

(1997) 09 MAD CK 0157

In the Madras High Court

Case No : W.A. No"s. 369 and 370 of 1992

Syed Moinuddin

APPELLANT

Vs

Tamil Nadu Wakf Board and Others

RESPONDENT

Date of Decision : 01-09-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92, 92(1), 92(2)
Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 — Section 63, 64,
64(5), 69, 70
Waqf Act, 1954 — Section 15, 3, 43, 8

Citation : AIR 1998 Mad 129 : (1998) 1 LW 134

Hon'ble Judges : K. Natarajan, J;J. Kanakaraj, J

Bench : Division Bench

Advocate : Habibullah Badsha for S.M. Amjad Nainar and A.S. Hussain, for the Appellant; O.R. Abdulkalam, for the Respondent

Final Decision : Dismissed

Judgement

J. Kanakaraj, J.—The dispute in these two writ appeals relates to the Durga known as Saint Hazarath Syed Moosa Sha Khaderi Durga located at Mount Road, Madras. By a common order, dated 28-2-1992, Bakthavatsalam, J. disposed of two writ petitions, viz., W.P. Nos. 5315 of 1991 and 6401 of 1987. Writ Petition No. 5315 of 1991 was for the issue of a writ of certiorari, to quash the order of the wakf board, dated 10-1-1991, appointing the third respondent therein by name Syed Moinuddin as Mutawalli of the said Durga. Writ Petition No. 6401 of 1987 is in respect of that portion of the order of the wakf board, dated 8-3-1987 holding that the decree of the High Court in C.S. No. 116 of 1909 is not a scheme decree and that therefore, the wakf board has jurisdiction to appoint and remove the mutawalli. In effect, the prayers in both the writ petitions related to the effect of the decree in C.S. No. 116 of 1909 and whether the wakf board was deprived of its powers to remove the mutawalli and appoint a fresh mutawalli. The writ Appeals are directed against the said common Judgment in the two writ petitions.

2. For the purpose of convenience, we will refer to the parties by their names to avoid confusion, Saint Hazarath Syed Moosa Sha Khaderi is said to have been buried in Survey No. 7/1. One Syed Aminuddin is said to be the founder of the Durga and he has acting as the mujawar. After the death of Syed Aminuddin, his two sons Syed Ismail and Syed Gulam Dastagir were managing the Durga 2nd were performing the "fathibes" of the Saint jointly. Syed Ismail is said to have died in or about 1902 and after his death his brother, Syed Gulam Dastagir is said to have been in management of the Durga. Syed Gulam Dastagir died in or about 1905. Thereafter, disputes arose between the widow and children of Syed Ismail and the widow and children of Syed Gulam Destagir with reference to the management of the Durga and the sharing of the emoluments. The children of Syed Ismail and their mother filed a suit in C.S. No. 116 of 1909 against the children of Syed Gulam Dastagir and their mother in this Court. The prayer in the said suit related to: (i) a declaration that both the parties are entitled to perform the duties of mujawar of the Durga in turns; (ii) Both the parties are entitled to collect and receive the offerings, gifts and other emoluments and appropriate the hundial collections from the Durga; (iii) that a scheme may be settled as between the parties; (iv) for rendering accounts and (v) for appointment of a Receiver pending disposal of the, suit and for certain other consequential reliefs. The said suit was decreed on 11-8-1910. Since the terms of the decree are important for the purpose of a decision in these writ appeals, we would like to extract below the decree in full:

(1) That the first plaintiff and the first and second defendants herein are entitled to perform the duties of Mujawar (Superintendent) of the Durga of the Saint Hazarath Syed Khadiri situate in Mount Road, Madras in turns;

(2) That the first plaintiff and the first and second defendants herein are entitled to collect and receive the offerings, gifts and other emoluments of the said Durga and as the collections of the hundi box in the said Durga and apportion the same in two equal moities and that Syed Moose Sahib the first plaintiff is entitled to one half and Syed Gaffar Sahib and Syed Moideen Sahib the first and second defendants are entitled to the other half of the said collections, offerings, gifts and other emoluments;

(3) That the first plaintiff herein is entitled to rupees fifteen (Rs. 15/-) a month net as and for his share of the mesne profits of the said Durga, since 15th day of May, 1907 to the end of October, 1909 less rupees ninety five annas twelve and paise five (Rs. 95,12.5) which was paid by the defendants to the plaintiffs in respect of this period and it is ordered and decreed as follows:

(4) That Mr. Mahomed Ibrahim Sahib the Receiver appointed herein do pay to the plaintiffs herein the amount retained by him representing one half of the net collections payable to the plaintiffs;

(5) That the defendants herein do pay to the plaintiffs herein mesne profits at the rate of rupees fifteen (Rs. 15.0.0)per mensem from 15th May, 1907 up to the

end of October, 1909 after giving credit for rupees ninety five annas twelve and paise 5 (Rs. 95.12.5) paid on account and

(6) That the defendants herein do pay to the plaintiffs their costs of this suit when taxed and noted in the margin hereof with interest thereon at the rate of six per cent per annum from the date of taxation to the date of payment.

The said decree was confirmed in O.S.A. No. 34 of 1910.

3. Thereafter the two families were sub divided into several branches and the female members also claimed a right to manage and appropriate the income in accordance with their respective shares and as on date a long genealogical tree is filed to indicate the innumerable number of the sharers who claimed to have share in the emoluments and consequentially for the alleged management of the Durga. It is said that there are as many as 34 turn trustees holding office for periods between five days and twenty six and half days. It is needless to point out that the reference to management of the Durga is only a farce to make a claim for the collections from the Durga.

4. After the enactment of the Wakf Act, 1954, the subject Durga was also surveyed and notified by the Government. The Tamil Nadu Wakf Board recognised Syed Amiruddin (second respondent in W.P. No. 5315 of 1991) as the mutawalli of the wakf and appointed him in that capacity by an order, dated 30-9-1963. The Durga itself is situate in an important locality and it is comprised in Survey No. 4/1 in an extent of about nine grounds. There being a considerable scope for making unlawful income from the property of the Durga by leasing out portions of the same, apart from the legal income by way of emoluments, gifts and hundial collections, there has always been a clamour for taking the control over the Durga not only by the turn trustees, but by others also. The wakf board had been exercising its powers by appointing committee or executive officers for monitoring the collections from the Durga. Such orders of the wakf board were time and again challenged in this Court by way of writ petitions and writ appeals. To quote one instance, when a committee was appointed by the wakf board in its proceedings, dated 27-4-1979, before the committee was ultimately held to be illegal, the committee had effected several improvements to the Durga and its properties. It is pointed out that an iron grill was provided to protect the Durga, pipe lines were laid to drain the storm water, two watchmen were appointed to look after the Durga during day and night part-time sweepers and scavengers were appointed, a bore pump was installed, permanent toilet facilities were provided and six additional lamp posts were erected, a water tank with 12 taps for providing drinking water was also constructed, name boards were installed and iron safety hundials were fixed in the inner chamber of the Durga. In the decision reported in Khadar Shariff and Others Vs. Tamil Nadu State Wakf Board and Others, , the appointment of the committee was set aside. It is thereafter that an application was filed to remove the second respondent Syed Amiruddin from the office of the mutawalli because of his acts of commission and omission. It is on a consideration of such complaints against the second respondent, Syed

Amiruddin, that the wakf board ultimately removed the second respondent from the office of the mutawalli by an order, dated 21-3-1987, confirmed in the subsequent order, dated 10-1-1991. In the subsequent order, 10-1-1991, the third respondent, in W.P. No. 5315 of 1991 viz., Syed Moinuddin Sahib was appointed as mutawalli. The terms of his appointment are interesting and will give a clue to the relationship of the mujawar or turn trustees vis-a-vis the mutawalli. The conditions of appointment were as follows:

1. The newly appointed Muthawalli Janab Syed Moinuddin Sahib will judiciously ensure proper distribution of the money realised from the hundi collections as among the turn holders according to custom.
2. He should strictly abide by the customary rules and conditions connected with the administration of the petition wakf.
3. He shall ensure proper rendition of accounts and will get prior permission and sanction of the Tamil Nadu Wakf Board for any capital investment by way of renovation or extension or construction of the Durgah premises.
4. He should strictly discharge statutory obligation and to the satisfaction of the Board and
5. He shall hold office for a period of five years from the date of this order.

It is thus order of the wakf that is now challenged by the petitioners in the writ petition. The primary ground of attack is that the wakf Board has no jurisdiction to remove or appoint a mutawalli because the Durga and the wakf are governed by a scheme decree framed in C.S. No. 116 of 1909. Learned single Judge accepted this plea and allowed the writ petition No. 5315 of 1991 and the appointment of the third respondent, Syed Moinuddin as mutawalli was set aside. So far as writ petition No. 6401 of 1987, the same was dismissed as having become infructuous.

5. Writ Appeal No. 369 of 1992 has been filed by the affected mutawalli viz., Syed Moinuddin. Writ Appeal No. 370 of 1992 has been filed by the Tamil Nadu Wakf Board. Mr. Habibullah Badsha, learned senior Counsel appearing for both the appellants raised the following points.

(i) The decree in C.S. No. 116 of 1909 is not a scheme decree and therefore it cannot stand in the way of the wakf board exercising its powers Under the Act;

(ii) As early as in the year 1963, the Tamil Nadu Wakf Board had exercised its powers by appointing Syed Amiruddin as a mutawalli. The said appointment was in force till 1987, when he was removed from the office. During the entire period from 1963 to 1987, the functioning of Syed Amiruddin as mutawalli was never questioned. Therefore, the power of the Wakf Board to appoint a mutawalli has got to be accepted; and

(iii) A perusal of the genealogical tree shows that there are as many as thirty four turn trustees as per the decree in C.S. No. 116 of 1909 and such a

management in bits and pieces can never be in the interest of the wakf. Therefore the existence of the mujawars or turn trustees alongwith a mutawalli appointed by the wakf board cannot be objected to by any person genuinely interested in the wakf.

6. Bakthavatsalam, J. came to the conclusion that the decree in C.S. No. 116 of 1909 is, in effect a scheme decree and therefore by following the Judgment of Ismail, J. in *Palani Muslim Dharhapari - The Palni Muslim Dharmapari Palana Sangam and Others Vs. The Tamil Nadu Wakf Board and Others*, held that the wakf board loses jurisdiction to exercise powers over the subject Durga. Before us, therefore elaborate arguments have been advanced by both the parties to understand the scope of the decree in O.S. No. 116 of 1909 and to find out as to whether it is a scheme decree or not. Both the parties proceeded on the basis that a scheme decree has to be instituted in accordance with Scheme 92 of the Code of Civil Procedure. In *A. Subramanyam and Others Vs. B. Yegnanarayaniah and Another*, K.S. Palaniswamy, J. was trying to find out whether a particular suit would come under the scope of Section 92 of the Code of Civil Procedure. In that connection, learned Judge found that if a suit is to come within the purport of Section 92 of the Code of Civil Procedure, there must be a trust created for a public purpose of a charitable or religious nature. Secondly, there must be an allegation of breach of trust, particularly, the relief claimed must relate to the reliefs mentioned in Section 92 of the Code of Civil Procedure. Once a suit answers the above description, it must be held to be a suit falling squarely within Section 92 of the Code of Civil Procedure. Therefore in that particular case it was held that the suit instituted without the sanction of the Advocate General was not maintainable.

7. To the same effect is the Judgment of the Supreme Court in *Charan Singh and Another Vs. Darshan Singh and Others*, . In that case, also, a suit was filed without following the procedure prescribed u/s 92 of the Code of Civil Procedure. The Supreme Court held that the suit being one u/s 92 of the Code of Civil Procedure, the same was not maintainable for not conforming to the requirements of Section 92 of the Code of Civil Procedure. Mr. Habibullah Badsha, learned Senior Counsel therefore contends that inasmuch as C.S. No. 116 of 1909 had not been filed by following the procedure prescribed in Section 92 of the Code of Civil Procedure, the same cannot be considered to be a scheme decree. On the other hand, the argument of Mr. O.R. Abdul Kalam, learned Counsel for the contesting respondents is that a perusal of the plaint, the reliefs claimed in the suit and the terms of the decree clearly indicate that it is a suit u/s 92 of the Code of Civil Procedure. For this purpose, he relied on the decisions reported in *Narsidas v. Ravishankar* AIR 1931 Bom 33 and *Gajramji Jasramji Maharaj Vs. Somnath Bhudardas Soni*, . We are of the opinion that it is unnecessary to go into the arguments of Mr. O.R. Abdul Kalam and the decisions cited by him, because no attempt was made to show that the decree in the suit in C.S. No. 116 of 1909 was filed after complying with the provisions of Section 92 of the Code of Civil Procedure. It is the argument of Mr. Abdul Kalam that

having regard to the terms of the decree, it must be deemed to be a suit u/s 92 of the Code of Civil Procedure. As against the arguments of Mr. Habibullah Badsha that the decree does not provide for any mode of succession in relation to the office of mutawalli or mujawar. Mr. Abdul Kalam, argues that the succession to the office is in accordance with the Muslim Law of Succession and Inheritance. Therefore, even if the decree relates only to the duties of the parties inter se as well as the manner of sharing the income, the same would apply to successive heirs in accordance with the Mohammedan Law of Inheritance. We are of the opinion that whatever be the nature of relief and even accepting the stand of Mr. Abdul Kalam, no decree can be deemed to be a decree u/s 92 of the Code of Civil Procedure, unless the requirements of Section 92 of the CPC had been followed. The first and foremost requirement under unamended Section 92, is that the sanction from the Advocate General must have been obtained. As rightly pointed out by learned senior Counsel for the appellants, the purpose of the sanction from the Advocate General is to prevent frivolous suits being filed in respect of the trusts relating to religious or charitable objects. Whatever may be the purpose, the Judgments cited above clearly indicate that unless the requirements of Section 92 of the CPC are strictly followed, the suit cannot be deemed to be the suit u/s 92 of the Code of Civil Procedure.

8. Learned single Judge has rejected this argument in the following words:

The argument put forth by Mr. R. Krishnamoorthy, the learned senior Counsel that unless and until the provisions of Section 92 CPC are set aside, it cannot be said to be a scheme decree, in my view, cannot be accepted. When the right of management and the right to succession in the management with regard to wakf settled in the year 1910 itself, I do not think the contention put forth by Mr. R. Krishnamoorthy, the learned senior Counsel that it is not a scheme decree cannot be accepted. A scheme for the management of the Durga has been laid down by this Court earlier and that is in force now. So far as that is in force and it is not altered or amended by any method known to law, I do not think the wakf board can appoint a muthavalli....

We have already pointed out that no attempt was made to prove that C.S. No. 116 of 1909 was filed with the sanction of the Advocate General and as such, the suit would come within the meaning of Section 92 of the Code of Civil Procedure. In this connection, a reference may be made to Sub-section (2) of Section 92 of the Code of Civil Procedure, which reads as follows:

(2) Save as provided by the Religious Endowments Act, 1863 (or by any corresponding law in force in the territories which immediately before the 1st November, 1956, were comprised in Part-B States) no suit claiming any of the reliefs specified in Sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that Sub-section.

It, therefore follows that by no stretch of imagination can the suit, C.S. No. 116

of 1909 be considered as a scheme suit or a suit providing for any of the reliefs mentioned in Section 92 of the Code of Civil Procedure. Consequently, we set aside the said finding of learned single Judge and we hold that C.S. No. 116 of 1909 is not a suit coming within the purview of Section 92 of the Code of Civil Procedure.

9. Once, we come to the above conclusion what remains to be considered is the scope and purport of the decree in C.S. No. 116 of 1909. Mr. Habibullah Badsha, learned senior Counsel points out that it is a suit "inter partes". On the other hand, Mr. Abdul Kalam points out that the decree will bind the heirs and successors. Whatever that may be, the question is whether such a decree will act as a bar to the wakf board exercising its power under the Act. In this connection, there are two decisions to be noticed. One is The Palni Muslim Dharmaparipalana Sangam and Others Vs. The Tamil Nadu Wakf Board and Others, . The following passage makes the position crystal clear:

The learned Counsel for respondents 1 and 2 herein did not contend that the Wakf Board had any power to supersede the scheme decree; all that the learned Counsel contended was that u/s 15 of the Wakfs Act XXIX of 1954, the general superintendence of all wakfs in a State shall vest in the Board established for the state and that in exercise of this power of general superintendence the Wakf Board was competent to convene the meeting of Jamathars and appoint an Executive Officer. I am unable to agree that this power of general superintendence will extend to nullify or ignore or supersede a scheme for the administration of a wakf settled by a decree of Court....

10. In A.M. Mohideen Packker v. T.N. Wakf Board 1983 TNLJ 418, a Pallivasal was administered under a scheme decree in O.S. No. 31 of 1995. The attempts of the wakf board to interfere with the management of the mosque was repeatedly prevented by the management and. the wakf board proceeded to file a suit, seeking a declaration that the election conducted under the scheme decree was null and void. Learned Judge observed as follows:

...What the Board could have done is to file a petition before the Supreme Court for impleading itself as a party to the scheme suit and after impleading in the proceedings as a party, the Board could have obtained orders for the transfer of the entire scheme decree to its file and thereafter could have passed appropriate orders, The Board has not adopted that course in this case. Considering the facts of this case, I am of the view, that the Board has no jurisdiction to file a civil suit for a declaration that the election of the trustees functioning under the scheme decree is void and invalid. There is no provision under the Act for the Wakfs Board to interfere with the administration of wakfs which are controlled and administered under the scheme by a civil Court....

11. We do not want to express any opinion on the correctness of the above Judgments, except to say that those Judgments cannot be applied to the facts of the present case because the decree in the instant case is not a scheme decree.

It does not provide for any of the reliefs mentioned in Section 92 of the Code of Civil Procedure. In this view of the matter the power of the Wakf Board is not taken away. On the otherhand, in our opinion, the powers of the wakf board under the Wakf Act, 1954 are very wide and comprehensive. Once a mosque or a durga is notified under the Act, they come under the direct control of the wakf board. Section 15 of the Act gives sweeping powers to the board while controlling the activities of the wakf. The only restriction that is imposed on the exercise of the powers of the wakf board is that the board shall act in conformity with the directions of the wakf document, the purposes of the wakf and any usage of custom of the wakf sanctioned by the Muslim Law. In this connection one has to see the difference between the Wakf Act and the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter called as the HR & CE Act). The HR & CE Act provides for enquiries regarding a religious institution as to whether it comes within the purview of the Act and related matters u/s 63 of the Act. Section 64 of the HR & CE Act enables the prescribed Officers to settle schemes, Sub-section 5(a) of Section 64 of the said Act enables the officers to cancel or modify a scheme by a Court in a suit and Section 69 of the HR & CE Act enables the aggrieved party to file Appeals and Section 70 of the HR & CE Act enables the aggrieved party, to file a suit against the Appellate Authority. On the other hand, the Wakf Act, 1954 gives unrestricted powers to the Wakf board in the matter of administration of a wakf. Under stated circumstances as provided u/s 8 of the Wakf Act, 1954, a mutawalli can be removed from his office, if a mutawalli acts in contravention of Section 43 of the Wakf Act, 1954. We do not see how the wakf board can be prevented from taking action to remove the mutawalli, when he acts contrary to Act. Once a vacancy is caused in the office of the mutawalli, the wakf board gets powers to appoint a fresh mutawalli. All that we can say is that in taking action under the Wakf Act, 1954, the Wakf Board should have regard to the terms of the decree in a civil Court. If the terms of the decree in a civil Court are contrary to the Wakf Act and if the Wakf Board is not a party to the suit, it passes our comprehension as to how the wakf board can remain silent. Therefore, we hold that the Judgments of M.M. Ismail, J. and Satar Syed, J. in the above quoted Judgments should be restricted to scheme decrees framed u/s 92 of the Code of Civil Procedure, where the wakf board or its predecessors is also a party to the suit. In this view of the matter, we hold that the decree in C.S. No. 116 of 1909 is not a bar to the wakf board from exercising its powers.

12. The next question that is to be considered is as to whether a mujawar is also a mutawalli. Mr. Abdul Kalam, learned Counsel for the appellants took great pains to explain that the definition in the Wakf Act is an inclusive definition and such a definition should be understood as enlarging the meaning of the word mutawalli. "Mutawalli" is defined in the Wakf Act, at the time, when the dispute arose in the following words u/s 3(f) of the Wakf Act:

"mutawalli" means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a competent authority to be the mutawalli of a wakf and includes any naib mutawalli, khadim mujawar,

sajjadanashin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act, any person or Committee for the time being managing or administering any wakf property as such....

Mr. Habibullah Badsha, learned Senior Counsel does not dispute the above proposition and therefore we do not propose to go into the various Judgments cited by Mr. Abdul Kalam, we are, however, tempted to refer to Text Books to understand the meaning the words naib mutawalli, khadim, mujawar, sajjadanashin, amin which are now included within the meaning of the word "mutawalli". We agree with Mr. Abdul Kalam that the words "appointed by mutawalli to perform the duties of a mutawalli" would govern only the word "other person" and not the words "naib-mutawalli" etc., But we find from the text book that naib mutawalli is only an Assistant to mutawalli and is generally appointed by the mutawalli to help him in the discharge of his functions. A khadim is a servant of the wakf and is usually appointed by the mutawalli. A mujawar is a care-taker of a Durga and he discharges the duties of a sweeper of the premises. A sajjadanashin discharges, spiritual functions as a curator of a Durga or Shrine. The functions of an Amin are said to be that of a manager. In fact in the decision reported in *Sardar Ali v. Gehne* AIR 1933 Lah 444, it is stated that the status of a sajjadanashin is higher than that of a mutawalli. Therefore, it appears to us that in any institution, which is a wakf, there may be officers of the above description but who are not described as mutawallis. The Wakf Act wanted to bring all those officers like naib mutawalli etc., within the scope of the word "mutawalli". This is only for the sake of convenience to bring them under the control of the wakf board. It is quite possible that in an Institution, there can be a mutawallis as well as other officers like naib mutawallis etc., because their functions are totally different. The view taken by us is to some extent illustrated by the judgment of the Bombay High Court in *Mohamed Oosman v. Essak Sale mohamed Vanjana* ILR (1938) Bom 184. In that case certain hereditary mujawars of a durga were subjected to a scheme decree. The scheme decree had appointed certain trustees under the darga. The mujawars claimed independently of the scheme to act as mujawars and to occupy free rental quarters. While there was an elaborate discussion of the various issues it is important for our case to notice the decision of the Bombay High Court on the following issues. On the question whether the scheme decree affects the position of the plaintiffs as mujawars of the said durga, the Court answered in the affirmative. But on the question whether one of the parties was a majawar for long years prior to 1900 AD, the Court answered in the affirmative and that he did act as a mujawar. On the issue, whether in the year 1915, the plaintiff No. 1 was appointed as mujawar and by whom, the Court came to the conclusion that the plaintiff No. 1 was so appointed as mujawar by the trustees. The above position clearly illustrates the point that the mujawar can co-exist with the trustees appointed by the wakf board. It is also clear from the order dated 10-1-91, imposing conditions.

13. Much argument was advanced by both the parties on the inference to be drawn from the fact that Syed Amiruddin (second respondent in W.P. No. 5315 of 1991) was apposed as a mutawalli by the wakf board as per the order, dated 30-9-1983 and he continued to hold the office till the year 1987. While according to Mr. Habibullah Badsha, learned senior Counsel it only supports the contention of the appellants that the wakf board has jurisdiction to appoint a mutawalli notwithstanding the existence of the decree in C.S. No. 116 of 1909, according to Mr. Abdul Kalam, the fact that the said appointment was not challenged for some reasons, would not estop the writ petitioners from challenging the present appointment by the wakf board on 10-1-1991. We are of the opinion that for the reasons already given by us, it is not necessary to draw any inference adverse or otherwise on the course of conduct of the parties. Suffice it to say that we have already given our reasons upholding the power of the wakf board to remove and appoint a fresh mutawalli for the subject durga.

14. For all the above reasons, we set aside the findings of the learned single Judge and allow both the Writ Appeals. Consequently, Writ Petitions Nos. 5315 of 1991 and 6401 of 1987 shall stand dismissed. However, there will be no order as to costs.