Wali Mohammed (dead) by Lrs.

Vs

Rahmat Bee

Civil Appeal No. 159 of 1990

(M. Jagannadha Rao, M.B. Shah JJ)

23.02.1999

JUDGMENT

M. Jagannadha Rao, J.

1. This is an appeal by the plaintiff in the suit - O.S. No. 938 of 1976 on the file of the First Assistant Judge, City Civil Court, Secunderabad. The appellant filed the suit as Mutawalli and person. Incharge of the suit property, for possession. The suit was decreed by the trial court by Judgment dated 13.10.1977. The respondent-defendant filed appeal A.S. No. 83 of 1978 and the same was allowed on 17.3.1979 by the Additional Chief Judge (cum Special Judge, S.P.E.,) City Civil Court, Hyderabad and the suit was dismissed. The plaintiff then filed Second Appeal No. 575 of 1979 in the High Court and it was dismissed on 2.8.1982. Against that Judgment, the plaintiff has filed this appeal by special leave. Pending this appeal, plaintiff's legal representatives have been brought on record. We are, however, *suo moto* leading the A.P. Wakf Board as an appellant in exercise of our power under article 136 of the Constitution of India, so as to safeguard the interests of the Wakf property.

2. The main point urged by the learned counsel for the appellant-plaintiff is that finding of the lower appellate court and the High Court that the respondent-defendant acquired title by adverse possession to the suit property is not correct in law.

3. The suit property is an extent of 300 sq. yards in Secunderabad containing various premises and buildings thereon, located within the grave yard and Darga described in the plaint schedule as `Syed Khaja Peer Darga'. The suit property is claimed by the Wakf Board through the plaintiff as Mutavalli.

4. We shall initially refer to the earlier litigation between the parties and to the findings therein. Earlier, Rahiman Khan, the respondent herein filed O.S. No. 193 of 1963 on the file of the First-Assistant Judge, City Civil Court, Secunderabad against the appellant, Wali Mohammed claiming to be in possession and claiming that his father late Yakub Khan had constructed a house in the suit property a few years before 1938. He sued for declaration of "his right to manage and possess the grave yard and darga and to restrain the defendant therein (present plaintiff) from cutting branches of certain trees". The suit was filed on 27.7.1963. It was dismissed by the trial Court on 27.2.1965. Therein the trial court referred to the evidence of PW-1, a clerk from the Wakf Board, to the effect that the Darga related to one Syed Peer Ali, who died 15 years earlier and the said Syed Peer Ali was buried there, that the mosque adjoins the grave yard which contains the tombs and Darga, that the `Grave yard and mosque are public property and that the Wakf Board manages the grave yard and mosque as trustee'. The said witness produced Ex. B-1 therein being the book of Endowments

which showed that this mosque and grave yard were entered in that book. It appears that the counsel for the respondent (plaintiff in that suit) conceded that the `suit grave yard and Darga are a Wakf by user'.

5. Adverting to the plea of title to the property set up by the respondent, the Court held that there was absolutely no evidence on behalf of the respondent that the suit property was either his own or he had any right in the grave yard or the Darga. The Court held, on the other hand that the present plaintiff (defendant therein) was the person performing the Urs at the Darga and *managing* the grave yard and the *house* therein and that the house was being used as a Musafir Khana. There was a further finding that the respondent's father was only a Chowkidar appointed by the Mosque Committee. The suit was accordingly dismissed by the trial Court by Judgment dated 27.2.1965. Against the said Judgment, the respondent herein (plaintiff in that suit) appealed in A.S. No. 32 of 1965 before the Chief Judge, City Civil Court, Hyderabad and the appeal was dismissed on 22.1.1968. Thereafter, the Second Appeal No. 684 of 1968 was also dismissed by the High Court on 24.4.1970. Thus, in all the three Courts, the respondent was unsuccessful in the earlier suit.

6. The present suit has been filed on 4.2.1976 by Wali Mohd., the defendant in the earlier suit, for possession. He is the appellant in this Civil Appeal. The defendant raised the same pleas he had raised in the suit filed by him in 1963. The courts below went into the question as to whether the findings in the earlier suit operated as *res Judicata.* The trial Court and the first appellate Court held that the said findings operated as *res Judicata.* However, while the trial Court decreed the present suit, the lower appellate court allowed the appeal and dismissed the appellant's suit. It observed that the respondent, as PW-4 in the earlier suit had stated that his father Yakub Khan gifted the house property to him by registered gift deed marked in present suit as Ex. B-1 dated 4.7.1938, that his ancestors were in possession for 200 years and that the respondent paid property tax as per Ex. B03 to B-19. The appellate Court then referred to the evidence of another witness, PW-2 in the earlier suit to the effect that the respondent's father got the property from his ancestors and that the Wakf Board was never in possession. It referred to the admission of the appellant as PW1 that the Wakf Board was never in possession of the suit property and that the respondent's father was residing in the suit house for the last 40 years, that the respondent was paying taxes and that after the death of the respondent's father, respondent continued to be in possession. The appellate court therefore held that there was no doubt that the defendant and his father were in possession of the house continuously for over 40 years and that respondent's father constructed the house before 1938 as per Ex. B-2, in spite of objection by the present plaintiff and that they must be treated to be in adverse possession for more than 12 years. The appellate court observed as follows :

> "But when he filed the suit OS No. 193/63..... claiming title in himself to the suit property, it must be deemed that he has asserted title to the property *adverse* to the Wakf on and from the date of filing the suit."

After holding that the respondent and his father had perfected title to the suit property by adverse possession, the appellate Court allowed the appeal by Judgment dated 17.3.1979 and the suit was dismissed. The said Judgment was confirmed in Second Appeal No. 575 of 1979 on 2.8.1982 by the High Court. The plaintiff has now preferred the present appeal.

7. In this appeal, learned counsel for the appellant Sri A. Subba Rao contended that the findings in the earlier suit as found by the lower appellate Court were that the suit property including grave yard and Darga and house were Wakf property, that the suit house was being used as Musafir Khana and hence the entire property was Wakf property. These findings were *res Judicata.* Even in the

earlier suit, the respondent merely contended in the plaint of 1963 that he and his fore-fathers were "managing the Darga as well as grave yard" and on that basis sought injunction restraining the present appellant from cutting the trees and that the defendant claimed only to be a manager and there could, therefore, be no adverse possession. Learned counsel also contended that the house constructed by respondent's father sometime before 1938 was only an accretion to the Wakf property and was being used as Musafir Khana. In the earlier suit, there was a further finding that the present plaintiff was in management of the property including the house property and this finding would foreclose any plea of adverse possession by the defendant. Assuming that respondent's father and the defendant were in management of all these properties, they could not set up adverse title. In any event, the respondent being not a transferee for consideration but only a donee from his father, possession could be recovered from the respondent because Section 10 of the Indian Limitation Act, 1963, removes the bar of limitation to sue a person who is a transferee without consideration.

8. On the other hand, learned counsel for the respondent Sri D. Ramakrishna Reddy vehemently contended that the earlier Judgments did not operate as *res Judicata,* that the Judgment in the earlier suit showed that the respondent, as plaintiff therein, claimed that the property was ancestral property and he was "proprietary" of the same. At any rate, in view of Ex. B-1 gift deed of 1938 in his favour from his father the house, property was his own property. Therefore his adverse possession commenced from the date of the plaint filed by him in the earlier suit, i.e. 27.7.1963 and present suit by the appellant for possession having been filed on 4.2.1976 after lapse of more than 12 years, was barred by time and was rightly dismissed by the lower appellate Court and the High Court.

9. On these submissions of the learned counsel, the following points arise for consideration :

> (1) Do the findings in the earlier suit O.S. No. 193 of 1963 filed by the respondent-defendant, operate as *Res Judicata* in the present suit against the defendant, under Section 11 of the Code of Civil Procedure, 1908 ?
>
> (2) Whether the plaintiff has proved title to the suit property including the house ?
>
> (3) Whether the respondent-defendant has perfected title by adverse possession to the suit property or at any rate to the house property obtained by him under the gift deed of 1938 from his father ?

Point 1 :

> On the question of *res judicata*, it will be noticed that the trial court in the present suit accepted the appellants' contention that the earlier findings operate as *res Judicata.* The parties are the same in the present suit and in the earlier suit OS No. 193 of 1963. The property is also the same. Even the lower appellate Court which reversed the trial court and accepted the plea of adverse possession, has affirmed that the findings in the earlier suit operate as res-judicata under Section 11 of the Code of Civil Procedure, 1908. We shall refer to the certain important findings given by the trial Court in the earlier suit.

10. It was conceded before the trial court that the entire property was Wakf property. The trial court recorded the said concession as follows :

> "Mr. K.R.K. Iyengar, the learned counsel for the plaintiff had admitted across the bar

> that the suit grave yard together (with) Darga are Wakf by user."

The Court gave a further finding as follows :

> "There can be no doubt that the suit grave yard together with the Darga adjoining the Regimental Bazar mosque, constitute Wakf property."

It was nextly held that the grave yard, Darga and house were under the management of the present plaintiff. The finding in para 17 of the trial Court in the earlier suit reads as follows :

> "It is however in evidence that the defendant (i.e. present plaintiff) has been performing the Urs for the Darga. PW3 Azimuddin, a person aged 60 years swears that the grave yards is under the management of the Regimental Bazar Mosque and the management of the grave yard was entrusted to the first defendant and (the) *house* in the grave yard *was used* as a *Musafir Khana.* The plaintiff does not challenge the testimony of the witness."

Therefore, the finding was that this house was being used as a Musafir Khana. The above findings operate as *res Judicata* in the present suit.

11. For the present, we shall omit from consideration the findings in the earlier suit that the present plaintiff was in possession and that the respondent was not in possession. We shall also omit from consideration the finding that the respondent's father was a Chowkidar. In fact, in his written statement in the present suit, the respondent did not accept the above findings given in the earlier suit.

12. Point 1 is decided accordingly.

Point 2 :

> On the question of title to the suit property, we have already referred to the concession of the respondent's counsel in the earlier suit that the suit properties were all wakf property. Further, it was stated in the earlier suit that so far as the house located in the suit property was concerned, it was being used as a Musafir Khana. Even so, learned counsel for the respondent-defendant has placed reliance on Ex. B-1 registered Gift Deed of 1938 executed by his father in his favour as proof of his title to the house property. In our view, when the finding in the earlier suit that the suit property was Wakf property is *res Judicata,* it is not permissible for the respondent to rely on this document of 1938 for proving title. As to how far this document will help the respondent to prove adverse possession, we shall consider that question separately under Point 3. For the present, we hold that the respondent cannot be permitted to prove title to the house property on the basis of Ex. B-1 gift deed. Further, the house property covered by the gift deed Ex. B-1, was constructed in the grave yard and it was, as we shall presently show, meant to be used for religious purposes, and therefore it became an accretion to the Wakf property, and bore the same character as the other properties in the compound in view of the principle laid down in *Mohammed Shah v. Fasiuddin Ansari, AIR 1956 SC 713.*

13. For the aforesaid reasons, we hold that the suit properties, namely, the grave yard, Darga and house located therein are all wakf properties and that the respondent has not proved any title thereto.

Point 2 is held accordingly. *Point 3* :

14. This point deals with the question of adverse possession and is the crucial point. It is on this point that the respondent-defendant has succeeded before the lower appellate court and the High Court in the present proceedings.

15. Learned counsel for the respondent proceeded on the basis that the grave yard and Darga were Wakf properties and confined the plea of adverse possession to the house property alone.

16. We shall start discussion on this point once again with Ex. B-1 registered gift deed of 1938 executed by the respondent's father in favour of the respondent. *Ex. B-2 deed of 1898 created a Wakf in respect of the house :*

17. It is necessary initially to refer to the evidence of the respondent in regard to the purpose for which and the circumstances in which the house was constructed by his father. On this aspect the respondent relied upon Ex. B-2 dated 17th Sherawar 1308 F (i.e. 1898) to show that permission was granted to his father for construction of the house in 1898 and therefore the house became personal property. But the contents of this document Ex. B-2, in our view, are important and they throw much light on the purpose of the permission granted for construction of the house. We get it from para 6 of the Judgment of the first appellate Court in A.S. 32 of 1965 in the earlier suit, that under the above document permission was given to the respondent's father by the Fakirs of Arzan Shahi for construction of the house and they directed that :

> "he should act in accordance with the wishes of the people of the locality to perform fateha of the tombs I n the grave yard-compound, according to his mite and that the Fakirs who gather at the grave yard should be provided with hucca tobacco and that the applicant and his *progeny* will have similar rights."

The word `progeny' used, in this connection, is very significant. It means that the above obligations were cast on the respondent's father and also on the respondent.

18. Further, as is clear from the Judgment of the trial Court in the earlier suit, the respondent's case in the plaint in that suit, - so far as the permission for construction was concerned - was as follows :

> "The plaintiff and his forefathers have been managing the *Darga* as well as the *grave yard.* An ancestor of the plaintiff Mohammed Ali Shah got the right to manage the Darga and the grave yard and the right of Fatheah by the issue of a permission letter dated 17th Sherewar 1308 F given by the Sargaraeh Arzan Shahi, the head of the order of Fatheah. There are a number of tombs in the said compound."
>
> The first part of this pleading shows that the *Darga* and *grave yard* were given, even according to the respondent only for "management". The second part of this pleading coupled with the recitals in Ex. B-2 of 1898 shows that the permission was given to his father for the construction of a *house* for using the same in accordance with the wishes of the people of the locality and for performance of Fateha at the tombs in the grave yard compound, and to provide hucca tobacco to the fakirs who would gather at the grave yard. The same obligations were conferred on the respondent-defendant also under that document.

19. *Fateha implies creation of a valid Wakf* :

> Question is whether property given for use for purposes of `Fateha' would create a Wakf. Such a question arose before the Privy Council in *Mutu Ramanadan Chettiyar v. Vave Levvai Marakayar, 41 I.A. 21 (P.C).* In that case property was settled in 1893 by two Mohammedan brothers in trust for various purposes including the performance of the customary Fatiha. Lord Atkinson observed (at p. 29) :
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> "As far as the *Fatiha* is concerned, it is to be the `customary' ceremony that the trustees are to perform without fail. Part of that ceremony is to feed the poor ..... the dominating purpose and intention of the grantors is executing this deed evidently was to provide adequately for these charities. That was their main and paramount object ..... the gift for the charities was perpetual ..... "

and concluded,

> "If this be so, as they think it is, the deed is within the authorities a good and valid *deed of wakf* ....."
>
> Mulla says that performance of annual Fatiha of the Settlor and other members of his family consists of recital of prayers for the welfare of the souls of the said deceased persons, accompanied by distribution of alms to the poor and is a valid wakf. [Mulla's Mohammedan Law, 19th Edn. (para 178)].

20. Therefore, the directions for conduct `Fateha' at the grave yard and to use the house for those purposes are certainly valid objects of a Wakf.

21. In the present case, the offerings of prayers are not confined to prayers at the tombs of the grantor or his family members. The grant was by the head of the order and related to prayers at a number of tombs in the grave yard. It is, therefore, clear that a Wakf of a public nature was created. In fact, it is the finding in the earlier suit in para 17 of the trial Court Judgment that the house was being used as a musafir khana. *Respondent's evidence of being `proprietor' cannot be divorced from the other parts of his evidence.* Learned counsel for the respondent, however, strongly relied upon the words `proprietor' used in pars 10 of the judgment of the trial Court in the earlier suit. We shall refer to the relevant passage from that Judgment and explain the context in which the said word was used.

22. In para 10, the trial Court in the earlier suit had referred to the evidence of the present respondent-defendant as PW4 where he started that :

> "he (defendant in the present suit) has the right to be the manager of the grave yard and that he is also the *proprietor*. He claims and traces his right to Ex. A2 dated 17th Sharewar 1308 F. It is styled as a sanction letter issued by the Fakirs of Arzan Shahi. It reads that in accordance with the application ..... submitted through Ramzan Ali, the permission was granted to construct a house. It is further recounted in Ex. A2 that the person to whom the permission was granted in accordance with the wishes of the people of the locality and he performed the Fateh of the tombs in the grave yard compound according to his might. Fariyas who gather at the grave yard should be provided with hucca." The document Ex. A2 referred to in the above passage is Ex B2 permission, in the present suit.

23. It is true that the Court stated in the earlier suit that the respondent in his evidence used the word

`proprietor'. But it is obvious from a reading of the entire para that the word `proprietor' has to be read along with the rest of the respondent's evidence in that extract and cannot be divorced from the context. Viewed in the context in which these words occur it is clear that the respondent admitted that the house belonged to their family but was to be used for religious purposes. In our view, the word `proprietor' and the claim as ancestral property in the earlier suit were meant by the defendant to mean that the present plaintiff and the Wakf Board had no right of management and that these properties were meant to be the properties of the respondent and of his family for being used for the aforesaid religious purposes. Thus the use of the word `proprietor' cannot be of any help to the respondent-defendant. *On basis of the 1898 deed, were respondent and his father in the position of a mutavalli*[illegible]*s?* If, therefore, the respondent's father and after him, the respondent were permitted since 1898 to use the house property for the purposes of the Fateha and for use of the Fakirs as stated above, are they in the position of a mutavalli ?

24. Now there are more reasons than one as to why the respondent's father and the respondent cannot plead adverse possession in respect of the house. We have noticed that the permission granted in 1898 to the respondent's father by the Fakirs of Arzan Shahi creating obligations of a religious nature in respect of the proposed house. Such obligations were created both on the respondent's father and his progeny, the respondent. According to Mulla's Mohammadan Law [(para 202) 19th Ed., 1990] a mutavalli is a superintendent or manager of the Wakf property. If that be so, the respondent and his father were certainly in a fiduciary position so far as the house property was concerned and such persons in whom the management was so vested are in law in the position of mutavallis. *A mutavalli is prohibited from setting up adverse title unlike a stranger.* We have stated that both the respondent and his father, on their own showing, are to be treated as Mutavallis in the eye of the law, at the relevant time. If that be so then, as stated in Mulla (para 217), though `Wakf property may be lost by adverse possession of a *stranger* to the trust, a mutavalli's possession cannot be adverse to the wakf'. It was so stated in *Mohd. Shah v. Fasiuddin Ansari, AIR 1956 SC 713.* In that case Bose, J. observed as follows (p. 724)

> "It is true that a stranger to the trust could have encroached on the trust estate and would in course of time acquired a title by adverse possession. But a Mutavalli cannot take up such a position."

Inasmuch as both the respondent's father and his progeny (i.e. the respondent) answer the description of mutavallis, vis-a-vis the house, it is clear that it was not open to either of them to set up adverse possession.

25. It is true that the respondent is also a donee of the property under the gift deed of 1938 from his father. A question might arise whether his possession is referable to the original deed of 1898 which conferred obligation on the `progeny' also or whether the possession is to be treated to the gift deed of 1938. In our view, respondent's father was himself a manager and if could not have claimed adverse possession of the property, and could not have acquired title by adverse possession he could not have transferred to his son a higher right than that of a manager. Thus the respondent's father and the respondent if they were managing the properties and were in the position of mutavallis, they could not have prescribed title by adverse possession. *Also no adverse possession because of constructive res Judicata upto 1963.* It must also be held, applying the principle of constructive *res Judicata,* that inasmuch as the respondent had not set up any plea of adverse possession by the date of the earlier suit, there could be no adverse possession at any rate for the period upto 27.7.1963 when the earlier suit was filed. *After 1963, no adverse possession could be prescribed by respondent, as he was not a trustee for consideration, even if he was not a mutavalli but a stranger* :

26. Alternatively, the question as to adverse possession of the respondent after 27.7.1963 can be examined separately, on the basis that he was in possession of the house as a stranger, that is to say, as donee under the 1938 document and not as a successor-mutavalli. Even so, we are of the opinion that the present plaintiffs' right to recover possession from the defendant is not barred in view of Section 10 of the Indian Limitation Act, 1963. The said provision came into force w.e.f. 1.1.1964. Section 10 of the said Act reads as follows :

> "*Section 10 - Suits against trustees and their representatives* - Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (*not being assigns for valuable consideration),* for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.
>
> *Explanation* - For the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof."
>
> It will be seen that the main part of Section 10 states that no period of limitation applies for recovery of property from a trustee in whom the property is vested for a specific purpose, unless such a person is as assignee for valuable consideration. The Explanation further states that it shall be deemed that a person managing the property of a Hindu, Muslim or Buddhist religious or charitable endowments is to be *deemed* to be trustee in whom such property has vested for a specific purpose. We shall explain these provisions in some detail.

27. In *Vidya Varuthi v. Baluswami, AIR 1922 PC 123 : ILR 44 Mad. 835 (PC),* the Privy council held that property comprised in a HIndu or Muhammadan religious or charitable endowment was *not* property *vested* in trust for a *specific purpose* within the meaning of the said words in the main section. The reason was that according to the customary law, where property was dedicated to a Hindu idol or Mutt or to a Muhammadan wakf, the property vested in the idol or the institution or God, as the case may be, *directly* and that the shebait, mahant, mutavalli or other person who was in charge of the institution was simply a *manager* on behalf of the institution. As Section 10 did not apply unless these persons were trustees this Judgment made recovery of properties of the above trusts from donees from these managers, rather difficult.

28. The Legislature therefore intervened and amended Section 10 for the purpose of getting over the effect of the above Judgment. The Statement of Objects and Reasons to the Bill of 1929 makes this clear. It says :

> "The (Civil Justice) Committee's recommendation refers, it is understood, to the decisions of the Privy Council in *Vidya Varuthi v. Baluswami, ILR 45 Mad. 835 (PC)* and *Abdur Rahiman v. Narayan Das, 1922 50 1 A 84* which lay down that the dharmakarta, mahant or manager of a Hindu religious property or the mutavalli or sajjada nashin in whom the management of Muhammandan religious endowment is vested, are not trustees within the meaning of the words as used in Section 10 of the Limitation Act, for the reason that the property does not vest in them. The result is that when a suit is brought against a person, not being an assign for valuable

> consideration, endowments of this nature, are not protected. The Committee's recommendation is that Section 10 of the Limitation Act should be amended so as to put Hindu and Mohammendan religious endowments on the same footing as other trust funds which definitely vest in a trustee."

Thus, in view of the Explanation to Section 10 of the Limitation Act, 1963 the respondent's father who was managing the property must be `deemed' to be a trustee in whom the properties vested specifically and in as much as the respondent was a donee and was not a transferee for valuable consideration, Section 10 applies and possession could be recovered from the defendant without any limitation as to time.

29. The position in *Gadadhar v. Official Trustee, AIR 1940 PC 45* was the same. There the trust was created under a Will by the testator. His son and one Dwarkanath were to be trustees. After the son's death, the co-trustee got the property of the trust mutated in the name of the son's widow. The respondent-defendant came into possession after the death of the son's widow. The Official Trustee sued to recover possession. The respondent-defendant contended that their predecessor-in-interest, namely, the son's widow was in adverse possession for nearly 50 years, while managing the trust. Sir George Rankin, speaking for the Board rejected the plea and observed that as it was not pretended that she gave valuable consideration, the defence of limitation was not available to her but was excluded by the terms of Section 10. On the other hand, in *Gushiddaswami v. D.M.D. Jain Sabha, AIR 1953 SC 514* reliance by the plaintiffs on Section 10 of the Limitation Act, 1908 was not accepted on the ground that the respondents-defendants were alienees for consideration and were not assignees without consideration. In the present case before us, the respondent-defendant was a donee from his father and hence Section 10 applies and there is no period of limitation for recovery of the property.

30. The lower appellate court and the High Court erred in not noting that a Mutavalli can never set up adverse title and that property could be recovered from the donee of a Mutavalli at any time in view of Section 10. The Courts also erred in thinking that the respondent in the earlier suit claimed as `proprietor' and that was the starting point of limitation.

31. The judgment and decrees passed by the lower appellate court and the High Court are contrary to law and are set aside and the appeal is allowed. The decree of the trial court is restored. There will be no order as to costs in this appeal.