

(1995) 03 KAR CK 0020

In the Karnataka High Court

Case No : Regular First Appeal No. 541 of 1986

The Karnataka Wakf Board

APPELLANT

Vs

State of Karnataka and others

RESPONDENT

Date of Decision : 10-03-1995

Acts Referred:

Karnataka Land Revenue Act, 1964 — Section 67 (2)
Waqf Act, 1954 — Section 26

Citation : AIR 1996 Kar 55 : (1995) ILR (Kar) 3031 : (1995) 4 KarLJ 326

Hon'ble Judges : K.B. Navadgi, J;C.N. Aswathanarayana Rao, J

Bench : Division Bench

Advocate : K.S. Savanur, for the Appellant; Y.V. Parthasarathi Govt. Advocate and Mohammed Farooq, for the Respondent

Judgement

Aswathanarayana Rao J.

1. This is a defendant's appeal. The first respondent filed a suit in O.S. No. 1/1981 on the file of Court of the Additional Civil Judge, Bijapur against the appellant, who was the first defendant, and respondent Nos. 2, 2A, 2B and 3, who were defendant Nos. 2, 2A, 2B and 3 respectively for a declaration of its title to the suit property namely property bearing CTS No. 34B in Ward VI of Bijapur City, for a declaration that the Notification published by the first defendant under No. KTW 531, ASR/74/7490 dated 24-1-1976 and also the Gazette Notification at page No. 608 dated 8-7-1976 in Part VI relating to the suit property are illegal and void. Further, the plaintiff sought for a declaration that the order passed by the third defendant under No. WKF. SR. 6(V) dated 10-1-1980 is illegal and void, for deletion of the entries in the revenue records in favour of the defendant Nos. 2 to 2B in respect of the suit property and for a permanent injunction restraining the defendant Nos. 1 and 2A and 2B from obstructing the plaintiffs possession over the suit property. As an alternative relief, the plaintiff prayed for a declaration of its title to the suit property by adverse possession, The suit having been decreed as prayed for, the first defendant has filed this appeal impleading

the plaintiff as the first respondent and defendant Nos. 2, 2A, 2B and 3 as respondent Nos. 2, 2a, 2b and 3 respectively.

2. The facts which have led to this appeal may briefly be stated as follows:--

For the purpose of convenience, we will refer to the parties to this appeal by the position they have occupied in the lower Court.

3. The plaintiff is the State of Karnataka represented by Deputy Director of Public Instructions, Bijapur. The first defendant is the Karnataka Wakf Board represented by its Secretary. The second defendant is Peer Mahabari Khandayat and Peer Chinni Mahabari, managed by its managing Mutawalli and Sajjada Nashin, the defendant Nos. 2A and 2B. The third defendant is the Assistant Commissioner, Bijapur. During the pendency of this appeal, respondent No. 2a died and his legal representative has been brought on record.

4. In the plaint, the plaintiff alleged that the suit property belonged to the then Government Bombay. The District Local Board, Bijapur, purchased the said property for a sum of Rs. 16,325/-. The District Local Board subsequently handed over that property to the District School Board. At that time it was a vacant land. The District School Board construed the present office building existing in the suit property in the year 1961. Subsequently, after reorganisation of States, the District School Board merged in the Department of Education, Government of Karnataka. Therefore, the suit property belongs to the plaintiff.

5. It is alleged recently the plaintiff came to know that the first defendant got published a Notification dated 21--1976 u/s 26 of the Wakf Act showing the suit property as "wakf property". It is alleged that the same has been published in the Karnataka Gazette dated 8-7-1976. It is alleged this has been done at the instance of defendant Nos. 2A and 2B. It is alleged the said Notifications are false and incorrect. It is contended no notice was served on the plaintiff before publication of such a Notification and no opportunity was given to the plaintiff to make a representation in that regard before the competent authority. It is contended, hence the said Notifications are not binding on the plaintiff. It is contended that the suit property was never owned by the defendant Nos. 1 to 2B at any time and was never in their possession and it has been in lawful possession of the plaintiff throughout.

6. It is alleged the defendant Nos. 2A and 2B have managed to get the suit property declared as "wakf property" in collusion with the first defendant. It is contended, on the basis of that illegal Notification, the defendant Nos. 1 and 2B have approached the third defendant and got initiated an enquiry u/s 67(2) of the Karnataka Land Revenue Act, 1964, It is alleged in that enquiry, when a notice was served upon the plaintiff, Assistant Government Pleader, Bijapur, appeared to defend the plaintiff and Requested time for production of documents and to get himself prepared. The third defendant rejected the prayer and without giving any opportunity to the plaintiff, passed an order directing the plaintiff to hand over the suit property to the wakf, in No. W. K. F. A. P. 1/80 and the Special

Deputy Commissioner directed the plaintiff to file a civil suit by an order dated 8-4-1980. It is contended the order passed by the third defendant is illegal and it has been passed without giving any opportunity to the plaintiff to defend itself. It is alleged, as soon as the order was passed by the third defendant, the defendant Nos. 1 to 2B, in collusion with the City Survey officials, got entered their names in the property extracts, which is also illegal. The plaintiff has further contended that it has become the owner of the suit property by adverse possession having been in possession of the same for more than the statutory period as owner adversely and to the knowledge of the defendant Nos. 1 to 2B.

7. The first defendant in its written statement denied the plaintiff's claim of title over the suit property. It denied that the District Local Board purchased the property and it was then handed over to the District School Board. It contended that the first defendant, after following the legal procedure, has registered and declared the suit property as "wakf property" and the plaintiff itself has published it in the Gazette and therefore the plaintiff cannot now say that it had no notice of the proceedings. It denied that the plaintiff has become the owner of the suit property by adverse possession. It denied that the first defendant approached the third defendant to hold an enquiry u/s 67(2) of the Karnataka Land Revenue Act, 1964. It contended it is the plaintiff which directed the Deputy Commissioner to hold an enquiry and the Deputy Commissioner in turn directed the third defendant to hold an enquiry. The first defendant denied that the plaintiff has not been given sufficient opportunity by the third defendant to participate in the proceedings and the order passed by the third defendant is illegal. The first defendant also contended that as required u/s 56 of the Wakf Act, 1954, the plaintiff has not given the necessary notice and therefore the suit is not maintainable in law.

8. Defendant Nos. 2A and 2B in their written statement denied the plaintiff's claim of title over the suit property. They contended that one of the Arab Preachers Peer Mahabari Khandayat came as a missionary to Deccan as early as in A.D. 1304 and occupied the whole of Arkilla area in Bijapur and erected Mecca Masjid, according to established customs to offer prayers. It is alleged since the last seven centuries, the suit property has been treated as "wakf property" and is being managed and maintained by the Sajjadanashin and the present defendant Nos. 2A and 2B are the Sajjadanashin and managing Mutawalli in respect of the suit property. It is alleged the said Darga was rightly recognised as a "wakf property" and registered as such by the Assistant Charity Commissioner, Belgaum under the Bombay Public Trust Act u/s 27, of the Wakf Act, 1954. It is alleged, throughout the suit property has been in possession of the wakf and nobody has a right to challenge the same. They contended that the suit filed by the plaintiff is barred by the law of limitation. The defendant Nos. 1 to 2B therefore prayed for the dismissal of the suit. The third defendant remained ex parte.

9. On these pleadings of the parties, the learned Trial Judge framed the following

issues:--

"(1) Does the plaintiff prove that the suit property belongs to the plaintiff?

(2) Does plaintiff further prove that the notification issued by defendant No. 1 on 21-4-1976 is illegal and void and passed behind the back of the plaintiff and they are not binding on them ?

(3) Do plaintiff prove that they have become owner by adverse possession ?

(4) Whether it is proved that the order of defendant -- 3 (sic) on 10-1-1980 is illegal and not binding on the plaintiffs?

(5) Whether the defendant -- 3 was entitled to hold any enquiry ?

(6) Whether the suit is barred by time ?

(7) Whether the suit is not maintainable for want of notice u/s 56 of the Wakf Act ?

(8) Whether the plaintiffs are estopped for claiming adverse possession ?

(9) do defendants prove that plaintiff is estopped from contending that suit property is of plaintiff's ownership ?

10. To what reliefs the parties are entitled to?"

10. After trial, the learned Trial Judge answered Issue Nos. 1, 2, 3, and 4 in favour of the plaintiff and Issue Nos. 5 to 9 against the defendants. Consequently the Trial Court decreed the plaintiff's suit. Being aggrieved by the said Judgment and decree, the first defendant has preferred this appeal.

11. In the appeal memo, the appellant has contended that the appreciation of evidence on record by the Lower Court is not proper. It is contended, since there were four suits of similar nature, the evidence has been mechanically dealt with and there is no independent application of mind in respect of different suits (It may be mentioned here that the suits in O.S. Nos. 4,7, 8 and 9 of 1981 are the other suits referred to).

12. It is contended that the Lower Court erred in not noting the existence of Peer Mahabari Khandayat between the years 1300 to 1700 by noting the three texts which were produced as evidence by the defendants. It is contended that the Trial Court failed to note that the Notification under the Wakf Act itself was notice to all the concerned including the plaintiffs and the first plaintiff who has made the Gazette Notification, has not deleted the suit property from that publication and therefore the plaintiffs cannot contend that they had no notice before the Notification u/s 5 of the Wakf Act was made. It is contended that Trial Court has wrongly relied upon the ruling in Radhakishan and Another Vs. State of Rajasthan and Others, which has been over-ruled in the decision in Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, . It is con- tended the Trial Court failed to see that the suit is barred u/s 6 of the Wakf Act. The

appellant has therefore prayed for setting aside the judgment and decree of the Lower Court and for dismissal of the suit.

13. At the time of arguments, the learned Counsel for the appellant, at the end of his arguments, made a submission that since the defendant Nos. 1 and 2 have not produced some of the important documents, the matter may be remanded to the Trial Court in order to enable them to produce the said documents and with a direction to the Trial Court for a fresh disposal in accordance with law.

14. On the facts narrated above, and in view of the grounds urged in the appeal memo and at the time of arguments, the following point arise for determination in this appeal :--

(i) Whether the Trial Court is right in holding that the plaintiff has established its title over the suit property ?

(ii) Whether the Trial Court is right in holding that the plaintiff has complied with the requirements of Section 56 of the Wakf Act, 1954?

(iii) Whether the Trial Court is right in holding that the suit is not barred by limitation u/s 6 of the Wakf Act ?

(iv) Whether the matter needs to be remanded to the Trial Court ?

(v) What Order ?

15. Our findings on the above points are as follows:--

Point No. (i) -- Yes. Point No. (ii) -- Yes. Point No. (iii) -- Yes. Point No. (iv) -- No. Point No. (v) -- See last paragraph. 16. Point No. (i) :-- On this point, in the Lower Court, the plaintiff examined one witness and relied upon the documents Exs. P1 to P8 produced by it. the defendant Nos. 2 to 2B examined one witness and relied upon the documents Exs. D1 to D3 produced by them.

17, P. W. 1 Mallikarjun is the Superintendent in the Office of the D.D.P.I., Bijapur. He has stated in his evidence that the suit property belongs to the State Government where the office of the D.D.P.I. is situate. That office was previously belonging to the District School Board. The District School Board merged in the State Government alongwith its properties, assets and liabilities. The School Board was existing when Bijapur District was part of the State of Bombay. After the reorganisation the properties were handed over to the Slate of Mysore. In this regard, the plaintiff has produced certified copies of two documents Exs. P1 and P2 and the witness has spoken to them. Ex. P1 is the certified copy of the order passed by the Governor of Bombay of dated 29-5-1941 which goes to show that two acres of land in Bijapur was sanctioned by the Government of Bombay to the District Local Board, Bijapur on an occupying price of Rs. 16, 335/-. Ex. P2 is a certified copy of a letter addressed by the Collector of Bijapur to the President of the District Local Board, Bijapur dated 6-10-1941. It refers to the grant under Ex. P1 and shows that the payment of occupancy price was exempted by the Government and certain conditions were imposed on the

District Local Board for the user of the said property. The property conveyed to the District Local Board under Exs. P1 and P2 has been specified in these documents as C.T.S. No. 34B which is the suit property in the suit under appeal, Ex. P3 is a certified copy of the Government Order dated 1-8-1960 under which suit property which belonged to the District School Board has been resumed to the Government and granted to the District School Board, Bijapur. Ex. P4 is a property register extract issued by the City Survey Authorities which goes to show that the suit property stood in the name of the District School Board in the year 1941. In the cross-examination, P.W. 1 has denied that the suit property belongs to the second defendant wakf. It is elicited that he has not verified the C.T.S. records pertaining to the suit property prior to 1921-22, he is not aware if prior to 1921-22 it was standing in the name of the second defendant in the C.T.S. records. He has denied that since the date of existence of second defendant, the second defendant has remained in possession and wahiwat of the suit property since from the last 700 to 800 years. He is not aware if the second defendant was started by an Arab Saint by name Peer Mahabare Khandayat. He has denied that the suit property is granted by a sannad to the second defendant darga. He has denied that defendant Nos. 2A and 2B are the mutawallis managing the suit property for the second defendant. There is nothing elicited in the cross-examination of P.W. 1 to disbelieve his evidence. His evidence is amply corroborated by the documentary evidence placed on record namely Exs. P1 to P4. They clearly go to show that the suit property belongs to the plaintiff. As against this evidence, defendant Nos. 2A and 2B have examined one Sayyad Abdul Babi as D. W. 1. He is the power of attorned holder of defendant Nos. 2A and 2B. He has stated in his evidence that the second defendant-Trust was found in the name of and by Peer Mahabari Khandayat and Peer Chinni-Mahabari Khandayat. Peer Mahabari Khandayat was an Arabian Saint, he had come to Bijapur earlier to the regime of Adil Shahi and settled down in the area known as Arkilla area, there are two drags in that area, Peer Mahabari Khandayat died in Bijapur and has been buried in Arkilla area and it is known as Mahabari Khandayat darga. He has stated that the suit property is inside the darga area. He has stated the suit property belongs to the second defendant-Trust and it is in the possession of the second defendant. There is a Sajjadanashin and mutawalli to manage the properly, they are looking after the ritual ceremonies tike uras and other festivals. He has stated the second defendant is a registered public trust under the Bombay Public Trusts Act and the suit property is included in the said Trust. In the year 1965, the defendant Nos. 2A and 2B filed an application before the Wakf Board for registration of the suit property as "wakf" and it was registered. Accordingly the name of the second defendant has been entered in the C.T.S. records. Ex. P4 goes to show that the name of the second defendant was entered in the C.T.S. record in the year 1980. The defendants have not placed any evidence on record to show that earlier to that year, the suit property stood in the name of the second defendant in the C.T.S. records at any time. D.W. 1 has stated that the defendant Nos.2A and 2B arc incharge of the suit property for and on behalf of the second defendant. He has deposed on their

behalf as power of attorney holder and has produced the General Power of Attorneys at Exs. D1 and D2.

18. In the cross-examination, D.W. 1 has stilted there is a reference in a book called "The Preaching of Islam" by T. W. Arnold at Page No. 274 and he has produced a xerox copy of it at Ex. D3. He has stated there is a mention about the saint Peer Mahabari Khandayat in the other books namely "Bija-pur Varnain" and "Sufis of Bijapur" by Richard Maxewell Faton. He has produced xerox copies of the relevant portions of the said book. However, they have not been marked as exhibits. A perusal of Ex. D3 and the accompanying xerox copies of the other books referred to by the witness goes to show that there is a reference to Peer Mahabari Khandayat in them. But, as has been rightly held by the Trial Court, reference in any text books of academic interest cannot be construed as documents of title. Except these documents, the defendant Nos. 2A and 2B have not produced any other documents relating to their claim of title over the suit property for and on behalf of the second defendant. In the cross-examination he has stated that he has no documents to show that in the year 1922-23 they had given an application to enter their names in the City Survey Records. He has admitted he looked into the City Survey Records pertaining to the year 1938 and he found that the suit property stood in the name of Sarkar (Government) in the said records. He has admitted in unequivocal terms that the suit property was in possession of the Government from 1922 to 1938. He has admitted that he has no documents to show that the suit property came to the second defendant's possession in the year 1938. He has stated that he has not produced any municipal tax receipts or any such document pertaining to the suit property.

19. D.W. 1 has further admitted in para 4 of his deposition that in the suit property, the school board office was constructed in the year 1961. He says they objected to the construction at that time. But he has admitted that he has not produced any documents to show the same. He has admitted that the name of the second defendant had never been entered in the C.T.S. records in 1938 or subsequently and on the strength of the order passed by the Assistant Commissioner, they got the name of the second defendant entered in the C.T.S. records (this is in 1980 as seen in Ex. P4). D.W. 1 has further stated that there is a genealogy to show that the defendant Nos. 2A and 2B are the descendants of Peer Mahabari Khandayat and he has also got old sannads. He has admitted that he has not produced any of the documents deposed to by him. He has denied the suit property never belonged to the second defendant at any time. He has admitted that the building in the suit property was constructed in the year 1962 at a cost of Rs. 4,00,000/- to Rs. 5,00,000/-. There is no explanation in the evidence of D.W. 1 as to why he has not produced the documents referred to by him.

20. The defendant Nos. 1, 2, 2A and 2B have merely relied upon the publication made u/s 5 of the Wakf Act, 1954 (hereinafter referred to as "the Act" for short)

in order to prove their title to the suit property. It does not help the defendants in any way because u/s 5 of the Act, only a list of existing wakfs is prepared by the Wakf Board. After the necessary enquiry by the Commissioner, that list is published by the State Government. Therefore, it is for the defendants to prove that a wakf in respect of the suit schedule property existed. As seen from the above discussion of the evidence placed on record, the defendants have not placed any satisfactory evidence to prove the same. It was contended by the learned Counsel for the first respondent that the list published by the first defendant u/s 5 of the Act declaring the suit property as a "Wakf Property" is not legal and is not binding on the respondent because, there is no enquiry held by the Wakf Commissioner as required u/s 4(3) of the Act. He submitted that no notice was issued to the plaintiff before any such enquiry and the list has been published u/s 5 of the Act behind the back of the plaintiff. Per contra, the learned Counsel for the appellant argued that there has been a proper enquiry and since the plaintiff is the State Government, it has published the Gazette Notification publishing the list of wakfs u/s 5 of the Act and therefore the plaintiff cannot contend that it has no notice of it. This argument cannot be accepted because the enquiry contemplated u/s 4(3) of the Act is independent of the publication of the list of wakfs u/s 5 of the Act. The enquiry contemplated is by the Commissioner of Wakfs whereas the publication of the list u/s 5 of the Act is by the Wakf Board. Holding of enquiry, as submitted by the learned Counsel for the first respondent necessarily implies issuing of notice to all the parties interested. Section 4(3) of the Act gives an indication regarding the nature of the enquiry to be held u/s 4(3) of the Act. It provides that the Commissioner shall, while making an enquiry, have the same powers as are vested in a Civil Court in respect of summoning and examining witnesses, production of documents, requisitioning of public records etc. Therefore, what is contemplated u/s 4(3) of the Act is a full-fledged enquiry to enable the Commissioner to determine whether a particular property is existing wakf and make a report to the Wakf Board to enable it to publish a list of such wakfs. In this regard, the learned Counsel of the appellant relied upon a decision reported in Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, It is not possible to know how this decision is helpful to the appellant's contention. It has been held therein that the Wakf Commissioner has the power to enquire whether a certain property is a wakf property or not. Thus, in view of this legal position, when the plaintiff has taken a contention that there is no enquiry held as required u/s 4(3) of the Act and consequently the list published u/s 5 of the Act is not legal and is not binding on the plaintiff, it was for the defendants to have proved by adducing satisfactory evidence that a valid enquiry has been held and the plaintiff had notice prior to such enquiry. It was for the Wakf Board, the appellant, who was the first defendant in the suit, to have placed the necessary records before the Trial Court in that regard. But the first defendant did not adduce any such evidence. In the absence of any such evidence, it is not possible to hold that there has been an enquiry as required u/s 4(3) of the Act before the list was published u/s 5 of the Act and the plaintiff had been notified prior to any such

enquiry. In the absence of such evidence it has to be held that there is no enquiry at all u/s 4(3) of the Act in the eye of law and consequently the list published without such enquiry is illegal. The learned Trial Judge has come to the right conclusion in this regard also.

21. The admissions of D.W. 1 in his evidence, the non-production of any documents worth the name by the contesting defendants in support of their claim that the suit property belonged to a trust constituted in respect of the two drags referred to by him, the evidence of P.W. 1 which is amply supported by the documents Exs. P1 to P4 clearly establish that the plaintiff has proved its title over the suit property. The learned Trial Judge has correctly appreciated the evidence in this regard and has come to the right conclusion.

22. The plaintiff has taken up an alternative plea that it has perfected its title to the suit property by adverse possession also. In the appeal memo, in para 10 at page No. 7, it is contended that the said plea is inconsistent with the plea of title under Issue No. 1. It is not possible to accept this contention. It is well-settled that the plaintiff can take an alternative plea. The plea regarding title and the plea of adverse possession pleaded by the plaintiff in this case, cannot be said to be inconsistent with one another. The evidence of P.W. 1 and the documentary evidence placed on record by the plaintiff and also the clear and unequivocal admissions made by D.W. 1 in his evidence, as discussed above, go to show that the plaintiff has been in possession of the suit property right from the year 1928 and in 1941, the plaintiff granted the suit property in favour of the District Local Board and again in 1960, the plaintiff resumed the said property from the District Local Board and granted it to the District School Board under Ex. P3 and subsequently the Education Department constructed a building in the suit property in the year 1961 and the plaintiff has been in possession of it till the date of suit. The suit has been filed on 18-12-1980. Since the defendants have been putting forward a claim to the suit property since ancient times, the possession of the plaintiff is necessarily hostile to the claim of title made by the defendants and is to their knowledge. The period of plaintiffs possession being well over the statutory period under Article 64 of the Limitation Act, 1963, the learned Trial Judge has rightly held that the plaintiff has established its title to the suit property by adverse possession also. There is no substance in the contention of the appellant that the appreciation of evidence on record by the Trial Court is not proper. Hence, Point No. (i) is answered in the affirmative.

23. Point No. (ii):-- Defendant No. 1 in Para 12 of its written statement has contended that the suit has been filed by the plaintiff without complying with the requirement u/s 56 of the Act and therefore, the suit is not maintainable. Section 56 of the Act provides that no suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of the Act or of any rules made thereunder, untill the expiration of two months next after the notice in writing has been delivered to, or left at, the office of the Board, stating the cause of action, the name, description and place of residence of the plaintiff and the

relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left. At the time of arguments, the learned Counsel for the appellant contended that there is no such compliance in this case and the plaint does not contain any such statement. On a careful perusal of the records, I find that it is not possible to accept this contention. A perusal of para 7 (page 53 of the paper book) goes to show that there is a clear recital in the plaint that notice u/s 80 of the CPC read with Section 56 of the Act has been issued to the defendants. The plaintiff has produced a copy of the said notice at Ex. P8. P.W. 1 has spoken on this aspect in his evidence. In para 3 he has stated that the notices were served on the defendants. In the cross-examination he has denied the suggestion that no such notice has been issued. It is elicited that they issued one notice to all the parties. Eventhough the plaintiff has not produced the postal acknowledgement receipts relating to Ex. P8, it is not fatal to the plaintiff's case inasmuch as u/s 114(e) of the Evidence Act, there is a presumption that official acts have been regularly performed. Further, it may be seen that D.W. 1 in his evidence has not challenged the statement of P.W. 1. He has not stated in his evidence that the defendants have not received the notice as per Ex. P8 and he has also not questioned the genuineness of Ex. P8. Therefore, there is sufficient compliance with the requirement of Section 56 of the Act. Hence, Point No. (ii) is answered in the affirmative.

24. Point No. (iii):- The learned Counsel for the appellant argued that the suit is barred by limitation u/s 6 of the Act and the learned Trial Judge has not properly appreciated this aspect. Section 6 of the Act reads as follows:--

"6. DISPUTES REGARDING WAKFS :-- (1) If any question arises whether a particular property specified as wakf property in a list of wakfs published under sub-section (2) of Section 5 is wakf property or not or whether a wakf specified in such list is a Shia Wakf or Sunni Wakf the Board or the Mulawalli of the wakf or any person interested therein may institute a suit in a Civil Court of competent jurisdiction for the decision of the Civil Court in respect of such matter shall be final :

Provided that no such suit shall be entertained by the Civil Court after the expiry of one year from the date of the publication of the list of wakfs under sub-section (2) of Section 5.

xxx xxx xxx xxx The learned Counsel for the appellant argued that the publication of the list u/s 5 of the Act in this case has been made on 8-7-1976 in the Gazette whereas the suit has been filed on 18-12-1980 which is far beyond the period of one year from the date of Notification and therefore the suit is barred by the law of limitation. Per contra, the learned Counsel for the first respondent argued that the limitation of one year prescribed under this provision is only in respect of suits Which are to be filed by the Wakf Board or a Mutawalli of the wakf or any person interested in the wakf and has no application to a stranger. There is much force in this contention. A perusal of Section 6 of the Act extracted above, goes to show that the suit contemplated under the said Section

is by the Mutawalli of a wakf or any person interested therein. It cannot be said that the plaintiff in this case is a person interested in the wakf. The learned Counsel for the first respondent relied upon the very same decision which is referred to earlier namely Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, . It has been held therein as follows:--

"Where a stranger who is a non-Muslim and is in possession of certain property his right, title and interest therein cannot be put in jeopardy merely because the property is included in the list published under sub section (2) of Section 5 of the Act. The failure of such a person to institute a suit in a Civil Court of competent jurisdiction for decision of such question within a period of one year as provided under sub-section (1) of Section 6 does not make the inclusion of such property in the list of wakfs published by the Board under sub-section (2) of Section 5 of the Act final and conclusive under sub-section (4) of Section 6.

The purpose of Section 6 is to confine the dispute between the Wakf Board, the Mutawalli and a person interested in the wakf. The word "therein" in the expression "any person interested therein" appearing in sub-sec. (1) of Section 6 must necessarily refer to the "wakf which immediately precedes it. It cannot refer to the "wakf property". Thus the list published under sub-section (2) of Section 5 will not bind a stranger who is in possession of the property merely because he happens to be a person affected by the publication of the list of wakfs."

This decision fully supports the argument of the learned Counsel for the first respondent. In view of this legal position, there is no merit in the contention of the appellant that the suit is barred by time u/s 6 of the Act. Hence Point No. (iii) is answered in the affirmative.

25. Point No. (iv):-- Lastly, the learned Counsel for the appellant requested this Court to remand the matter to the Trial Court for a fresh disposal in accordance with law after giving an opportunity to both the parties to adduce their evidence. He submitted that there are important documents in support of the case of the defendant Nos. 1 to 2B, but somehow, they have not been produced in the Lower Court and got marked as exhibits. He submitted that they are ancient sannads issued in favour of the second defendant and establish the existence of the wakf since over a period of centuries. He also submitted that there are several Circulars issued by the State Government which go to show that the "wakf properties", if they are in possession of different Government Departments, should be handed over to the concerned Mutawalli of Wakfs. The learned Counsel for the appellants alongwith a memo dated 10-1-1995 has filed xerox copies of Government Circular dated 8-6-1978, Government Order dated 7- 1-1984, communications dated 8-6-1978 and 2-4-1985 and Judgment of this Court in R.F.A. Nos. 51 to 55 of 1978. He submitted that the defendant Nos. 1 to 2B may be permitted to produce the originals in the Lower Court and requested for an order of remand. After carefully considering the request, we find that it is not possible to accede to it. The circumstances under which a remand order could be

passed are governed by well laid down principles. In this regard, we may also refer to a decision reported in Bishnu Putel Vs. Bajra Putel, It has been held therein as follows :--

"A remand should not, generally speaking, be ordered when the defect in the proceeding has been made due to the negligence or default of the party who will benefit by the remand.

XX XX XX XX XX The mere fact That the evidence on record is not sufficient to enable the Court to come to a definite finding on the point in issue is not sufficient to enable the Court to remand the case, when there is no reason to think that the parties did not have an opportunity of producing all the evidence that they desired to produce before the trial Court, as it may in effect be an invitation to penury."

Further it has been held:--

"Where the party had an opportunity of adducing evidence in the case but with open eyes failed to adduce that evidence, the case should not be remanded to give a second chance to the party to adduce that evidence. The policy of the law is that once the matter has been fairly tried between the parties, it should not, except in special circumstances, be reopened and retried. In a recent decision their Lordships of the Supreme Court laid down that power to order retrial after remand, where there has already been a trial on evidence before the court of first instance, cannot be exercised merely because the appellate court is of the view that the parties who could lead better evidence in the court of first instance have failed to do so."

These principles fully apply to the facts of the case on hand. In the case on hand, the defendant Nos. 1 to 2B had ample opportunity in the trial Court to adduce that evidence. But they did not do so. In fact, defendant Nos. 2A and 2B, who are the Sajjadanishin and Managing Muthawalli of the second defendant Darga, did not choose even to enter into the witness box. They satisfied themselves by executing a power of attorney in favour of P.W. 1, who is the only witness examined in the case. There is no reason forthcoming in the evidence of P.W. 1 as to why he was unable to produce the documents which are now referred to by the learned Counsel for the appellant. The appellant has not come out with any application under Order 41, Rule 27 of the CPC producing the original documents with a request to receive them as additional evidence even in this Court. Under the circumstances, the appellant has not made out any case for remanding the matter to the trial Court.

26. In view of our findings on Point Nos. (i) to (iv) as above, the appeal is liable to be dismissed.

27. Before concluding, an error which has crept in the lower Court's judgment must be pointed out and needs to be corrected. The plaintiff has filed the suit for several reliefs and one of them is in the alternative. When that is so, in the

operative portion of the judgment of the lower Court, it should have cleared as to for which reliefs the suit is decreed and what are the exact reliefs granted. But the learned trial Judge, in para 8 which is the operative portion of the judgment, has merely stated as follows:--

"The suit of the plaintiff is decreed as prayed for."

The decree which has followed the judgment is equally vague. The decree also reads that:--

"The suit of the plaintiff is decreed as prayed."

This error in the lower Court's judgment needs to be corrected. Since the lower Court's decree merges with appellate Court's decree, the error can be rectified by this Court even though the plaintiff has not preferred any appeal. Since this Court has confirmed the judgment of the trial Court and dismissed the appeal, it is hereby clarified that the plaintiff's suit is decreed as follows :--

1. It is hereby declared that the plaintiff is the owner of the suit property and defendant Nos. 1 to 2B are restrained by an order of permanent injunction from interfering with the plaintiff's possession over the suit property in any manner.

2. It is hereby declared that the two notifications, one published by the first defendant in No. KTW 531, ASR/74/7490 dated 21-4-1976 and the Gazette Notification at page N. 608/Part VI dated 8-7-1976 relating to the suit property are illegal and void.

3. The order passed by the first defendant in No.WKF.SR.6(v) dated 10-1-1980 directing the plaintiff to hand over possession of the suit property to the managing Mutawalli is illegal and not binding on the plaintiff.

4. The concerned Revenue Authorities are directed to delete the entries in the revenue records which stand in the name of the second defendant in respect of the suit property.

28. The appeal is dismissed. Parties are directed to bear their own costs in this appeal.

29. Appeal dismissed.