

RAJASTHAN HIGH COURT

Radhakishan

Vs.

State of Rajasthan

Civil Writ Petn. No. 74 of 1965
(D.S. Dave, C.J. and Kan Singh, J.)

04.05.1966

JUDGMENT

D. S. DAVE, C.J.

1. The petitioners Radhakishan and Badrinarain, in this case, are Khandelwal Mahajans and residents of Jaipur. They are partners in a firm which is known as Shivjiram Ramkumar. They have filed this writ application under Article 226 of the Constitution of India. It relates to a two-storied building situated near Mirza Ismail Road at Jaipur.

2. The petitioners' case is that the said building belonged to one Ashan Ali Khan who mortgaged it with possession with Seth Bijaylalji, father of petitioner Badrinarain, and Bhuramalji, father of petitioner Radhakishan, for Rs. 7,999 and executed a mortgage-deed on 30-7-1944. At the time of the mortgage, the building was in physical possession of Ashan Ali Khan's tenants. When the mortgage-deed was presented for registration, the Sub-Registrar invited objections, but since no objection was received, that document was registered by him. Ashan Ali Khan had purchased an open land in front of the said building from the Municipal Council in 1943-44. He constructed verandahs on the ground-floor and the first floor thereafter. For making this construction, he raised another loan by effecting a second mortgage of the same property on 7-7-45 for an additional amount of Rs. 9,999 in favor of the same mortgagees. The petitioners purchased the ground-floor of the said building from Ashanali Khan for Rs. 19,999 by means of a registered sale-deed dated 23-11-54. Both the previous mortgages were paid off out of this amount obtained by the mortgagor. The petitioners then purchased the first floor of the said building for Rs. 13,999 by means of another registered sale-deed dated 31-7-1956. After purchasing

the entire building, they spent about Rs. 12,000 in making certain additions and alterations.

3. On 30-8-1963 respondent No. 4 Hakim Mohd. Shaukat Ali Khan presented an application to the Wakf Commissioner, Rajasthan, respondent No. 2, saying that the said building was wakf property, that its sale was invalid, that it was fit to be cancelled and that its possession should be recovered and entrusted to the Wakf Committee Dharamshala. The Wakf Commissioner issued a notice to the petitioners to appear before him in the enquiry which he wanted to make into the matter. The petitioners accordingly appeared before him and raised a preliminary objection to the effect that the Wakf Commissioner had no jurisdiction to make an enquiry as they did not admit that it was a wakf property and that if anybody wanted to dispute the petitioners' right, title or interest in the property, the proper course for him was to file a suit in a civil Court under section 6 of the Muslim Wakf Act, 1954, hereinafter to be referred to as 'the Act'. On 19-9-1962 the Wakf Commissioner dismissed this preliminary objection and fixed 4-10-62 for holding an enquiry. On 3-10-62 the petitioners filed a writ petition under Articles 226 and 227 of the Constitution of India before this High Court challenging the validity of the order of the Wakf Commissioner dated 19-9-62. On that application which came before another Bench of this Court, it was observed as follows:

"The apprehension of the petitioners is that the Wakf Commissioner after holding an enquiry may determine the questions relating to the title of the petitioners and he may also without going to a civil Court take up steps for dispossessing them. It may be pointed out that no such indication can be gathered from the order of the Wakf Commissioner. He has obviously no jurisdiction under the Muslim Wakf Act, 1954, either to decide any question relating to the title of the petitioners or to eject them without going to a competent civil Court. It seems what he contemplates to do is to hold an enquiry and to come to a finding if there is a case for going to a civil Court under section 6 of the Act. Therefore, he cannot be restrained from holding an enquiry for that purpose. In this view of the matter, we think the apprehensions of the petitioners have no foundation. The petition is, therefore, dismissed in limine."

4. The petitioners proceed to say that a certified copy of the above observations was put up before the Wakf Commissioner along with the petitioner's reply and yet he

passed an order on 15-12-64 holding that the said building was wakf property, that its alienation was invalid and that it should be recorded and entered as wakf property.

5. It was urged that the Wakf Commissioner had no jurisdiction to decide disputed question of title, that he had exceeded the jurisdiction given to him by section 4 of the Act, that he had misinterpreted Section 6 of the Act and, therefore, it was proved that the entire proceedings taken by him and the impugned order passed by him on 15-12-1964 should be quashed and he should be prohibited from sending his report to the State Government and the State Government should also be restrained from forwarding it to the Board of Muslim Wakfs, Rajasthan respondent No. 3. It was further prayed that respondent No. 3 should be prohibited from examining such report and publishing it in the official gazette.

6. Along with the writ application, the petitioners presented another application requesting the Court to restrain respondent No. 3 from examining the report for including the disputed property in the list of Wakfs and publishing the list in the official gazette till the decision of the writ application. After hearing the petitioners' learned counsel and the Government Advocate, who appeared on behalf of the respondents, it was ordered by this Court on 9-12-1965 that, respondent No. 3 be restrained from publishing in the official gazette the property in dispute by showing it in the list of wakfs existing in the State. It transpired later on that during the pendency of this stay application, the report of the Wakf Commissioner was sent to respondent No. 3 and respondent No. 3, in its turn, showed this property in the list of wakfs existing in the State, which was published in the Rajasthan Rajpatra on 2-12-65. The petitioners have, therefore, presented another application requesting this Court to issue orders to the respondent No. 3 and the State Government to publish an errata in the Rajasthan Rajpatra deleting the disputed property from the list of Muslim Wakfs or to issue any other appropriate writ, direction or order giving them appropriate relief to which they may be entitled.

7. In reply, it is submitted on behalf of the non petitioners that the property in dispute originally belonged to one Haji Mohd. Ali Khan who died in the year 1912. Before his death, he had executed two wills, one on 17-2-1910 and another on 1-7-1911, whereby a wakf was created and the said property was dedicated for charitable purposes and converted into a Dharamshala. He appointed his son Ashanali Khan as its Mutawalli. After the death of Haji Modh. Ali Khan, there was a suit for partition between

Ashanali Khan and his brother Mohd. Fayaz Ali Khan and in that suit also this property was taken to be a wakf property and was, therefore, left out of partition. The factum of mortgage and sale has been denied by the respondents for want of knowledge. It is urged that even if it be assumed that Ashanali Khan had mortgaged the property with the petitioners' parents or later on sold it to the petitioners, he had no authority to do so and, therefore, the mortgage and sale were both invalid. It is contended that Ashanali Khan could not pass on to the petitioners a valid title which he himself did not possess and, therefore, they had no right to file the writ application and it should be dismissed. It is further urged that the Wakf Commissioner had proceeded under section 4 of the Act that he had jurisdiction to make a survey of the wakf properties in Rajasthan and to "investigate and adjudicate a cause which arose during such enquiry." It is pointed out that the Commissioner was not bound by the order of this Court dated 11-10-62 which was passed in his absence without any notice to him, that after the said order the petitioners had joined the enquiry held by the Commissioner, that the Commissioner after examining the evidence, decided by his order dated 15-12-64 that the disputed property was wakf property and the alienation by Mutawalli Ashanali Khan was void in law as he had no right to mortgage or alienate the property as a Mutawalli. After making the said order, the Commissioner submitted his survey report to the Government which sent the same to the Board of Wakfs, which, in its turn, published it in the Rajasthan Gazette dated 2-12-1965. It is further contended that since the property has been shown in the list published under section 5 (2) of the Act, it is for the petitioners to file a suit in a civil Court under section 6 (1), if they so desire, to obtain a declaration about their title to the property. It was further pointed out at the time of the arguments that according to the proviso to section 6, the period of limitation for filing a suit by a person interested in the property was one year from the date of publication of the list of wakfs under section 5 (2) and that unless the list so published was modified in pursuance of the decision of the civil Court, it would be final and conclusive according to section 6 (4) of the Act. Reference has also been made to section 27 of the Act and it is pointed out that the said section further empowers the Board to collect information regarding any property which it has reason to believe to be the wakf property and to make an enquiry and decide the question whether a particular property is wakf property or not or whether a wakf is a Sunni Wakf or a Shia wakf. It is urged that according to sub-section (2) of section 27, the decision of the Board on any question under sub-section (1) would be final, unless it is revoked or modified by a civil Court of competent jurisdiction. Learned Government Advocate has proceeded to argue that if the two provisions,

namely, sections 6 and 27 are read together, it is clear that the petitioners should approach a civil Court of competent jurisdiction if they want any kind of relief and that it is not necessary for the Board to file a civil suit and that if the petitioners fail to approach the civil Court within the time allowed by sub-section (2) of section 6 of the Act, the list will be final and conclusive and they would be debarred from raising the question that the disputed property was not a wakf property.

8. Now, it may be observed at once, that there can be no two opinions on the point that a vendor cannot pass to the vendee a title better than what he himself possesses over the immovable property which is sold by him. The question, however, whether Ashanali Khan was owner of the property as asserted by the petitioners or whether he was only a Mutawalli as averred by the respondents cannot be decided by this Court in its extra-ordinary jurisdiction because the decision of such a question may require examination of a good deal of documentary and oral evidence. This question can be decided only by way of a suit to be instituted in a civil Court of competent jurisdiction. All that we have to consider in this writ application is, whether the Wakfs Commissioner had the jurisdiction to adjudicate and decide against the petitioners whether the property in dispute was a wakf property, whether the list of wakfs published by the Board of Wakfs under sub-section (2) and section 5 would be final and conclusive against the petitioners under section 6 (4) in case the petitioners do not file a suit within one year from the publication of the list, and whether the petitioners can be dispossessed or their possession can be threatened by the Board of Wakfs by proceeding under section 36-B without filing a suit in a civil Court. In order to determine these questions, it would be proper to examine the scheme and scope of the Wakf Act No. 29 of 1954. It may be pointed out that, in the statement of objects and reasons with which the bill was introduced and which were published in the Gazette of India, 1952, Part II-Section 2, at page 285, it was observed that the management of wakfs, though it vested in a Mutawalli, required the supervision of the State. The Mussalman Wakfs Act, 1923 merely provided for the submission of audited accounts by the Mutawallis to the District Judges. That Act did not prove of much practical value. Certain States like Bengal, Bombay and Uttar Pradesh had made certain amendments, but many of the States had not come out with similar legislation. It was, therefore, considered necessary that one uniform and consolidated legislation may be adopted to serve as a model Act for various States. The Bill was referred to the Select Committee which submitted its report and which was published in the Gazette of India, Part II-Section 2 dated 4-3-1954, page 54. The preamble of the Act, as it finally

emerged, showed that it was meant "to provide for better administration and supervision of wakfs." The Act was divided into eight chapters. The first Chapter whose heading was 'Preliminary' dealt with the title, extent, commencement and application of the Act and definition of terms used therein. Chapter II dealt with Survey of Wakfs. The heading of section 4 with which this chapter started was "preliminary survey of wakfs". The use of the word "preliminary" in the heading is one of significance. It was provided by Section 4 (1) that the State Government may, by notification in the official gazette, appoint for the State, a Commissioner of Wakfs, and as many additional or assistant commissioners of wakfs, as may be necessary for the purpose of making a survey of wakf properties existing in the State at the date of the commencement of the Act. It is quite clear from the perusal of this sub-section that the purpose of the appointment of a Wakf Commissioner or additional or assistant wakf commissioners was to make a survey of wakf properties existing in the State at the date of the commencement of the Act. The use of the word 'existing' shows that the Wakf Commissioner is required to make a survey only of those properties which exist in the State at the date of the commencement of the Act. In other words, he is not to make a survey of those wakf properties which had already become extinct at the date of the commencement of the Act. Sub-section (3) provides that after the Commissioner has made a survey of existing wakf properties and finished his enquiry into the matter, he should submit his report to the State containing the particulars mentioned therein.

Sub-section (4), no doubt, invests the Commissioner, while making an enquiry, with powers of a civil Court under the Code of Civil Procedure, but only to a limited extent. In other words, he may use the powers of the civil Court for (a) summoning and examining any witness; (b) requiring the discovery and production of any document; (c) requisitioning any public record from any Court or office; (d) issuing commissions for the examination of any witness or accounts; (e) making any local inspection or local investigation and (f) any other matter which may be prescribed. We have looked into the Rajasthan Wakf Rules, 1956 and find that under heading (f) it is prescribed by the State that the Commissioner should give in his report particulars about (a) description of the landed property including extent, classification, etc., and the value thereof; (b) description of the movable properties and value thereof, including investments and their particulars; (c) encumbrances, if any, on the properties; and (d) how the wakf is administered at present; whether it is under a scheme settled by a Court of law or by a registered document. Sub-section (5) then provides that if, during an enquiry, a dispute arises as to whether a particular wakf is a Shia wakf or a Sunni

wakf and there are clear indications in the deed of wakf as to its nature, the Commissioner should decide the dispute on the basis of such deed.

9. It is significant that it is only under sub-section (5) that the Commissioner is empowered to decide a dispute and that dispute should relate only to the question whether particular wakf is a Shia wakf or a Sunni wakf if such a question arises and if there is a deed of wakf, then he should decide the nature of the wakf on the basis of that deed. Except sub-section (5) there is nothing in section 4 or in the Rules made by the State to show that, the Commissioner is empowered to adjudicate on a question, if one arises whether a particular property is a wakf property or not. He has been invested with the powers of a civil Court in order to enable him to make a proper survey of existing wakf properties and to submit a thorough report to the State. What we mean to point out is, that the Commissioner has not been given the powers of a Civil Court to try and decide a dispute if it arises on the question whether a particular property is a wakf property or not. He has only to make a survey and submit his report to the Government. Sub-section(1) of section 5 next provides that on the receipt of the report of the Commissioner by the State Government, it should forward a copy of that report to the Board. Sub-section (2) enjoins upon a Board to examine the report forwarded to it and, publish, in the official gazette, a list of wakfs existing in the State. The use of the word 'existing' in this section is again significant and it shows that the Board should publish a list only of those wakfs which are still existing and not of those which have already become extinct.

10. Next comes section 6 which is of primary importance so far as this case is concerned. It deals with disputes regarding wakfs and runs as follows :

"Section 6. - Disputes regarding wakf's :

(1) If any question arises whether a particular property is wakf property or not or whether a wakf is a Shia wakf or Sunni wakf, the Board or the Mutawalli of the wakf or any person interested therein may institute a suit in a civil Court of competent jurisdiction for the decision of the question and 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.

(2) Notwithstanding anything contained in sub-section (1), no proceeding under

this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made there under.

(4) The list of wakfs published under sub-section (2) of section 5 shall, unless it is modified in pursuance of a decision of the civil Court under sub-section (1), be final and conclusive."

It would appear from the perusal of the said section that if a dispute arises whether a particular property is wakf property or not, or if a question arises whether a wakf is a Shia wakf or a Sunni Wakf, the Board of Wakfs or the mutawalli of the wakf or any other person interested therein may institute a suit in a civil Court for the decision of the question and the decision of the civil Court would be final. According to the proviso to this sub-section, if a suit is not filed within a year from the date of the publication of the list of wakfs under sub-section (2) of section 5, the civil Court will not entertain the suit after the expiry of one year from the date of such publication. Sub-section (4) provides that the list of wakfs published under sub-section (2) of section 5, shall be final and conclusive, unless it is modified by a decision of a civil Court.

11. Before examining further full implications of sub-sections (1) and (4) of section 6, it would be proper to show the remaining scheme of the Act. It may be pointed out that the next Chapter is Chapter 2-A which has been added to the Act by Act No. 34 of 1964. It deals with Central Wakf Council with which we are not concerned here. Chapter III deals with establishment of Boards and their functions. No person is qualified to be appointed as a member of the Board unless he is a muslim and not less than 21 years of age. Section 11 deals with qualifications and appointment of members and section 13 with disqualifications. Section 15, which deals with the functions of the Board, shows that its main function is to exercise general superintendence over all wakfs (in the State) which vest in the Board. It is its duty to so exercise its power as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended. Sub-section (2) then deals with other powers one of them under clause (i) being to institute and defend suits and

proceedings in a Court of law relating to wakfs. The next Chapter IV then deals with registration of wakfs. Section 25 requires that every wakf whether created before or after the commencement of the Act should be registered at the office of the Board. An application for registration must be made by the mutawalli and it should contain particulars mentioned in sub-section (3). Section 27 on which an argument has been built up on behalf of the respondents, runs as follows :

"Section 27 - Decision if a property is wakf property. -

(1) The Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf, it may, after making such enquiry as it may deem fit, decide the question.

(2) The decision of the Board on any question under sub-section (1) shall, unless revoked or modified by a civil Court of competent jurisdiction, be final."

We may also reproduce here sections 36-A and 36-B which were also added by Act No. 34 of 1964.

"Section 36-A - Transfer of immovable property of wakfs. –

Notwithstanding anything contained in the wakf deed, no transfer of any immovable property of a wakf by way of;

(i) sale, gift, mortgage or exchange; or

(ii) lease for a period exceeding three years in the case of agricultural land, or for a period exceeding one year in the case of non-agricultural land or building,

shall be valid without the previous sanction of the Board."

"Section 36-B. - Recovery of wakf property transferred in contravention of section 36-A.;

(1) If the Board is satisfied, after making an inquiry in such manner as may be prescribed, that any immovable property of a wakf entered as such in the register of wakfs maintained under Section 26, has been transferred without the previous sanction of the Board in contravention of the provisions of section 36-

A, it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.

(2) On receipt of a requisition under sub-section (1), the Collector shall pass an order directing the person in possession of the property to deliver the property to the Board within a period of thirty days from the date of the service of the order.

(3) Every order passed under sub-section (2) shall be served;

(a) by giving or tendering the order or by sending it by post to the person for whom it is intended; or

(b) if such person cannot be found, by affixing the order on some conspicuous part of his last known place of abode or business, or by giving or tendering the order to some adult male member or servant of his family or by causing it to be affixed on some conspicuous part of the property to which it relates :

Provided that, where the person on whom the order is to be served is a minor, service upon his guardian or upon any adult male member or servant of his family shall be deemed to be service upon the minor.

(4) Any person aggrieved by the order of the Collector under sub-section (2) may, within a period of thirty days from the date of the service of the order, prefer an appeal to the district Court within whose jurisdiction the property is situate and the decision of the district Court on such appeal shall be final.

Explanation: In this sub-section, "district Court" means, in any area for which there is a city civil Court, that Court, and, in any other area, the principal civil Court of original jurisdiction.

(5) Where an order passed under sub-section (2) has not been complied with and the time for appealing against such order has expired without an appeal having been preferred or the appeal, if any, preferred within that time has been dismissed, the Collector shall obtain possession of the property in respect of which this order has been made, using such force, if any, as may be necessary for the purpose and deliver it to the Board.

(6) In exercising his functions under this section, the Collector shall be guided by such rules as may be made in this behalf by the State Government."

We shall deal with the interpretation of these sections later on.

12. Next Chapter V deals with Mutawallis and wakf accounts. Chapter VI relates to the Finance of the Board, Chapter VII to judicial proceedings and Chapter VIII to miscellaneous matters.

13. Now, it may be observed, that, when petitioners filed their writ application No. 423 of 1962, they had an apprehension that if the Wakf Commissioner decides against them that the property in dispute is a wakf property, they may be dispossessed by the respondents without going to a Civil Court. A Division Bench before which their writ petition came for admission observed that their apprehensions were not well founded, that the Wakf Commissioner had no jurisdiction to decide a question of title, that they could not be dispossessed except by a decree of a competent civil Court and so the application was dismissed in limine. It is true that this observation was made by the Court ex parte without notice to the respondents, but when a copy of that order was produced before the Wakf Commissioner, it ought to have been given a proper thought. We have already discussed above and shown that the view which was taken by the Court at that time was correct and the Wakf Commissioner had no jurisdiction to adjudicate whether a particular property was a wakf property or not. He could only make his report to the State Government but that report could not take the place of a binding decision like that of a civil Court. The respondents have contended on the basis of section 6, that even if the Commissioner's report could not have the binding effect of a decision of a Court, it was open to the Board to include a property which it considered to be wakf property on the basis of that report in the list of wakfs which it may publish under sub-section (2) of section 5 and that, if such property is shown in the list and if that list is not got modified by a decision of a civil Court, it would be final and conclusive and it would not be open to anybody to challenge it after a year of its publication in the official gazette, if no suit is filed. It is contended that the use of the words "any person interested therein" in section 6 (1) show that if anybody is interested in the property, which is published in the list under sub-section (2) of section 5, that it is not a wakf property, it is incumbent upon him to file a suit in a competent civil Court within a year from the date of the publication of the list and if no such suit is filed, the said list would be final and conclusive proof of the fact that it is a wakf property. We have given our anxious consideration to this argument and we find it difficult to accept it. If this argument is accepted, then it would mean that even though a Commissioner is not competent to give a final decision about the nature of the disputed property, that is, whether it is a wakf property or not, the Board can take such decision ex parte and if that decision is not challenged in a civil court of competent jurisdiction within a year from the date of the publication of the list, a stranger, who is in possession of the property, would not be able to establish his title after a year of the publication of the list even though the ex parte stand taken by the

Board may be grossly incorrect and such a person may be having a valid title over the property. In our opinion, the words "any person interested therein" appearing in sub-section (1) of section 6 mean no more than a person interested in a wakf as defined in clause (h) of section 3 of the Act. Clause (h) runs as follows :

"Section 3 –

(A) to (g) x x x

(h) "person interested in a wakf" means any person who is entitled to receive any pecuniary or other benefits from the wakf and includes:

(i) any person who has a right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, Khangah, maqbara, graveyard or any other religious institution connected with the wakf or to participate in any religious or charitable institution under the wakf;

(ii) the wakif and any descendant of the wakif and the mutawalli."

It is urged by learned counsel for the petitioners that the Legislature has not used in section 6(1) the words "any person interested in a wakf" and, therefore, this meaning should not be given to the words "any person interested therein". This argument is not tenable because the words "any person interested therein" appear soon after the words "the Mutawalli of the wakf" and therefore the word "therein" has been used to avoid repetition of the words "in the wakf" and not to extend the scope of the section to persons who fall outside the scope of the words "person interested in a wakf". The purpose of section 6 is to confine the dispute between the Wakf Board, the mutawalli and a person interested in the wakf. In other words, if there is a dispute whether a particular property is a wakf property or not, or whether a wakf is a Shia wakf or a Sunni wakf, then the Board or the mutawalli of the wakf or a person interested in the wakf as defined in section 3 may institute suit in a civil court of competent jurisdiction for the decision of the question. They can file such a suit within one year of the date of the publication of the list of wakfs and if no such suit is filed, the list would be final and conclusive between them. The very object of the Wakf Act is to provide for better administration and supervision of wakfs and the Board has been given powers of superintendence over all wakfs which vest in the Board. This provision seems to have been made in order to avoid prolongation of triangular disputes between the Wakf Board, the mutawalli and a person interested in the wakf who would be a person of the same community. It could never have been the intention of the legislature to cast a

cloud on the right, title or interest of persons who are not Muslims. That is, if a person who is a non-muslim whether he be a Christian, a Hindu, a Sikh, a Parsi or of any other religious denomination and if he is in possession of a certain property his right, title and interest cannot be put in jeopardy simply because that property is included in the list published under sub-section (2) of section 5. The Legislature could not have meant that he should be driven to file a suit in a civil court for declaration of his title simply because the property in his possession is included in the list. Similarly, the legislature could not have meant to curtail the period of limitation available to him under the Limitation Act and to provide that he must file a suit within a year or the list would be final and conclusive against him. In our opinion, sub-section (4) makes the list final and conclusive only between the Wakf Board, the mutawalli and the person interested in the wakf as defined in section 3 and to no other person.

14. It is urged on behalf of the respondents that section 27, which has been reproduced above, further provides that the Board has got the authority to decide itself after collecting information whether a particular property is a wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf and that if the decision of the Board is not challenged in a civil court, it would be final. It is argued that this decision would be final for all persons to whatever religious denomination they might belong.

15. We have again given serious consideration to this argument and in our view it is not correct. It has already been pointed out that section 27 appears in Chapter IV which deals with registration of wakfs. It has also already been pointed out that according to section 25 every wakf created before or after the commencement of the Act must be registered at the office of the Board and that an application for registration must be made by the mutawalli giving particulars noted in the section. Section 26 enjoins upon the Board a duty to maintain a register of wakfs and to enter the particulars mentioned in that section. Section 27 has to be read in that context and, so read, it would only mean that if the mutawalli fails to get any wakf registered, then the Board may suo motu collect information if it has reason to believe that a particular property is a wakf property. If it finds that the property in the hands of a mutawalli is a wakf property and he is wrongly denying it to be a wakf property, it may be registered as such. Similarly, if there is a dispute as to whether a wakf is a Sunni wakf or a Shia wakf, it may decide that matter and register the wakf as a Sunni wakf or a Shia wakf as it considers proper. The decision of the Board under sub-section (2) would be final only between the Board and the mutawalli or a person interested in the wakf, if it is

not revoked or modified by a civil court of competent jurisdiction. Section 27 does not seem to suggest that it empowers the Board to decide the question whether a particular property is a wakf property or not, if that challenge comes from a stranger, who is neither mutawalli nor a person interested in the wakf, but who belongs to another religious denomination and who claims a valid title and lawful possession over that property. To accept the respondents' argument would mean that the Board would be given the powers of the civil court to decide such disputes between itself and strangers and thus, to make the Board's decision final unless it is changed by a civil court of competent jurisdiction. If a dispute is raised by a non-muslim, the Board cannot by simply entering the property in the register of wakfs drive him to take recourse to a civil court.

16. We may now turn to sections 36A and 36B. Section 36A provides that a transfer of any immovable property of wakf whether it is by way of gift, sale, mortgage or exchange or lease for a period exceeding three years in the case of agricultural land, or for a period exceeding one year in the case of non-agricultural land or building would be invalid if such a transfer is made without the previous sanction of the Board. Section 36B further provides that if any immovable property entered in the register of wakfs has been transferred without the previous sanction of the Board in contravention of the provisions of section 36A, it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain its possession and on receipt of such a requisition, the Collector will direct the person in possession of the property to deliver it to the Board within a period of thirty days. It may be pointed out, in the first instance that Sections 36A and 36B were added by Act No. 34 of 1964 and they cannot take effect retrospectively. Moreover, Section 36B would come into play only if the property has been transferred by a person over whom the Board exercises control and who ought to have obtained the previous sanction of the Board before such transfer, for example, a mutawalli or some other person who has been entrusted with the management of the property by the Board. In our opinion, this section cannot apply in the case of a property which is in the hands of a stranger over whom the Board has no control under the Act, simply because the Board happens to enter the property in its register. In a case like the present one, where the petitioners claim their possession over the property as mortgagees from the year 1944 and further claim their title and possession as vendees over the same property from the year 1954, the Board of Wakfs cannot, by simply entering the property in the list of wakfs or registering it in the register of wakfs, drive them to file a suit to establish their title or retain their

possession. It cannot also seek to dispossess them from the property by resorting to Section 36-B. It is for the Board to file a civil suit for a declaration that the property in dispute is a wakf property and to obtain its possession.

17. We may now consider the matter in its historical background and in the light of precedents. Under the Mussalman Wakf Act No. 42 of 1923, which has been repealed by the present Wakf Act No. 29 of 1954, every mutawalli had to furnish to the court within the local limits of whose jurisdiction the property of wakf was situated a statement containing necessary particulars relating to wakf. The 'court' defined by that Act meant the "Court of District Judge, or within the limits of original civil jurisdiction of a High Court, such court subordinate to the High Court as the State Government was to designate in this behalf by a notification in the official gazette. A statement of account was also required to be furnished to that court and Section 10 thereof provided that a person who was required by or under Section 3 or Section 4 to furnish a statement of particulars or any document relating to wakf or who was required by Section 5 to furnish a statement of account or who furnished the statement of account which was not audited in the manner required by Section 6, would be punishable with fine mentioned therein. In short, the supervision of wakf estates vested in the District Judge.

18. In *Ali Mohammad v. Collector of Bhagalpur*,¹ a question arose whether a particular share in village Kazi Koerya Tauzi in the District of Bhagalpur was wakf property within the meaning of Section 2(e) of the Act No. 42 of 1923. The District Judge decided that question and a revision against his order was filed in the High Court. It was contended on behalf of the petitioner that the action taken by the District Judge was without jurisdiction. It was held that

"there is no provision in the Act authorising the court, as defined in the Act, to determine as to whether any property which is denied to be a wakf property, is a wakf property within the meaning of the Act."

This view was not accepted in *Mohammad Baqar v. Mohammad Casim*,² by a Full Bench of the Oudh Chief Court. In that case, the following question was referred to the Full Bench:

"Has the Court of District Judge no jurisdiction under the Mussalman Wakf Act,

1923, to take proceedings under the same Act when the alleged wakf is not admitted or is denied by the alleged muttawali?" Two out of three learned Judges, who constituted the Full Bench, answered the said question in the negative and it was observed by them that the District Judge had jurisdiction. The third learned Judge gave a dissenting judgment and held that the District Judge had no jurisdiction. It is significant that the dispute in that case was raised by the mutawalli and the alleged wakf was denied by him and not by a stranger. Even then, there was a difference of opinion as noted above. The view of this Full Bench was not followed by the Nagpur High Court in *Abdul Hussain v. Mohamad Ebrahim Riza*,³ It was observed by the learned Judges of the Nagpur High Court as follows :

"Considering the terms of the enactment and the scope and purpose of the Act, it is clear that the Legislature intended to secure merely a record of the extent of income of wakf properties for the purpose of providing some control on the management of properties which are admittedly wakf. It could not have intended to include in its scope the enquiry into the vital question whether the disputed property is wakf property and the person in possession of it is a mutawalli, which are questions of fundamental character such as could be subject-matter of a suit alone. We are, therefore, of opinion that where the existence of the wakf itself is in dispute, the District Judge has no jurisdiction to enquire under section 10 of the Mussalman Wakf Act, 1923."

Thus, the view taken in AIR 1927 Patna 189, referred to above, was adopted in preference to the view of the Full Bench of the Oudh Chief Court.

19. In *Waheed Hasan v. Abdul Rahman*,⁴ also the view of the Patna High Court was followed.

20. In *Shia Youngmen's Association v. Fateh Ali Shah*,⁵ Full Bench of the Lahore High Court considered the question whether in proceedings under section 10 of the Mussalman Wakf Act No. 42 of 1923, the District Judge had jurisdiction to hold an enquiry into the nature of the property where the alleged mutawalli denied the existence of the wakf and it was answered in the negative by all the learned judge unanimously. It was observed as follows:

"When the nature and scope of the Act are considered, it appears to me that the Act merely confers administrative powers upon the "Court." The object is to

have on record full particulars of all wakf property and to enforce that the mutawalli shall honestly carry out the provisions of the trust imposed upon him, and to have in a convenient place information available to the public, or to any beneficiary of the wakf, in order that they may see whether the wakf property is being properly administered The 'Court' is nowhere in the Act said to be acting in its judicial capacity....."

21. In *Mahomed Hussein v. Collector of Broach and Panchmahals*,⁶ the Bombay High Court had an occasion to consider the provisions of the Mussalman Wakf Act, 1923 as amended by the Bombay Act No. 18 of 1935. In the amended Act greater powers were given to the Court by Section 6-C, the relevant portion of which ran as follows:

"Section 6C. (1). The Court may, either on its own motion or upon the application of any person claiming to have an interest in a wakf, hold an enquiry in the prescribed manner at any time to ascertain :

- (i) whether a wakf is a wakf to which this Act applies;
- (ii) and (iii) xx xx "

A question turned about the correct interpretation of sub-section (1) (i) and it was held that the enquiry contemplated was "confined to cases where the existence of the wakf was admitted". It was further held that "where the existence of the wakf was disputed, the District Judge had no jurisdiction to enquire into its existence."

22. The Madras High Court also in *Ismail Sahib v. Ethikasha Sarguru*,⁷ followed the view taken in AIR 1941 Lahore 145 referred to above.

23. Thus, all the High Courts, referred to above, excluding Oudh Chief Court were of opinion that the District Judge had no jurisdiction to hold an enquiry into the nature of the property where even the alleged mutawalli denied the existence of the wakf.

24. The present Act No. 29 of 1954 is, no doubt, an improvement on the Mussalman Wakf Act, 1923, but, in our view, this also does not empower the Board of Wakfs to decide the question whether a particular property is a wakf property or not if such a dispute is raised by a person who is a stranger to wakf. This view is further confirmed by the provisions of section 59 of the Act which lays down that in any suit or

proceeding in respect of a wakf or any wakf property by or against a stranger to the wakf or any other person, the Board may appear and plead as a party to the suit or proceeding.

25. To sum up the position, the Wakf Commissioner, though he is invested with the powers of a civil court in respect of certain matters, is not a civil court empowered to decide a disputed question whether a particular property is a wakf property or not. He has only to make a survey of wakf property existing in the State at the date of the commencement of the Act and to make a report of survey to the State Government. When the State Government forwards the report to the Board of Wakfs, it becomes the duty of the Board to examine it. Thereafter the Board should publish, in the official gazette, a list of wakfs existing in the State. The law does not require the Commissioner to make a survey of wakf properties which have already become extinct as such. If he mentions in his report that certain properties were once wakf properties and can still be recovered as such, then the proper course, in our opinion, for the Board is to file a suit, get them declared as wakf properties and to recover their possession. If a dispute about the existence of a wakf is raised by a person who is stranger to the wakf, then it is neither fair nor proper for the Board to include such properties in the list published in the official gazette. Section 6, in our opinion, refers only to those triangular disputes which exist between the Board of Wakfs, the mutawalli and a person interested in the wakf. If there is a dispute between these three on a question whether a particular property is a wakf property or whether a wakf is a Shia wakf or a Sunni wakf, it is open to any one of them to institute a suit in a civil court of competent jurisdiction. If a suit is instituted, the decision of the Civil Court will be final. If no such suit is filed by any one of them within a year from the date of the publication of the list of wakfs, the Court would not entertain the suit thereafter and the list of the wakfs shall be final and conclusive between them. The object of section 6 is to narrow down the dispute between the Board of Wakfs, the Mutawalli and the person interested in the wakf as defined in section 3. In our view, it does not concern a dispute if it is raised by a person who is an utter stranger to the wakf. The list cannot be final and conclusive as against a non-muslim who is not covered by section 6(1) of the Act. Again, if a dispute whether a particular property is a wakf property or not, is raised by a non-muslim and a stranger to the wakf, the Board of Wakfs has no jurisdiction to decide the matter in its own favor under section 27 and enter it in the register. The Board's decision under section 27 would not be binding against such persons. For the same reason, the Board would not be able to recover

possession of the property from such persons under section 36B of the Act.

26. The writ application is, therefore, allowed and it is declared that the inclusion of the disputed property in the list of wakfs published in the Rajasthan Rajpatra dated 2-12-65 would not be binding on the petitioners. Respondent No. 3, namely, the Board of Muslim Wakfs is restrained from entering the disputed property in the register of wakfs and from dispossessing the petitioners except by way of a suit in a civil court of competent jurisdiction. In the circumstances of the case, we leave the parties to bear their own costs.

Petition allowed.

Cases Referred.

1. AIR 1927 Pat 189
2. AIR 1932 Oudh 210
3. AIR 1939 Nag205
4. AIR 1935 All 254
5. AIR 1941 Lah 145
6. AIR 1945 Bom 157
7. AIR 1941 Mad 897