

RAJASTHAN HIGH COURT

Anjuman A Burhani

Vs.

Daudi Bohra Jamaet Registered Society

Civil Revision Petition No. 159 of 2007

(Vineet Kothari, J.)

26.02.2009

JUDGMENT

Vineet Kothari, J.

1. This revision petition has been filed by the defendant Anjuman A Burhani (Shiya Daudi Bohra Jamaet) against the plaintiff Daudi Bohra Jamaet, being aggrieved by the order of the learned trial Court dated 12.04.2007 whereby the learned trial Court rejected the application under Order 7 Rule 11 Civil Procedure Code filed by the defendant - petitioner seeking dismissal of the suit at threshold as barred by law.
2. The defendant - petitioner contended before the Court below that Section 85 of the Wakf Act, 1995 barred the present suit of injunction filed by the plaintiff also and, therefore, the learned Court below has erred in rejecting the application under Order 7 Rule 11 Civil Procedure Code and being aggrieved by the said order, the present revision petition has been filed by the petitioner & defendant.
3. The learned counsel for the petitioner urged that Section 85 of the Wakf Act, 1995 clearly bars jurisdiction of Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal constituted under Section 83 of the said Act and scope of jurisdiction of the Tribunal is not limited to the disputes as defined in Section 6 and 7 of the said Act and, therefore, even the injunction suit filed by the plaintiff which was essentially based on dispute between the parties as to the extent of property held by either of the parties also deserves to be decided by Wakf Tribunal constituted under the said Act and the Civil Court had no jurisdiction to decide the same and, therefore, rejection of application under Order 7 Rule 11 Civil Procedure Code was not justified. He relied upon the following decisions:

1. *Syed Inanrul Haq Shah v. State of Rajasthan & Anr.* ¹ 2. *Rajasthan Board of Muslim Wakf v. Om Prakash Boob & Anr.* ²

3. *V.S.B. Sikkandar v. K.M. Khader. Gani & Anr. reported in* ³

4. On the side opposite, Mr. Sajjan Singh learned counsel appearing for the plaintiff-respondent vehemently submitted that this was not a suit for declaration of any property being wakf property or not and the simple injunction claimed by the plaintiff against the defendant seeking to restrain him from raising any construction on the disputed suit premises fell within the jurisdiction of the Civil Court and could not be dismissed by an application under Order 7 Rule 11 Civil Procedure Code and, therefore, the impugned order was justified and the present revision petition deserves to be dismissed. He relied upon the decision of Kerala High Court in the case of *Abdul Rahiman Musaliar v. T.K. Muhammed Sahib reported* ⁴ in

5. Having heard the learned counsel and having gone through the impugned order as well as judgments cited at the Bar, this Court is of the view that the present revision petition deserves to be allowed and the impugned order of Courts-below deserves to be set aside.

6. The provisions of Sections 6, 7, 83 and 85 of the said Act being relevant are reproduced hereunder for ready reference:

"6. Disputes regarding wakfs - (1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list 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 Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final: Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of wakfs.

Explanation - For the purposes of this section and section 7, the expression "any person interested therein, shall, in relation to any property specified as wakf property in the list of wakfs published after the commencement of this Act, shall include also every person who, though not interested in the wakf concerned, is interested in such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry under 'Section 4.

(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 Survey 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 any rules made there under.

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

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a court in that State in relation to any question referred to in sub-section (1).

7. Power of Tribunal to determine disputes regarding wakfs - (1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final :

Provided that:-

(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs; and

(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement :

Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re- open such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this section in respect of any wakf shall be stayed by any court, tribunal, or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be made a party to any application under sub-section (1).

(4) The list of wakfs and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil Court under sub-section (1) of section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

83. Constitution of Tribunals, etc.: (1) The State Government shall, by notification in the Official Gazette constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act for each of such Tribunals.

(2) Any mutawalli or person interested in a wakf or any other person aggrieved by an order made under this Act or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the wakf.

(3) Where any application made under sub-section (1) relates to any wakf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallis of the wakf actually and voluntarily resides, carries on business or personally works for gain, and, where, any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any application for determination of such dispute, question or other matter :

Provided that the State Government may, if it is of opinion that it is expedient in the interest of the wakf or any other person interested in the wakf or the wakf property to transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interest of justice to deal with the application afresh.

(4) Every Tribunal shall consist of one person, who shall be a member of the

State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, and the appointment of every such person may be made either by name or by designation.

(5) The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under the Civil Procedure Code, 1908 (5 of 1908) while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the Civil Procedure Code, 1908 (5 of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court.

(8) The execution of any decision of the Tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit.

85. Bar of jurisdiction of civil courts - No suit or other legal proceeding shall lie in any civil court in respect of any dispute, question or other matter relating to any wakf. Wakf property or other matter which is required by or under this Act to be determined by a Tribunal."

7. The judgment relied upon by the learned counsel for the respondent- plaintiff in the case of Abdul Raluman Musaliar (supra) in which Kerala High Court held that where the suit was for a permanent prohibitory injunction restraining the defendant from interfering with the affairs of the Mosque, Jaram and Madrassa, thus, the right of office of Mutawalli as claimed by plaintiff being a common law right and in the absence of any provision) specifically requiring such disputes to be adjudicated by the Tribunal and it being a suit for injunction, a relief which could be granted only by the Civil Court, the suit instituted was within the jurisdiction of the Civil Court to be tried and decided.

The said judgment cannot be applied in the present case because here the dispute is not relating to interference with the affairs of wakf property simpliciter, but the

injunction itself is claimed on the basis of fact that according to the plaintiff the defendant has claimed ownership and possession over the suit property and is undertaking construction thereon.

Therefore, the dispute essentially pertains to title of wakf property itself between the 'two parties and the claim of injunction is merely consequential. Therefore, this judgment is of little help to the learned counsel for the respondent-plaintiff.

8. As against this, the judgments relied upon by the learned counsel for the petitioner - defendant help the case of the petitioner. In the case of *Syed Inamul Hag Shah v. State of Rajasthan & Anr. reported in* ⁵ the coordinate Bench of this Court has held as under :

"The words 'no suit or other legal proceedings shall lie' would mean that no suit or other legal proceedings shall be maintainable or sustainable which means no suitor other legal proceedings shall be carried on or continued to be entertained. If this is the plain meaning of the words, the bar would apply to pending proceedings also. It cannot, therefore, be said that the trial court committed any error in holding that the continuance of the suit was barred by Section 85 of the Act.

On coming into force of the Act, the bar under section 85 of the Act applied to the continuation of the suit also and thus, the Court had no jurisdiction to pass any order in the suit except that of return of it for presentation to proper court. The impugned order is, therefore, *ex facie* without jurisdiction and has to be set aside without going into the merits of the order. It is, therefore., set aside. The question decided by the impugned order shall obviously remain open for being raised in any other proceedings which are taken in accordance with law."

9. In the case of *Rajasthan Board of Muslim Wakf v. Om Prakash Boob & Anr. reported in* ⁷ another coordinate Bench of this Court dealing with the provisions of Section 85 of the Act held as under :

"Section 85 of the Act of 1995 creates a bar of the civil Court's jurisdiction but that is in relation to those persons who are interested in wakf. The person interested would be one as defined in section 3(k) of the Act of 1995. A bare reading of the definition demonstrates that the plaintiff cannot be treated to be a person interested in terms of the definition.

The application has tried to create a bar for the plaintiff in view of the explanation contained in Section 6 of the Act of 1995. The Bar which can be

enforced against a person in view of the Explanation is that if the person is interested in relation to any property specified as wakf property in the list of wakf published after commencement of this Act.

This is not the case of anybody that no list has been published after the commencement of the Act of 1995. Therefore, the expression "any person interested" as mentioned in explanation to Section 6 of the Act of 1995 cannot be applied to the petitioner.

Further provision in the explanation is in relation to every such person who though not interested in such property, to whom a reasonable opportunity has been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry under Section 4 of the Act of 1995 after giving notice to the plaintiff.

No such enquiry after notice is alleged in the application under Order 7 Rule 11, Civil Procedure Code. Thus, in none of the clauses of explanation, the case of the plaintiff can be covered. Therefore, the order passed by the trial Court is not liable to be interfered. That being the position, the order of dismissal of the application under Order 7 Rule 11, Civil Procedure Code is not liable to be interfered as it is considered to be in accordance with law."

10. The Division Bench of Madras High Court in the case of *V.S. B.Sikkandar v. K.M. Khader Gani & Anr. reported in* ⁸ held in para 5.5 that after 01.01.1996, the suit filed for permanent injunction restraining the first defendant in interfering with the plaintiff's management in the Trust was liable to be dismissed in view of Section 85 of the Act. Para 5.5 and 7 of the said judgment are reproduced hereunder for ready reference:

"5.5 A harmonious construction of the above relevant provisions of the Act, makes it clear that after 01.01.1996, the Civil Court, viz. The Principal Sub-Court, Nagapattinam District, has ceased to have jurisdiction to try the present suit, viz. O.S. No. 192 of 1993 and pass judgment and decree thereon, either decreeing the suit as prayed for or dismissing the same. Hence, in our considered opinion, of course, without going into the merits of the claims of either party and the findings of the Court below thereon, we find that the learned Subordinate Judge, Nagapattinam has committed an error in law, apparent on the face of record, for having tried the suit and dismissed the same after 01.01.1996, in view of the bar under Section 85 of the Act and, therefore, the same is a nullity in the eye of law.

7. In view of the discussion made above, we are of the considered opinion that

the judgment and decree dated 10.04.1996 made in O.S. No. 192 of 1993 on the file of Principal Subordinate Judge, *Nagapattinam District*, has to be set aside and accordingly, it is set aside and the appeal is allowed. The plaintiff/appellant is at liberty to approach the Special Tribunal constituted to try the suits under the Wakf Act, 1995, for appropriate relief, if he is so advised and on receipt of any such application from the plaintiff/appellant, the Tribunal shall condone the delay occurred due to the pendency of the above appeal before this Court. No costs."

11. In view of the above legal position and in view of the clear intendment of the Legislature to confer the jurisdiction upon the Wakf Tribunal to decide any dispute, question or other matter relating to wakf or wakf property by the Tribunal created under Section 83 of the Act, it cannot be said that mere suit for injunction does not fall within the jurisdiction of the Tribunal and can be tried by the Civil Court. The very purpose of creating the said Tribunal the said law, namely, Wakf Act would be defeated if the jurisdiction of the Tribunal is construed in narrow sense or in a watertight compartment. On the contrary, the jurisdiction of the Tribunal should be widened to decide the dispute relating to wakf property including the matter in the nature of suit for injunction by the Tribunal itself.

Therefore, Section 6 and 7 of the Act which deal with the question relating to property failing with the ambit of wakf property or not or whether wakf is Shia Wakf or Sunni wakf etc. cannot curtail or limit the jurisdiction of the Tribunal only to such issues.

The language of Section 83 and 85 of the Act confers such wider jurisdiction upon the Tribunal and, therefore, in the opinion of this Court, the Court below erred in rejecting the application under Order 7 Rule 11 Civil Procedure Code filed by the defendant-petitioner. The present controversy falls within the domain and jurisdiction of the Wakf Tribunal and, therefore, the Civil court had no jurisdiction in the matter in view of Section 85 of the Act.

12. Consequently, this revision petition is allowed and the order dated 12.04.2007 is set aside and the application filed by the defendant - petitioner under Order 7 Rule 11 Civil Procedure Code is allowed and the civil suit filed by the plaintiff is dismissed. The plaintiff will however, be at liberty to file an appropriate application before the Wakf Tribunal under the provisions of section 83 of the Wakf Act and if such application is filed within a period of four weeks from today, the Tribunal may sympathetically consider the case of the plaintiff for condonation of delay and decide such application on merits. No order as to costs.

Cases Referred.

1. 2000(4) WLC (Raj) 528
2. 2006(5) RDD 2434 (Raj)
3. 2007 AIHC 251
4. AIR 2003 Ker 84
5. 2000(4) WLC (Raj) 528
6. 2006(5) RDD 2434 (Raj)
7. 2006(5) RDD 2434 (Raj)
8. 2007 AIHC 251