single Bench decisions of the Madras High Court.

[a] N. Palani Vs. P. Lakshavatsalu Chettiar,

[b] A.M. Ali Akbar and Another Vs. Keelakarai South Street Jamath Masjid Paripalana Committee and Others, .

16. While the first decision is relied upon to contend that even on the pleadings, no case was made out to contend that there was a dispute in existence which was required to be taken either before the civil court or the tribunal as the defendants by themselves had not only admitted the right of easement in favour of the plaintiff but also had in categorical terms indicated in the written statement that they are not interested in preventing the plaintiff from exercising its right of easement over the approach path owned by the defendants. In this regard, learned Counsel for the petitioner - first defendant has drawn the attention of the court to paragraph-11 of the written statement which reads as under:

11. Re: Plaint para 10: This Defendant has never at any point of time obstructed the use of the right of way as alleged. This Defendant is putting up a gate at the Eastern end of the passage which lies facing the Hosur Road as a matter of protection of its property and to prevent the passage way from being used as a place to park vehicles. The persons who use the Ashurkhana are free to enter the gate and proceed to the Ashurkhana All allegations to the contrary are denied The decree in O.S. No. 1138 of 1987 in fact enures to the benefit of the Plaintiff. However if the Plaintiff does not want the rights as stated therein, then this Defendant has no objection. This Defendant perceives the statements in this para of the plaint are an abandonment of the rights stated to belong to the Plaintiff in the decree. The other averments in this paragraph are denied as false and false to the knowledge of the Plaintiff.

17. However, the legal point that is urged with seriousness is with regard to the lack of jurisdiction with the Tribunal to entertain the matter of this nature and therefore prays for setting aside the impugned order and for dismissal of the suit.

18. On the other hand, Sri Prabhuling K. Navadgi, learned Counsel for the respondents submits that the suit had been properly laid; that the tribunal has jurisdiction to entertain the suit; that the very proposal by the first defendant to put up a gate at the entrance through which the members and devotees of the plaintiff-waif have to pass through in itself is proof of the intention of the first defendant to prevent and regulate the movement of the followers of the plaintiff - wakf; that it definitely constitutes an infringement on the right of easement and while the plaintiff had every apprehension and cause of action for filing this suit, the suit was also very much tenable for the reason that when once the easement right had been conceded, the right of easement also constitutes a property even in terms of the definition of immovable property" under Sub-section (26) of Section 3 of the General Clauses Act, 1897 and in the absence of the definition of the Immovable property" in the wakf Act itself, one will have to fall back on the definition as contained in the General Clauses Act, 1897 and if so the dispute relating to a right of easement also comes within the scope of Section 83 of the Act and as such urges that the tribunal had jurisdiction; that the contention that

the tribunal had no jurisdiction cannot be accepted and prays for dismissal of the revision petition.

19. Learned Counsel for the respondents would further submit that a right of easement is also an important property right, particularly, as it happens in the present case as unless the plaintiff is able to exercise its right of easement to have access to its own property through the passage and the pathway ABCD described in the suit schedule, the plaintiff will not be in a position to enjoy or make use of its own property and any infringement over the exercise of the right of easement would amount to denial of a property owned by the wakf itself and as such it should be taken that it is a clear case of a dispute relating to a wakf property and if so the matter is squarely within the jurisdiction of the said tribunal constituted for the specific purpose under the Act and the tribunal has jurisdiction to entertain the matter.

20. It is further submitted by learned Counsel for the respondents - plaintiff in the suit that the object of the Act by creating a special tribunal to deal with all disputes relating to wakf properties is not only to ensure that all such disputes involving a wakf and wakf properties are resolved by a common specialized forum, but also for providing expedient disposal of the cases and resolution of the disputes; that a jurisdiction of this nature conferred exclusively on the tribunal cannot be in any way whittled down by giving a limited meaning to the word "wakf" and "wakf property" and disputes relating to wakf occurring in Section 83 of the Act and submits that the dispute of the present nature is squarely within the Jurisdiction of the tribunal and therefore the revision petition deserves to be dismissed.

21. In support of submission on behalf of the respondents, learned Counsel for the respondents would place reliance on the division Bench decision of the Kerala High Court in the case of Aliyathamada Beeyhathabiyyapura Pookoya Haji v. Pattakkal Cheriya Koya and Ors. reported in AIR 3003 Ker 366, particularly the observations as contained in paragraphs- 11 and 12 of this Judgment.

22. Learned Counsel would submit that the tribunal had not only jurisdiction for making necessary declaration even in respect of dispute relating to the Management of the wakf but also in respect of disputes relating to the wakf properties also; that the fact that the division Bench of the Kerala High Court had disagreed with the view taken by the learned single Judge of the Madras High Court in Ali Akbar's case supra, fully supports the submission made on behalf of the respondents - wakf and therefore urges for dismissal of the civil revision petition.

23. I have bestowed my anxious consideration to the rival submissions at the Bar. I have also perused the records and the statutory provisions relevant for the purpose of deciding this case and as extracted in the earlier part of this order.

24. It is no doubt true that the Wakf Act, 1995 is a special enactment and has created a special tribunal in terms of Section 83 of the Act for resolution of

disputes relating to wakf properties and management of the wakf and related matters. The main object is to ensure that all disputes relating to wakf and wakf properties are within the domain of the tribunal and to that extent the jurisdiction of the civil court is ousted u/s 85 of the Act.

25. The ouster of jurisdiction u/s 85 is with reference to the provisions of Section 83 of the Act i.e., the jurisdiction of the civil court is ousted only in so far as the matters which are brought within the jurisdiction of the tribunal and not a general ouster. Therefore, unless the subject matter is within the scope of either Sub-section (1) or Sub-section (2) of Section 83 of the Act, Section 85 of the Act is not attracted. In the circumstances, the question that is to be answered is whether the dispute relating to violation of right of easement as is sought to be complained by the plaintiff in the suit brought before the tribunal was a dispute within the scope of Section 83 of the Act.

26. As rightly contended by learned Counsel for the petitioner, the scope of the disputes with regard to the property etc., should be understood in the context of the earlier provisions, particularly, Sections 6, 7, 32(3) and 54(3) of the Act. A reading of these provisions indicate that the stress is always on the property belonging to the wakf as already notified and contained in the list of wakf properties or a wakf property which was asserted and used as a wakf property hitherto.

27. In the present case, the property in dispute i.e., the main property is admittedly the property belonging to the defendants and because of this reason, Sri. Navadgi, learned Counsel for the respondents seeks to bring the dispute within the scope of Section 83 of the Act by calling in aid the argument that a right of easement is also part of a property right in an immovable property and seeks to draw sustenance from the definition of "immovable property" as contained in Section 3(26) of the General Clauses Act, 1897.

28. Section 3(26) of the General Clauses Act, 1897 reads as under:

3. Definitions.-

(26) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

29. Even on an examination of Section 3(26) of the General Clauses Act, 1897, it does not necessarily indicate that a right of easement can be brought within the definition of immovable property" as defined in Section 3(26) of the General Clauses Act, 1897. I say so because the immovable property shall include land i.e., per se land, benefits that arise out of land and things attached to the earth etc. Now, so far as the right is concerned, it is not a right of land or right to land. The right of easement is while not a benefit, in the sense, the phrase as used in Section 3(26) of the General Clauses Act, 1897 is undisputedly a liability attached to the property and goes with that property and it is not a right which

enures in favour of any particular person but a liability which has to be suffered by the owner of that particular property. It is because of the liability the other person gets a corresponding right to make use of the property in the limited sense. A right of easement by no stretch of imagination can be elevated to the status of any type of ownership in the property. An examination of the provisions of the Wakf Act, 1995 clearly indicates that all disputes which can be taken before the tribunal are disputes relating to the ownership of the properties as to whether it belongs to wakf or otherwise.

30. Though Sri. Navadgi, learned Counsel for the respondents - plaintiff would urge that the residuary provision as it occurs in Sub-section (2) of Section 83 of the Act would include any disputes, question or other matters relating to the wakf can also be taken before the tribunal, I am afraid this submission cannot be accepted as rightly contended by learned Counsel for the petitioner, it has to be understood ejusdem generis in the context of the definition and Section 6, 7, 32 and 54 of the Act. The dispute relating to a wakf property and as is sought to be provided for in terms of Sections 6, 7, 32 and 54 of the Act which all help to understand the scope of the words disputes relating to a wakf or wakf property and the right of a Mutawalli or other interested person of a wakf or any other person aggrieved by an order made under this Act to take such dispute relating to the wakf before the Tribunal, the present is not a situation involving any order passed by any person functioning under the authority of the wakf. While, it is even difficult to say that the plaintiff had a real cause of action to bring a suit before the tribunal or a civil court in terms of the prayer sought for, particularly, as it appears the defendants had never interfered with the user by the followers of the plaintiff - wakf, that question may not be examined in this revision petition as I am of the view that a dispute of this nature and cause of action as was pleaded in the plaint was not one covered by Section 83 of the Act and therefore the tribunal lacked jurisdiction to entertain a suit of the nature brought before it

Section 83 of the Act is a provision which seeks to carve out a part of the jurisdiction of the civil court and confer that jurisdiction in favour of the tribunal. While interpreting a provision of this nature, there is no scope for enlarging the meaning and understanding of the words which seeks to ouster the jurisdiction of the civil court as any provision ousting the jurisdiction of the civil court should be strictly construed and cannot be unduly enlarged and unless the subject matter is squarely covered within the limited jurisdiction sought to be carved out, it cannot be taken to be within the jurisdiction of the special tribunal either by the process of interpretation or through a logical process.

31. In the circumstances, this revision petition is allowed. The impugned order dated 10.6.2005 passed on I.A. No. 5 in O.S. No. 6 of 2005 on the file of the Presiding Officer, Karnataka Wakf Tribunal, Bangalore Division, Bangalore, is set aside and the suit in O.S. No. 6 of 2005 itself is dismissed holding that the wakf tribunal did not have the jurisdiction to entertain the suit.

32. It is open to the plaintiff - respondents to work out the rights, if any, are

affected, in terms of any other provision of law.