
(1999) 07 MAD CK 0038
In the Madras High Court

Tamil Nadu Wakf Board

APPELLANT

Vs

S.J. Syed Basha and Others

RESPONDENT

Date of Decision : 19-07-1999

Acts Referred:

Waqf Act, 1954 — Section 6

Citation : (2000) 2 LW 510 : (1999) 3 MLJ 534

Hon'ble Judges : S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—Plaintiff in O.S.No. 672 of 1976, on the file of Sub Court, Salem, is the appellant. Appellant is Tamil Nadu Wakf

Board represented by its Secretary.

2. Suit filed by appellant was one to declare that the suit property is a wakf property and to recover possession of the property from defendants

and for costs of the suit.

3. It is averred in the plaint that the plaint properties are wakf properties under grant endowed for the maintenance and upkeep of Thakkia

Makkam and Durga called Shaker Sha Makkam. It is averred that the great Saint Shaker Sha and his disciples have been buried there. Fakir

charities and service to the said Durga are being carried out. The said Saint Shaker Sha was a member of Banuva Fakir Jama attached to the

Durga of Baba Fakiruddin Avulia of Penukonda. From time immemorial, the income from the aforesaid properties was utilised to meet the

expenses of watching the Durga, lighting it and repairing the Durga and Makkam. There is a mosque in the Makkam. The annual festivals are also

being regularly performed. The"" feeding of the poor and the Fakirs are being

carried out. Great sanctity is attached to the said Durga and the Mohammedan inhabitants of Salem Town and Shevapet customarily take part in the annual festivals. The Government and Mitta records also treated the said properties in favour of Shaker Sha Makkam. For proper administration and superintendence of Wakfs, the Central Wakf Act 29 of 1954 had been enacted, and it was extended to the State of Tamil Nadu on 15.1.1955. The plaintiff Board was reconstituted under the said Act on 25.4.1971. The entire Wakfs in the State of Tamil Nadu shall vest with the plaintiff-Board and it has assumed governance of superintendence and administration of the same. The Assistant Commissioner of Wakfs was appointed by the Government of Tamil Nadu under the Wakf Act, 1954 who followed all the Rules and Regulations, enquired into the matter in detail in respect of the grant, and sent a detailed report to the Government of Tamil Nadu, called Proforma Report. Based on the said report and on the advice of the State Government, the Tamil Nadu Wakf Board published and notified the entire grant as Wakf property in the list of Wakfs so published in the Fort St. George, dated 29.4.1959, u/s 5(2) of the said Act. It is said that any person interested in the wakf ought to have filed a statutory suit u/s 6 of the said Act within one year from the date of publication of the notification in a civil court of competent jurisdiction as to a decision whether the said property is wakf property or not and unless the said notification is set aside or a finding is obtained that the said property is not wakf property, the said notification would hold good and valid, and the same is conclusive and final and the same is binding on every body who are interested in the said Wakf. It is also said that a Scheme Decree has also been framed regarding the affairs of a administration of the Durga in O.S.No. 34 of 1936, on the file of Sub Court, Salem, wherein also it has been declared that the property constitutes trust properties. It is said that the defendants are in possession of the property under some purchase. Defendants or their vendors cannot claim vested or derivative title. Their possession is illegal and they are trespassers in the eye of law. The suit property is a wakf property under grant, wakf by user, under the abovesaid conclusive notification and by the said scheme decree. Defendants are in unlawful occupation, and in spite of demands, they did not vacate the same. Hence the suit was filed to

declare the title of the plaintiff-Wakf and also to recover possession of the property from the defendants.

4. Defendants 1 and 2 have filed written statement and also additional written statement. According to them, the suit property is not a wakf

property. The property originally belonged to one Hameedha Bi and Amir Bi, who are sisters. They inherited the property from their father. One of

the owners, namely, Hameedha Bi executed a settlement deed on 17.1.1918 as per Ex.B-3, in respect of one half of the property to Minor

Azeesa Bi. It is said that the first and third plaintiffs in O.S.No. 34 of 1936 referred to in the plaint have attested the gift deed Ex.B-3. The other

half which belonged to Amir Bi was sold by her along with her son Syed Yakub, to minor Azeesa Bi on 16.12.1919, as per Ex.B-4, The entire

property is having an extent of more than 7 acres, and the same was subject-matter of court auction in a suit filed by one Subramaniya Chettiar.

One Lakshmana Chettiar purchased the entire of seven acres, i.e., the entire area, in Court Auction. He sold the property on 14.10.1932 as per

Ex.B-6 to Advocates D.G. Gopala Iyengar and R. Subramania Mudaliar, for valid consideration. While so, an area of 5 acres and 1 cent was

acquired by Salem Municipality for construction of Municipal Office. Rest of the area is only 2 acres, out of which 10 cents was marked as

Samadhi land and excluded in Land Acquisition Case No. 12 of 1937. The remaining area belonged to Azeesa Bi on the basis of gift deed

executed by Gopala Iyengar and Subramaniya Mudaliar as evidenced by Ex.B-7. The right of Azeesa Bi was inherited by defendants 1 and 2 and

their sister Rokiya Bi and they are absolute owners of the property. The patta stands in their name and they have perfected title by adverse

possession also. Portions of the property have been sold to various persons and they have been dealing with the property as their own. No

reliance could be placed on the Scheme Decree in O.S.No. 34 of 1936, since it was a compromise decree to which Azeesa Bi did not agree, it is

further said that merely because the property was declared as Wakf Property by plaintiff, that will not affect the right of a stranger, and he is not

bound to file suit as contended in the plaint. Further, first defendant filed various rent control petitions and got possession of the property. At no

point of time, the Wakf Board has exercised any right, nor was the property treated as Wakf property as alleged. Defendants prayed for dismissal

of the suit.

5. The trial court, on the above pleadings, took oral and documentary evidence. Oral evidence consisted the testimony of P.Ws. 1 to 4 and D. W.

1. Exs.A-1 to A-62 were marked on the side of plaintiff. Exs.B-1 to B-107 were marked on the side of defendants.

6. After evaluating the entire evidence, the trial court came to the conclusion that the plaintiff has miserably failed to prove its title to the property

and the defendants are the owners of the same. It further came to the conclusion that the non-filing of a suit u/s 6 of the Wakf Act will not affect the

right, title and interest of the defendants over the property. It further held that the scheme decree also will not affect the defendant since their

predecessor, though a party to the suit, did not give consent, and even in that suit, she denied that the plaint property is a wakf property. In fact,

the suit was decreed only on the basis of a compromise to which late Azeesa Bi did not give her consent. The trial court also held that the suit filed

by Shaker Sha Makkam as O.S.No. 744 of 1976 and its dismissal will have great impact on the case that is now put forward by plaintiff. The trial

court further went on to discuss the dealings had by Azeesa Bi and others and how the property belonged to them. Finally, it came to the

conclusion that at no point of time, the plaint property was considered as wakf property, but the same was being dealt with by defendants 1 and 2

and their predecessors as their absolute property. The trial court also found that the claim of the plaintiff, even if any, is also barred by limitation.

Ultimately, the suit was dismissed with costs.

7. It is against that judgment, plaintiff has preferred this appeal.

8. Learned Counsel for the appellant mainly made two submissions, viz., (1) defendants have not filed a suit as contemplated u/s 6 of the Act and

the Notification that the plaint property is a wakf property concludes the matter; and (2) The decree Ex.A-3 shows that the plaint property has

been declared as Wakf property and the defendants are also bound by the same. Even though it is an ex parte decree, the same was passed after

contest, and, therefore, the validity of the decree cannot be questioned in this proceeding.

9. As against the said contentions, learned Counsel for respondent submitted that the defendants are strangers to the Wakf and, therefore, they are

not bound to file a suit u/s 6 of the Wakf Act and the Notification is of no avail. It was further contended that Ex.A-3 decree is ex parte and what

was the point decided is not clear without the judgment. It is further said that even assuming that Ex.A-3 concludes the matter, no action has been

taken pursuant to Ex.A-3 and possession of defendants was never disturbed by a declaration that it is a wakf property. The suit filed 38 years

thereafter is hopelessly barred by limitation and adverse possession. Respondents, therefore, prayed for dismissal of the appeal.

10. Heard learned Counsel for both parties.

11. In regard to first submission made by learned Counsel for appellant, namely, that the notification that the plaint property is wakf property

concludes the matter, so long as no suit has been filed within one year challenging the Notification, I am of the view that it is not correct. In Board

of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, , their Lordships considered a similar question, and held that the person interested in

the trust means Muthavalli or any person connected with the trust and a stranger who has nothing to do with the Wakf cannot be considered as a

person interested in the trust and consequently any failure on the part of a stranger to institute a suit u/s 6 of the Wakf Act will not affect his right. In

paragraph 34 of the judgment, their Lordships have held thus:

In dealing with the question, the High Court observes:

In our opinion, the words "any person interested therein" appearing in Sub-section (I) of Section 6 mean to more than a person interested in a wakf

as defined in Clause (h) of Section 3 of the Act.... It is urged by learned Counsel for the petitioner that the legislature has not used in Section 6(1)

the words, ""any person interested in a wakf and, therefore, this meaning should not be given to the words, ""any person interested therein"". This

argument is not tenable because the words, ""any person interested therein"" appears soon after the muthavalli of the wakf and therefore the word,

therein"" has been used to avoid repetition of the words"" in the wakf and not to extend the scope of the section to persons who fall outside the

scope of the words ""person interested in the wakf. The purpose of Section 6 is to confine the dispute between the Wakf Board, the muthawalli and

a person interested in the wakf.

That, in our opinion, is the right construction."" Their Lordships considered the

correctness of the judgment rendered by the Rajasthan High Court reported in Radhakishan and Another Vs. State of Rajasthan and Others, , from which appeal arose before the Honourable Supreme Court. After extracting the relevant portion in paragraph 37 of the reports, their Lordships held thus:

In this context, the scope of Section 6 was examined by the High Court and it observed; "The purpose of Section 6 is to confine the dispute

between the Wakf Board, the muthawalli and a person interested in the wakf. In other words, if there is a dispute whether a particular property is a

wakf property or not, or whether a wakf is a Shia wakf or a Sunni wakf, then the Board or the muthawalli of the wakf or a person interested in the

wakf as defined in Section 3 may institute suit in a civil court of competent jurisdiction for the decision of the question. They can file such a suit

within one year of the date of the publication of the list of wakfs and if no such suit is filed, the list would be final and conclusive between then.

The very object of the Wakf Act is to provide for better administration and supervision of wakfs and the Board has been given powers of

superintendence over all wakfs which vest in the Board. This provision seems to have been made in order to avoid prolongation of triangular

disputes between the Wakf Board, the muthawalli and a person interested in the wakf who would be a person of the same community. It could

never have been the intention of the legislature to cast a cloud on the right, title or interest of persons who are not Muslims. That is, if a person who

is non-Muslim whether he be a Christian, a Hindu, a Sikh, a Parsi or of any other religious denomination and if he is in possession of a certain

property, his right, title and interest cannot be put in jeopardy simply because that property is included in the list published under Sub-section (2) of

Section 5.

The Legislature could not have meant that he should be driven to file a suit in a civil court for declaration of his title simply because the property in

his possession is included in the list. Similarly, the legislature could not have meant to curtail the period of limitation available to him under the

Limitation Act and to provide that he must file a suit within a year or the list would be final and conclusive against him. In our opinion, Sub-section

(4) makes the list final and conclusive only between the Wakf Board, the

mutavalli and the person interested in the wakf as defined in Section 3 and to no other person.

We are in agreement with this reasoning of the High Court.

It follows that where a stranger who is a non-Muslim and is in possession of a certain property his right, title and interest therein cannot be put to

jeopardy merely because the property is included in the list. Such a person is not required to file a suit for a declaration of his title within a period of

one year. The special rule of limitation laid down in proviso to Sub-section (1) of Section 6 is not applicable to him.

In other words, the list published by the Board of Wakfs under Sub-section (2) of Section 5 can be challenged by him by filing a suit for

declaration of title even after the expiry of the period of one year, if the necessity of filing such suit arises.

12. The above decision was followed in the decision reported in Board of Muslim Wakfs Vs. Smt. Hadi Begum and others, (See para 10 of the judgment).

13. In view of this settled legal principle, the contention of learned Counsel for appellant cannot be accepted.

14. The second question that arises for consideration is, what is the effect of Ex.A-3 decree. Ex.A-3 is the certified copy of decree in O.S.No. 34

of 1936, on the file of Sub Court, Salem and Ex.A-4 is the certified copy of the judgment in that suit. It could be seen from Ex.A-4 that the present

respondents" mother was contesting the suit as if the property is not a trust property. An issue was suggested whether the plaint property is a trust

property. Thereafter, she did not appear. Her Counsel also reported no instructions. She was declared exparte. From Ex.A-4 judgment, I find that

all the issues have been considered, and it has been held that the plaint property is a trust property. The finding of the trial court that since Azeesa

Bi remained exparte, the judgment is not binding, and it cannot be pleaded as res judicata, cannot be correct. To consider the plea of resjudicata,

plaintiff has produced a copy of the plaint in that suit, which is Ex.A-56. Copy of the written statement filed by respondents" predecessor in that

suit has been marked as Ex.A-57. From these exhibits, it is clear that the very same question was in issue earlier and a decision was rendered

against the respondents" predecessor holding that the plaint property is a trust

property. That decision is binding on the defendants. I hold that

Exs.A-3 and A-4 constitute resjudicata in this case.

15. Once it is declared by a Competent Court that the plaint property is a wakf property, it follows that the plaintiff's title to the property stands

recognised. That right can be denied by defendants only if it is found that the claim is barred by limitation and adverse possession.

16. Regarding the claim of limitation and adverse possession, I find that the claim of the respondents has to succeed. In spite of Ex.A-3 decree, no

attempt has been made by the plaintiff to put into action or implement that judgment. The defendants are allowed to continue in possession and

they have been dealing with the property as before. Ex.A-3 can be relied on only to show that the plaintiff's title has been declared as if it is a

wakf property. But if there is no change in the character of defendants' possession and that was allowed to continue for years to come, I feel that

the claim of adverse possession has to succeed. The fact that defendants' possession is adverse has been brought to the knowledge of the Wakf in

the earlier suit itself. They denied that the plaint property is a wakf property and they wanted their title to be recognised. Most of the documents

now relied on by the respondents have been relied on in the earlier case also. Exs.B-3, B-4, B-5, B-6, B-8, B-9, B-10, B-11 etc., were all

produced in the earlier case. All these exhibits show that the defendants claim possession independently of the Wakf and after Ex.A-3, they were

also dealing with the property for alienating the same to various persons. Exs.B-14 to B-17 are such sale deeds, which are of the years 1951,

1945, 1943 and 1945. Likewise, the patta also stands in their name. Tax has also been paid by defendants and their predecessors, and the

revenue officials as well as urban land tax authorities have also recognised the defendants as absolute owners. The cumulative effect of all these

transactions will lead to only one result, namely, that these defendants, to the knowledge of plaintiff, have been dealing with the property as if they

belonged to them exclusively, and it spite of a decree in their favour, the plaintiff-Wakf Board also allowed the defendants to continue in

possession and deal with the same unobstructed by orders of court or authority. In these circumstances, though I feel that the title of the plaintiff

has been declared under Ex.A-3, the decision of the lower court has to be

confirmed, holding that the plaintiff has lost its title by adverse possession and limitation.

17. In the result, the appeal is dismissed, however, without any order as to costs. Pending C.M.Ps. are closed.