
(1973) 07 MAD CK 0026

In the Madras High Court

Case No : Letters Patent Appeal No. 80 of 1968

The Madras State Wakf Board, Madras

APPELLANT

Vs

Khazi Mohideen Sheriff

RESPONDENT

Date of Decision : 17-07-1973

Acts Referred:

Waqf Act, 1954 — Section 3(1), 3(A), 4, 5, 6

Citation : AIR 1974 Mad 225 : (1978) 87 LW 375 : (1974) 87 LW 375

Hon'ble Judges : N.S. Ramaswami, J;Kailasam, J

Bench : Division Bench

Judgement

N.S. Ramaswami, J.—This Letters Patent Appeal is against the judgment of Alagiriswami, J., who allowed the second appeal. The appellant

before us is the Madras State Wakf Board, who was the defendant in the suit. The Board published u/s 5 of the Wakf Act, Central Act 29 of

1954, a Notification in the Fort St. George Gazette, stating that the property in dispute is a wakf. The plaintiff filed the suit out of which this appeal

has arisen for a declaration of his title to the suit property and for a permanent injunction restraining the defendant from taking any action in

pursuance of the publication of the above said notification. The question was, whether the property was a wakf. According to the plaintiff, the

property had been granted by a non-Muslim for the support of Kazi service and his case is that it would not be a wakf as defined in the Wakf Act.

On the contrary, the case of the defendant-appellant has been that the property is a wakf. The learned Counsel for the appellant seeks to support

such a conclusion on two grounds, namely, that firstly the grant had been made by a Muslim and secondly even if it is not a grant made by a

Muslim, it came under the definition contained in Section 66-C of the Wakf Act.

Alagiriswami, J., who heard the second appeal, came to the conclusion that as there had been no evidence as to who made the grant, it was possible that the grant might have been made by a non-Muslim and therefore the property would not come under the definition of the word "wakf" contained in Section 3(1) of the Act. He further came to the conclusion that the grant was made for Kazi service and that is not one coming under anyone of the clauses in Section 66-C of the Act. The view of the learned Judge is that for a wakf, as defined in Section 3(A), the grant ought to have been made by a Muslim and if the grant is made by a non-Muslim it would be wakf only if it comes under anyone of the clauses of Section 66-C of the Act. "Kazi service" is not one contemplated by Section 66-C of the Act. Therefore, the learned Judge held that the property is not wakf and the plaintiff is entitled to a decree as prayed for.

2. There can be no serious dispute that the property had been granted, whether it be by a Muslim or a non-Muslim, only for Kazi service. Extracts from Inam fair register as well as a copy of the inam title deed have been filed. In the extracts from the Inam Fair Register, it is specifically mentioned that the grant was for Kazi service. In the copy of the inam title deed, the genuineness of which is not in dispute, it is specifically mentioned that the grant was for kazi service. In the very notification made by the Board, the grant is described as one for Kazi service. The notification is as follows:--

Kazi service inam Paramathi pious, religious and charitable and mushrut-al-khidmat. For rendering Kazi service in the Mosque 300,008.31.

The learned Counsel for the appellant, however, contends that in the extracts from the Inam Fair Register, there is one reference that the inam was for Masjid and therefore it must be held that the grant was to the mosque. No doubt in Ex. A-2, in one of the columns, namely, column 15, it is stated:

In Fasli 1230 Mahajid Inam Ji Mohammad Amir.

As Alagiriswami, J., has rightly pointed out this description in column 15 is rather confusing. The entries in the other columns in the extracts of inam

fair register made it quite clear that the grant was for kazi service. It has been described as kazi service inam. As stated earlier, even the inam title

deed, a copy of which is available, describes the inam as kazi service inam. It

may be that Kazi service is attached to a particular mosque. But that does not mean that the grant itself is to the Mosque. We have no hesitation in accepting the conclusion of Alagiriswami, J., that the grant was for kazi service.

3. Another question of fact raised is as to whether the grant has been made by a Muslim or a non-Muslim. Really there is no evidence on record

either way. The plaintiff as P.W. 1 stated in the witness box that the grant had been made by a Hindu ruler. But that statement cannot be accepted

as evidence and that is a statement of only his case and nothing more. The plaintiff himself had to concede in cross-examination that he did not

know who was the grantor, whether he grantor was a Muslim or a non-Muslim. No documentary evidence had been placed either by the plaintiff

or by the defendant in order to find out who the grantor was. Due to complete lack of evidence regarding this aspect, the burden of proof becomes

important. Alagiriswami, J., has held that the defendant, namely the Board has to prove that the grant was made by a muslim, if it wants to support

its case that the property is wakf on the ground that it has been granted by a Muslim. The learned Counsel for the defendant contends that the

Board having made an enquiry and held that the property is wakf in consequence of which a notification to that effect was published in the Fort St.

George Gazette when the plaintiff questioned that notification, the initial burden to prove that the property is not wakf is on him. The contention is

that if the plaintiff wants to support his case that if the plaintiff wants to support his case that the property is not wakf on the ground that the grant

had been made by a non-Muslim, the initial burden is on him to prove such a case. In this connection, the learned Counsel for the defendant invited

our attention to Mahant Shri Srinivasa Ramanuj Das Vs. Surajnarayan Dass and Another, . That was a case under the Orissa Hindu Religious

Endowments Act. u/s 64 of that Act, if any dispute arises as to whether an institution is a math or temple or whether a temple is an excepted

temple or not, such a dispute has to be decided by the Commissioner under that Act. The said section further provided that any person affected by

a decision of the Commissioner may within one year, institute a suit in a Civil Court to modify or set aside such decision and subject to the result of

such suit, the order of the Commissioner shall be final. The learned Counsel

contends that Sections 4 and 5 of the Wakf Act are on par with Section 64 of the Orissa Hindu Religious Endowments act and once the Wakf Board causes a notification to be published, it must be held that there has been a quasi-judicial finding regarding the character of the property. The learned counsel contends that under such circumstances, the initial burden is on the plaintiff, who institutes the suit in a Civil Court to show that the property is not wakf. However, we are unable to agree with this contention. The decision contemplated u/s 64 of the Orissa High Court Religious Endowments Act is certainly a quasi judicial decision. That section contemplates an enquiry to be made by the Commissioner and it further says that subject to the result of a suit which might be instituted in a Civil Court, the order of the Commissioner shall be final. But as far as the Wakf Act is concerned, there is no provision for the Wakf Board to make any enquiry regarding the character of the property. The very heading of Chapter II of the Act and the caption to Section 4 makes it clear that the Commissioner or the Board is not making any enquiry to determine the character of the property. The Commissioner makes only a preliminary survey regarding wakfs and a publication of the list of wakfs is made u/s 5. Section 6 which refers to filing of civil suits makes it clear that the decision of the Civil Court shall be final. It is nowhere stated that any decision of either the Commissioner or the Wakf Board shall be final subject to the decision by a Civil Court for the simple reason that neither the Commissioner nor the Wakf Board makes any decision after an enquiry regarding the character of the property. As already stated, only survey is made and a list of wakfs is published. This is only an administrative act and not a quasi-judicial act. Therefore, it is the defendant-Board which wants to establish that he property is wakf should shoulder the burden of proof initially. As there is no evidence on either side, the conclusion of the learned Judge that it has not been proved that the learned Judge that it has not been proved that the grant had been made by a Muslim has to be accepted as correct. Therefore, we have to proceed on the footing that the grant might have been by a non-Muslim and it was for Kazi service.

4. Now, we have to examine, on the above finding, whether the property would be wakf. Section 3(1) of the Wakf Act defines the work "wakf"

as follows:--

"Wakf" means the permanent dedication by a person professing Islam of any moveable or immovable property for any purpose recognized by

the Muslim law as pious, religious or charitable and includes (i) a wakf by user; (ii) grants (including mushrut-ul-khidmat) for any purpose

recognised by the Muslim law as pious, religious or charitable; and (iii) a wakf-alal-aulad to the extent to which the property is dedicated for any

purpose recognised by Muslim law as pious, religious or charitable.""²

The question is whether a grant made by a non-Muslim, whatever be the purpose for which the grant is made, would come under the above

definition. We are quite clear that it would not. The main part of the defining section makes it clear that the dedication should be by a Muslim. Only

then it could be wakf. The contention on behalf of the defendant-appellant is that in the latter part of the section which contains the inclusive

definition, there is no reference to the grant being made either by a Muslim or by a non-Muslim and therefore the grant made for any of the

purposes mentioned in clauses (i), (ii) or (iii) in the latter part of the section does not necessarily be one made by a Muslim to make a wakf. We

are unable to agree with this contention. The inclusive definition contained in the latter part of the section cannot go beyond the terms of the first

part, which is the main part of the section. In the first part, it is clearly stated that the dedication should be by a person professing Islam. That is one

of the qualification for making a dedication a wakf. The second qualification, in order to make a dedication, a wakf, is that it should be for any

purpose recognised by the Muslim law as pious, religious or charitable. This second qualification is in general terms. Then comes the inclusive

definition. It specifies certain items. But there can be no doubt that the items mentioned in clauses (i) to (iii) in the latter part of the section which

gives the inclusive definition should come within the general clause in the first part of the section which, as already stated, refers to the purpose of

the dedication as one recognised by the Muslim law as pious, religious or charitable. It is not possible to dissociate the three clauses in the inclusive

definition in the latter part of the section from the first part of the section itself.

5. Under the Madras Wakf (Supplementary) Act, 1961, Madras Act 19 of 1961, the term "wakf" as defined by the Central Act was amended.

Section 2 of the Madras Act is as follows-

The term "Wakf" defined in clause (1) of Section 3 of the Wakf Act, 1954 (Central Act 29 of 1954) (hereinafter referred to as the said Act),

shall include all property given or endowed by any person professing any religion other than Islam for the support of--(i) mosque, idgahs,

imambaras, dargahs, khangahs or maqbaras; (ii) graveyards of persons professing Islam; and (iii) choultries for, or musafarikhanas for, the benefit

or persons professing Islam; and the term "wakf" defined in the clause aforesaid shall include any person aforesaid"".

This amendment introduced by the above Madras Act has since been incorporated in the Central Act by the Central Act 34 of 1964 by the

introduction of Section 66-C. The said Section 66-C is as follows:--

Application of the Act to properties given or donated by persons not professing Islam for support of certain wakfs--Notwithstanding anything

contained in this Act where any movable or immovable property has been given or donated by any person not professing Islam for the support of a

wakf being (a) a mosque, idgath, imambara, dargah khangah or a maqhara; (b) a Muslim graveyard; (c) a choultry or a musafarkhana, then such

property shall be deemed to be comprised in that Wakf and be dealt with in the same manner as the wakf in which it is so comprised"".

The very introduction of this section, namely, Section 66-C would go to show that unless a grant made by a non-Muslim comes under any one of

the clauses mentioned in that section, it would not be wakf. In other words, a dedication made by a non-Muslim, even if it is for the purposes

contemplated u/s 3(1) of the Central Act, it would not be wakf. As already noted, Section 66-C says that the Act is being applied to properties

given or donated by persons not professing Islam for support of certain wakfs. But for this section which applies the Act to certain grants made by

non-Muslims, no dedication made by a non-Muslim would be part of wakf property.

6. The learned Counsel for the defendant-appellant relies upon Syed Anwar Batcha Sahib v. Jamia Masjid Mosque, 1966 1 MLJ 379, which is a

decision rendered by one of us. No doubt the observations contained in that judgment support the contention of the learned Counsel for the

appellant, that even if the dedication is made by a non-Muslim for Kazi service, it

would be wakf. But in that case, the definition of the word, "wakf" as contained in Section 3(1) of the Act, had not been considered along with Section 66-C of the Act. That decision has proceeded on the footing that the definition of the word "wakf" had been amended so as to include all dedications by non-muslims as well. But, as already stated, the amendment of the definition of the word "wakf" was by the Madras Act 19 of 1961 and that has now been incorporated in Section 66-C of the Central Act. That means all the dedications by a non-Muslim, even if the purpose of dedication is one contemplated u/s 3(1) of the Act would not be wakf; and a dedication by a non-Muslim can be wakf only if it comes within the four corners of Section 66-C. Whether the present dedication comes u/s 66-C is another question which we would consider presently. We want to make it clear that in order to treat the property as wakf, as defined in Section 3(1) of the Act, one of the pre-requisites is that the grant ought to have been made by a person professing Islam.

7. Now, the question is, whether the property can be brought under the provision of Section 66-C. As already noticed, u/s 66-C, the grant should be for the support of a wakf as described in clauses (a) to (c) in that section. A plain meaning of Section 66-C indicates that it does not contemplate a non-Muslim creating a wakf himself. He can donate property to an already existing wakf and that too if the wakf is one coming under any of the three clauses mentioned in that section. As we have already said, the grant in this case is for Kazi service. Kazi service which would be a mushrut-ul-khidmat is not one of the wakfs mentioned in any one of the three clauses in Section 66-C. That is why the learned Counsel for the defendant-appellant had been trying to establish that the grant was to a mosque, there would be no difficulty in holding that the property is wakf, because u/s 66-C, a non-muslim can dedicate property for the support of a mosque and such dedication shall be deemed to be wakf. As we are clear that the dedication in this case is not to a mosque but only to Kazi service to be done in a mosque, we agree with the conclusion of Alagiriswami, J., that this does not come u/s 66-C either.

8. The Letters Patent Appeal fails and it is dismissed. As the plaintiff-respondent is not represented, there will be no order as to costs.

9. Appeal dismissed.