

(1999) 11 MAD CK 0014

In the Madras High Court

Case No : S.A. No's. 972, 973 and 1242 of 1986

V.T. Duraiswami and another

APPELLANT

Vs

Five Gori Thaikal Wakf and others

RESPONDENT

Date of Decision : 19-11-1999

Acts Referred:

General Clauses Act, 1897 — Section 6
Limitation Act, 1963 — Section 10

Citation : (1999) 11 MAD CK 0014

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : S.V. Jayaraman, for Mr. A.S. Vijayaraghavan, for the Appellant; K.M. Santhanagopalan, for Mr. S. Thangavel, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Sivasubramaniam, J.—These three Second Appeals arise out of a common judgment rendered by the trial Court in two suits namely,

O.S. Nos. 449 and 451 of 1978 filed by S. Gori Thaikal Wakf, Vridachalam, before the District Munsif, Vridachalam. Both the suits were

dismissed. A.S. Nos. 62 and 63 of 1984 were preferred before the Sub Court, Vridachalam, by the plaintiff. The appellate Court allowed both the

appeals and decreed the suit as prayed for. As against the said judgment, defendants 1 and 2 in O.S. No. 449 of 1978 have filed Second Appeal

No. 972 of 1986 while defendants 1 to 3 in O.S. No. 451 of 1978 and fourth defendant in the same suit have filed Second Appeal No. 973 of

1986 and Second Appeal No. 1242 of 1986 respectively. It is not necessary to deal with the mutual pleadings in both the suits having regard to

the scope of the legal issue which is found to be sufficient for the disposal of all the three Second Appeals. It would be sufficient to point out that

both the suits were filed by the plaintiff/Wakf seeking recovery of possession of the suit properties and for mesne profits from the respective

defendants claiming that the suit properties belong to the Wakf. In both the suits, the defendants contended that the properties were not trust

properties and they were only private properties of one Syed Kasim Saheb and others and after their death their legal heirs had sold the properties

to the defendants who had purchased the same for valuable consideration. The suits were also barred by limitation not having been filed within the

period of limitation under Article 96 of the Limitation Act after the appointment of Muthavalli and that they had also perfected title by adverse

possession.

2. The trial Court in its common judgment held that the properties belong to the plaintiff/Wakf. The trial Court also held that the suit was barred by

limitation as well as that the defendants have perfected title by adverse possession and hence dismissed both the suits. The appellate Court

confirmed the finding that the property belongs to the plaintiff/Wakf, but set aside the findings relating to the issue of limitation and adverse

possession and with the result the appeals were allowed and both the suits were decreed. Hence, these appeals by the defendants in the suit.

3. The finding that the properties in both the suits belong to the plaintiff/Wakf is a finding of fact rendered by both the Courts below concurrently

on a very detailed analysis of the evidence and the appellants in these appeals not being able to point out any serious legal error or perversity in the

said finding rendered by the Courts below, the said finding has to be confirmed. The main dispute which is raised before me relates to the question

of limitation in filing the suit and the claim of adverse possession by the defendants. The trial Court held that after Arman Ali Shah, then Muthuvalli

who died during the year 1922, no other person was appointed as Muthuvalli till 12.6.1996 when an other Muthuvalli came to be appointed. The

claim of the plaintiff that the suit having been filed within 12 years after the appointment of last Muthuvalli, the suit was filed within the period of

limitation, was not acceptable to the trial Court. The trial Court on its interpretation of Article 134-B of the Limitation Act, 1908 and Article 96 of

the Limitation Act, 1963 and various rulings of the Courts on the said provision, rejected the contention of the plaintiff. But the appellate Court

took the contrary view and held that the suits filed within 12 years of the appointment of last Muthuvalli were not barred by limitation. The

appellate Court also held that alienations of the Wakf properties were by persons who were holding properties in trust and therefore on its

understanding of the scope of Section 10 of the Limitation Act, held that the alienations being bad in law, alienees cannot plead adverse possession

against the trust. Before me also arguments were advanced by both sides on the basis of the aforementioned provisions of the Limitation Act of

1908 and 1963 as well as the provisions under the Wakf Act 1954 and the Wakf (Tamil Nadu Amendment) Act 34 of 1982, by virtue of which

Section 59A and 59-B were inserted in the Wakf Act, 1954 dealing with the limitation concerning the wakf properties. Both sides referred to

various decisions and rulings of the various Courts rendered in that context.

4. But any further discussion of the points as aforementioned would appear to be a futile exercise as a result of the passing of the Wakf Act, 1995,

which has effected drastic changes especially on the issue of Limitation governing the Wakf properties as detailed hereunder.

5. The Wakf Act, 1995, Central Act 43 of 1995 (hereinafter called ""the Act"") received the assent of the President on 22.11.1995 and was

subsequently, notified with effect from 1.1.1996. The most crucial provision which requires to be considered in the context of application of Law

of Limitation as regards Wakf properties, is Section 107 which reads as follows:-

107. Act 36 of 1963 not to apply for recovery of wakf properties. - Nothing contained in the Limitation Act, 1963 (36 of 1963) shall apply to

any suit for possession of immovable property comprised in any wakf or for possession of any interest in such property.

In considering whether the provisions could be applied for the pending proceedings in respect of suits already filed and proceedings already taken

under Wakf Act, 1954, Section 112 of the Act dealing with Repeal and Savings also requires to be noticed.

112. Repeal and Savings. - (1) The Wakf Act, 1954 (29 of 1954) and the Wakf (Amendment) Act, 1984 (69 of 1984) are hereby repealed.

(2) Notwithstanding such repeal anything done or any action taken under the said Acts shall be deemed to have been done or taken under the

corresponding provisions of this Act.

(3) If immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act that

corresponding law shall stand repealed:

Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken

in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the

powers conferred by or under this Act as if this Act was in force on the day on which such things were done or action was taken.

6. Neither the provision relating to the commencement of the Act (Section 1) nor Section 107 specifically stipulates any retrospective effect. But a

reading of Section 112 would appear to give effect to the provisions of the Act even with reference to the actions taken under repealed Act.

Therefore, the question which arises for consideration is as to whether Section 107 would apply to pending proceedings or not. Learned Senior

Counsel appearing on both sides have submitted their respective points in an elaborate manner and have also relied upon several rulings touching

the issue as dealt with hereunder.

7. Mr. S.V. Jayaraman, learned Senior Counsel for the appellants/defendants contends that as long as there is no specific legislative intendment to

give retrospective effect to the Act and in particular to Section 107 of the Act, the said provision cannot apply to the pending proceedings. In this

context, he would refer to Section 6 of the General Clauses Act which holds that unless different intention appears, the repeal shall not affect any

right, or privilege or obligation or liability acquired or incurred under the repealed enactment.

8. Per contra, according to Mr. Santhanagopalan, Learned Counsel for the Wakf/respondent, the Act is retrospective in operation on a plain

reading of Section 112 of the Act. The Law of Limitation is a procedural law and the principle that vested right cannot be affected by a subsequent

enactment will not apply to the procedural law. He would further contend that even if the subject was not a procedural matter, the legislature is

competent to take away even the vested rights and the effect of Section 112 of the Act is that the provisions of the Act are deemed to apply with

reference to the pending matters. In support of his proposition that Law of

Limitation was only a procedural law and therefore, the law as on today would apply, he relies on the judgment of the Supreme Court in C. Beepathumma and Others Vs. V.S. Kadambolithaya and Others, .

9. Before considering the various rulings cited before me, it is necessary to consider the effect of Section 112 of the Act dealing with repeal and

savings. This Section apart from specifically repealing the Wakf Act, 1954, under Sub-section 2, it is stated that notwithstanding the repeal

anything done or any action taken under the corresponding provision of the Act. Sub section 3(3) of the Act also specifically excludes the

applicability of any law in force in any State which may correspond to the new Act. A Proviso is added to Sub Section (3) holding that the repeal

shall not affect the operation of the corresponding law with reference to which anything done or any action taken in the exercise of any power

under the corresponding law and that the said action shall be deemed to have done under the new Act.

10. Even though Section (1) dealing with the commencement of the Act and Section 107 itself which abrogates the application of the Limitation

Act do not specify retrospective application and the Act is also silent about the pending proceedings, a reading of Section 112 of the Act leads to

the conclusion that the provisions of the Act are intended to apply to pending proceedings also. Any action taken under the repealed Act shall be

deemed to have been done or taken under the corresponding provisions of the present Act. It is in this background, it would be useful to deal with

Section 6 of the General Clauses Act on which Learned Counsel for the appellant relies. Learned Counsel for the respondents has also referred to

various decisions in support of his contention that Section 6 of the General Clauses Act will not be applicable to the Wakf Act, 1995.

11. It is true that Section 6 of the General Clauses Act holds that the repeal of an enactment will not affect any right, privilege, obligation or liability

acquired or incurred under the repealed enactment. But the Section itself is made conditional upon the intention of the legislature. The provision

could be resorted to only if no "different intention" appears. Therefore, Section 6 of the General Clauses Act cannot be applied to under the

repealed Act, shall be deemed to have been done or taken every repealed provision or enactment regardless of the intention of the legislature and

the language used in the repealing provision, the object of the repeal, the existence of a saving clause etc.

12. One of the earliest instances of the effect of change in the statute would be the decision of Tindal. C.J. in *Kay v. Goodwin* (1930) 6 Bing 576

at 582, and it was held as follows:-

The effect of repealing a statute is to obliterate it completely from the records of the parliament as if it had never been passed; and it must be

considered as a law that, never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was

an existing law.

13. A subsequent decision of the Court of Appeal in *Quilter v. Mapleson* (1882 (9) QB, 672) is also relevant. Before the Court below, an action

for ejectment was instituted under the provision of re-entry for breach of covenant in the lease and the judgment was given for the plaintiff. In the

appeal before the Court of Appeal, the defendant obtained an order of stay and the plaintiff did not get actual possession. Before the appeal was

heard the Conveyancing and Law of Property Act, 1881 came into operation under, which the power to relieve against forfeiture was given. The

court of appeal reversed the verdict and granted relief to the defendant, holding that such a judgment ought to be given as if it was dealt with by the

Court of first instance. This ruling not only lays down that an appeal is only a continuation of the original proceeding and rehearing of the suit, but

also emphasises the effect of a subsequent statute on the rights of the parties. The view of the Court of Appeal was subsequently approved by

House of Lords in *Attorney General v. Birmingham, Tame, and Rea District Drainage Board* (1912 A C, 788).

14. The law in America is also very similar as in England and reference to the following extract from Crawford on Statutory Construction (Page

599, 600) would be sufficient:

A repeal will generally, therefore, divest all inchoate rights which have arisen under the repealed statute & destroy all accrued causes of action

based thereon. As a result, such a repeal, without a saving clause, will destroy any proceeding, whether not yet begun, or whether pending at the

time of the enactment of the repealing Act & not already prosecuted to a final judgment so as to create a vested right.

15. If the intention of the Parliament was to save the pending legal proceedings, the old practice in England was always to insert in the repealing

statute, a Saving clause specifically protecting actions and pending legal proceedings initiated under the repealed Act. But subsequently to dispense

with the necessity of inserting a Saving clause, Section 38(2) was inserted in Interpretation Act, 1889 which provides that a repeal, unless the

contrary intention appeared, will not affect the prior operation of the repealed enactment or the legal proceedings or remedies instituted, continued

or enforced in respect of the rights, liabilities and penalties under the repealed Act, as if the repealing Act had not been passed. In India also a

similar protection was ensured by virtue of Section 6 of the General Clauses Act, 1868. But as stated earlier, recourse to Section 6 of the General

Clauses Act can be had only if no different intention appears.

16. The legal effect of the repealing of an Act and the consequences" of a fresh legislation as would apply to India has always been the same as

held by the Courts in England or U.S.A.

17. In the case of Mukerjee, Official Receiver v. Ramratan Kuer (43 L.W. 336), the Privy Council had to deal with the following situation. In the

year 1927 a suit was filed by the Official Receiver representing the interest of the landlord on the basis of a right of re-entry and the Subordinate

Judge granted a decree for ejectment. The High Court reversed the judgment and during the pendency of the appeal before the Council, Bihar

Tenancy Amendment Act, 1934 was passed. By virtue of the Amendment the occupant was given a new right to transfer his holding subject to the

payment of a transfer fee to the landlord. On an analysis of the provisions, the Privy Council held that unless some savings could be contemplated

or implied as regards the holdings in question in a pending suit, the plaintiff's appeal must fail and that the Act did not contain any such provision.

18. In Lachmeshwar Prasad v. Keshwar Lal (53 L.W. 373) the Federal Court held that in its exercise of appellate jurisdiction the Federal Court

was bound to consider any change in law affecting the question involved in the appeal which was effected subsequent to the decision of the High

Court.

19. In State of Punjab v. Mohar Singh (AIR 1955 SC 84), the Supreme Court held that the applicability of Section 6 of the General Clauses Act

did not depend merely upon the absence or the existence of a saving clause in the new Act. It was held that in a case of simple repeal there was no room for expression of any contrary opinion. But when the repeal was followed by a fresh legislation on the same subject the Court would undoubtedly have to look to the provisions of the new Act for the purpose of determining whether they indicated a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy the said right.

20. In the present case, in enacting Section 107 in the 1995 Act, the intention to destroy the plea of limitation is made very clear.

21. In *Shyabuddinsab Mohidinsab Akki Vs. The Gadag-betgeri Municipal Borough and Others*, the SC held that there need not be express words in the amendment or the new statute to the effect that the new provision shall apply to pending proceedings also. In every case the language of the amending statute has to be examined to find out whether the Legislature clearly intended even pending proceedings should be affected by such statute.

22. In *Rafiquennessa Vs. Lal Bahadur Chetri (Dead) through his Representatives and Others*, a Constitution Bench of the Supreme Court had to deal with the following situation. In a suit for ejectment, the lease was due to expire on 12.2.1952. It was alleged that the lessee had sub let the premises contrary to the terms of the lease. The trial Judge decreed the suit but while the appeal was pending, the Assam Non-Agricultural Urban Areas Tenancy Act, 1955 was passed. u/s 5 of the Act, a tenant who had put up superstructure during the tenancy period with the knowledge of the lessor shall not be ejected from the tenancy. In the appeal, the tenant took out a petition to raise additional grounds based on the amendment. The Supreme Court" held that the object of the provision was clearly to benefit the tenant and if the Legislature had indicated only prospective application, it would have said so clear terms. There were no such express words in the Act and therefore, the tenant was entitled to the benefit conferred u/s 5 of the said Act. In the same judgment, it was held that the pending appeal was a continuation of the suit and hence the dispute between the parties would be governed by the new provisions.

23. In *Smt. Dayawati and Another Vs. Inderjit and Others*, the Supreme Court held that if a new law speaks in a language which expressly includes even pending matters, the trial Court as well as the appellate Court must have regard to the said express intention and the appellate Court also have to give effect to such law even after the judgment of the Court of first instance. The distinction between laws affecting procedure and those not affecting procedures does not matter when the law intends to take away from a successful plaintiff, what he has obtained under a judgment.

24. In the following cases also this Court as well as the Supreme Court had held that an appeal was only a continuation of the suit and any change in the law as applicable between the parties, effected during the pendency of the appeal, was bound to be given effect by the appellate Court.

(i) *Md. Ghouse v. Madras State Wakf Board* (AIR 1956 Mad, 439)

(ii) *Sakuntala v. Sarangapani Naidu* 1984 1 M.L.J., 336=97 L.W.64)

(iii) *Lakshmi Narayan Guin and Others Vs. Niranjan Modak*,

25. In *State of Tamil Nadu v. Hind stone* (1981 (II) SCC, 205= 94 L.W.89 S.N.) the SC considered the validity of G.O.Ms. No. 1312,

Industries, dated 2.12.1977 imposing prohibition on private persons for quarrying black granite. While upholding the validity of the G.O., the SC

also held that even in respect of old applications for the grant of licence pending with the Government for consideration, no one had a vested right

to have the application for the grant or renewal of a lease under particular provisions only and it was further held that such applications have to be

dealt with only in accordance with the Rules in force on the date of the disposal of the application.

26. In the present case, there is a further circumstance which would weigh in favour of the Wakf. It is settled proposition of law that in procedural

matters there is no vested right and hence any amendment to the procedural matters would apply to pending proceedings also. I have already

referred to the judgment of the Supreme Court reported in *C. Beepathumma and Others Vs. V.S. Kadambolithaya and Others*, relied on by

Learned Counsel for the respondent in support of his submission that the law of limitation was only a procedural law. In the said judgment the

Supreme Court held that the law of limitation was a procedural law and the

provisions existing as on the date of the suit should be applied.

27. English Courts have also held the same view for over a century vide the case of *The Ydun* (1899 (P) 236) Page - 287 of Odger's

Construction of Deeds and Statutes - V Edition. In that case, the Public Authorities Protection Act, 1893 provided that an action against a public

officer or authority should be brought within six months of the default complained of. It was held that it was only a matter of procedure and the

provision was retrospective and that the action was barred after six months from the date of default.

28. In the judgment of the SC already cited above, and reported in *Rafiquennessa Vs. Lal Bahadur Chetri (Dead)* through his Representatives and

Others, the Constitution Bench held that where vested rights are affected by any statutory provision the said provision would be normally

construed as prospective unless the provisions related to a procedural matter.

29. In AIR 1966 SC 1498 cited supra, it was held that the law affecting procedure was always retrospective.

30. In *Qudrat Ullah Vs. Municipal Board, Bareilly*, the SC dealt with a case where the appellant/tenant was entitled to the protection under the

Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 when the suit was filed. But when the appeal was pending before the SC, the

said Act was repealed and replaced by Uttar Pradesh Urban Buildings Act, 1972 wherein the Municipal Board/respondent was held entitled to

ejectment decree even if there was a lease in favour of the tenant. The SC held that even if Section 6 of the General Clauses Act could be held as

applicable, the provision was only procedural and hence applicable to pending proceedings.

31. Therefore, bearing in mind the principles enunciated in the above rulings and considering the various provisions and objects behind the Wakf

Act, 1955, I am inclined to hold that Section 107 would apply to the pending proceedings also having regard to the following features which

clearly indicate that the Act was intended to be a complete Code by itself and the provisions abrogating limitation were intended to apply to the

pending proceedings also.

(A) Section 2 of the Act holds that the Act shall apply to all Wakfs created either before or after the commencement of the Act.

(B) A separate Tribunal is constituted for determining disputes regarding Wakfs u/s 83.

(C) The jurisdiction of the Civil Courts is barred u/s 85 of the Act in respect of disputes determinable by the Tribunal.

(D) Section 112(2) specifically mandates that anything done or action taken thereon shall be deemed to be taken under the corresponding

provision of the Act. In this context, the expression "anything done or action taken in the exercise of the powers", had been held that it would not

mean or include an act done by a person in contravention of the provisions of the Act, but was intended only to keep alive the official actions, rules

and notifications issued and done in the exercise of the powers conferred under repealed provisions vide judgment of the Supreme Court reported

in AIR 1955 S.C.84, cited above. Therefore, in the absence of a specific provision expressly saving or protecting the pending legal proceedings, it

is incumbent on the Courts to give full effect to the provisions of the Act.

(E) The Act being a welfare legislation and intended to protect the trust properties, ought to be considered in a manner consistent with the

upholding of the said object. The object of the Legislature was to destroy the rights of trespassers and imperfect the alienees claiming adverse title

against the trust properties and as such no distinction can be made between pending proceedings and proceedings to be commenced afresh. The

various provisions under the Act as well as the saving provision signify that the Act is a self contained Code intended to come into effect covering

the pending proceedings also.

(F) To hold otherwise would lead to anomalous situations. In the suits filed by the occupant or the Wakfs prior to the coming into force of the Act,

the Wakf will not be entitled to raise the defence u/s 107 whereas in any suit filed or to be filed belatedly after coming into force of the Act, the

Wakf would be entitled to raise the said defence and the occupants would be deprived of their right to raise the plea of adverse possession. The

Legislature could not have intended such a fortuitous circumstance to be the determinative factor to decide the rights of the parties. It is also

possible to visualise the situation that in a pending suit, the Wakf can withdraw the suit with liberty to file a fresh suit on the same cause of action

and thereby in the fresh suit confer upon itself the advantages of Section 107.

Therefore, the interpretation to be placed on a statutory provision should be purposeful, meaningful and reasonable and not to give rise to anomalous and unintended situations.

(G) It is also pertinent to note that the issue of limitation as referable to the dispute between parties under Wakfs Act, 1954, is also dependent

upon a consideration of the Public Works (Extension of Limitation) Act, Central Act 29 of 1959 and also the subsequent Wakf (Tamil Nadu

Amendment) Act, 1982 in and by which Section 59-A and 59-B were inserted in the Central Act of 1954. Now as a result of Section 112(3) of

the Wakf Act, 1994, all the State Acts corresponding to the present Act stand repealed. This would also add to the complexity of interpreting the

rights of the parties, if no retrospective effect is given.

32. Therefore, I am inclined to hold that Section 107 of the Act is applicable to pending proceedings also which had not become final and

conclusive between the parties. Hence the verdict of the trial Court that the suits were barred by limitation, cannot be sustained. Though the

appellate Court held that the alienees cannot plead adverse possession against the trust and decreed the suit in favour of the plaintiff/Wakf, yet the

decision of the appellate Court was based on erroneous application of Section 10 of the Limitation Act, 1963, which is not at all applicable or

relevant to the issues involved in the present proceedings. Section 10 of the Limitation Act pertains to suits brought against the trustees and their

representatives as the title of the Section itself makes it clear. Therefore, the finding of the appellate Court to the effect that the alienations being

allegedly bad in law, the alienees cannot plead adverse possession as provided u/s 10 of the Limitation Act, is totally misconceived. This is a suit

filed by the wakf and the said provision will not apply. Therefore,, to the said extent, the finding of the learned appellate Judge is liable to be set

aside.

33. In the result, while confirming the finding by both Courts below that the property belongs to the plaintiff/Wakf, I hold that Section 107 of the

Wakf Act, 1995 disables the appellants from pleading adverse possession. Hence, the plaintiff is entitled to the decree as prayed for. In the result,

all the Second Appeals are dismissed. No costs.