

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

RSA.No. 466 of 2015 ()

AGAINST THE JUDGMENT IN AS 417/2012 of SUB COURT, KANNUR DATED 21-10-2014

**AGAINST THE ORDER IN OS 386/2011 of PRINCIPAL MUNSIFF COURT, KANNUR
DATED 19-06-2012**

APPELLANTS/APPELLANTS/DEFENDANTS:

- 1. KUNNATH PANHIKKAYIL MUHAMMED KUNHI
S/O. MOIDEEN KUNHI, MERCHANT, SHOP NO. 490B
(NEW NO. C.E 34/304) NOOR MASJID BUILDING
KANUR - 670 001.**
- 2. M.P.HUSSAIN AGED 72 YEARS
S/O. KOYAKUNHI, MERCHANT, SHOP NO. 490 B
(NEW NO. C.E 34/304) NOOR MASJID BUILDING
KANNUR - 670 001.**

BY ADV. SRI.K.RAJESH SUKUMARAN

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

- 1. MASJID NOOR PARIPALANA SANGHAM
(REG. NO. S 444/01) KANNUR BUS STAND
KANNUR - 670 001, REP. BY ITS PRESIDENT.**
- 2. MASJID NOOR PARIPALANA SANGHAM
(REG. NO S 444/01) KANNUR BUS STAND
KANNUR - 670 001, REP. BY ITS SECRETARY.**

R1-R2 BY ADV. SRI.V.RAMKUMAR NAMBIAR

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 26-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

P.B.SURESH KUMAR, J.

R.S.A. No.466 of 2015

Dated this the 26th day of November, 2015

JUDGMENT

The defeated defendants in a suit for eviction are the appellants in this second appeal.

2. The subject matter of the suit is a shop room. The plaintiff is a Waqf registered under the Waqf Act. The defendants are the tenants of the plaintiff. According to plaintiff, though the tenancy arrangement entered into by the plaintiff with the defendants was terminated, the defendants have not surrendered vacant possession of the shop room. The defendants contended that the suit is not maintainable. According to them, the provisions of the Kerala Buildings (Lease and Rent Control) Act ('the Act' for short) apply to the area where the plaintiff's shop room is situated and therefore, they are liable to be evicted only in accordance with the said statute. The trial court rejected the said contention of the defendants and decreed

the suit. Though the defendants took up the matter in appeal, the appellate court confirmed the decision of the trial court. Hence, this second appeal.

3. Heard the learned counsel for the defendants as also the learned counsel for the plaintiff.

4. While conceding that the buildings owned by Waqfs registered under the Waqf Act are exempted from the provisions of the Act and that the plaintiff is a Waqf registered under the Waqf Act, the learned counsel for the defendants contended that there is nothing on record to indicate that the suit property is registered under the Waqf Act and therefore, the plaintiff is not entitled to the benefit of the exemption under the Act. In other words, according to the learned counsel, in the absence of any evidence to indicate that the suit property is registered under the Waqf Act, the benefit of exemption cannot be claimed. The learned counsel placed reliance on the decision of this Court in S.A.No.104/1991 in support of the said contention. The passage in the said judgment on which reliance was placed by the learned counsel reads thus:

"In the absence of any evidence to show that this

building was registered under the Waqf Act it cannot be said that the building is a Waqf property. It is true that the building belongs to the Sabha. Simply on the ground that the Sabha was registered under the Waqf Act the building belonging to the Sabha cannot be said to be a Waqf."

5. S.R.O. No.47 of 1982 dated 12.1.1982 issued by the Government under Section 25 of the Act reads thus:

"S.R.O.No.47/82--In exercise of the powers conferred by sub-section(1) of section 25 of the Kerala Buildings (Lease and Rent Control) Act, 1965 (2 of 1965), the Government of Kerala hereby exempt in public interest the buildings owned by Wakfs registered under the Wakfs Act, 1954 (Central Act 29 of 1954) with the Kerala Wakf Board from all the provisions of the said Act"

It is evident from the said notification that the benefit of exemption is extended to the buildings owned by the Waqfs registered under the Waqf Act. Sections 36 and 37 of the Waqf Act dealing with the registration of Waqf and the particulars to be entered into the register of Waqfs read thus:

"36. **Registration:-** (1) Every Waqf, whether created before or after the commencement of this Act, shall be registered at the office of the Board.

(2) Application for registration shall be made by the mutawalli; Provided that such applications may be made by the Waqf or his descendants or beneficiary of the Waqf or any Muslim belonging

to the sect to which the Waqf belongs.

(3) An application for registration shall be made in such form and manner and at such place as the Board may by regulation provide and shall contain the following particulars.-

(a) a description of the Waqf properties sufficient for the identification thereof;

(b) the gross annual income from such properties;

(c) the amount of land revenue, cesses, rates and taxes annually payable in respect of the Waqf properties;

(d) an estimate of the expenses annually incurred in the realisation of the income of the Waqf properties;

(e) the amount set apart under the Waqf for-

(i) the salary of the mutawalli and allowances to the individuals;

(ii) purely religious purposes;

(iii) charitable purposes; and

(iv) any other purposes;

(f) any other particulars provided by the Board by regulations.

(4) Every such application shall be accompanied by a copy of the Waqf deed or if no such deed has been executed or a copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the applicant, of the origin, nature and objects of the Waqf.

(5) Every application made under sub-section (2) shall be signed and verified by the applicant in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908) for the signing and verification of pleadings.

(6) The Board may require the applicant to supply any further particulars or information that it may consider necessary.

(7) On receipt of an application for registration, the Board

may, before the registration of the Waqf make such inquiries as it thinks fit in respect of the genuineness and validity of the application and correctness of any particulars therein and when the application is made by any person other than the person administering the Waqf property, the board shall, before registering the Waqf, give notice of the application to the person administering the Waqf property and shall hear him if he desires to be heard.

(8) In the case of Waqfs created before the commencement of this Act, every application for registration shall be made, within three months from such commencement and in the case of Waqfs created after such commencement, within three months from the date of the creation of the Waqf:

Provided that where there is no Board at the time of creation of a Waqf, such application will be made within three months from the date of establishment of the Board.

37.Register of Waqfs.- The Board shall maintain a register of Waqfs which shall contain in respect of each Waqf copies of the Waqf deeds, when available and the following particulars, namely:-

- (a) the class of the Waqf;
- (b) the name of the mutawallis;
- (c) the rule of succession to the office of mutawalli under the Waqf deed or by custom or by usage;
- (d) particulars of all Waqf Properties and all title deeds and documents relating thereto;
- (e) particulars of the scheme of administration and the scheme of expenditure at the time of registration;
- (f) such other particulars as may be provided by regulations."

A close reading of the aforesaid provisions indicates that the

Waqf Act contemplates only registration of the Waqfs and it does not contemplate separate registration of the properties owned by Waqfs. True, Section 37 of the said Act contemplates that the properties of the registered Waqfs shall be included in the Register maintained in that connection by the Waqf Board. The defendants have no case that the plaint schedule shop room is not a property owned by the plaintiff. They have also no case that the plaintiff is not a registered Waqf. Their case is only that the plaintiff has not proved that the plaint schedule shop room is included in the Register maintained by the Waqf Board under Section 37 of the Act. True, in a case where the defendant raises a contention that the plaint schedule property in respect of which exemption is claimed is not a property owned by the plaintiff Waqf, it might be necessary for the plaintiff to prove that the suit property is included as the property of the plaintiff by the Waqf Board in the Register maintained by them under Section 37 of the Act. But, in a case where the ownership of the suit property by the plaintiff is not in dispute, even if the suit property is omitted to be included in the Register maintained by the Waqf

Board under Section 37 of the Act, the benefit of exemption cannot be denied in respect of the same. There is, therefore, no substance in the argument of the defendants.

6. Coming to the decision of this Court in S.A.No.104 of 1991, it is seen that the statement therein on which reliance was placed by the defendants was rendered in ignorance of the notification issued by the Government referred to above and the provisions contained in Sections 36 and 37 of the Waqf Act. The said judgment, in the circumstances, can be considered only as a judgment rendered *per incuriam*.

In the result, the second appeal is dismissed in limine. However, having regard to the facts and circumstances of the case, I deem it appropriate to grant the defendants time till 31.5.2016 to vacate the plaint schedule shop room and deliver vacant possession of the same to the plaintiff on the following terms:

- i. The defendants shall pay the arrears of rent, if any, to the plaintiff, within six weeks from today.
- ii. The defendants shall file an affidavit before the trial court/execution court, within six weeks

from the date of receipt of a copy of the judgment, unconditionally undertaking to surrender vacant possession of the plaint schedule building, on or before 31.5.2016.

- iii. The defendants shall pay to the plaintiff, the charges towards use and occupation of the building equivalent to the current rent from today till they give vacant possession of the building to the plaintiff.

Execution proceedings, if any, pending shall be kept in abeyance till 31.5.2016. If there is default in performing any of the aforesaid conditions, the benefits given to the defendants as per this judgment will automatically stand recalled and the executing court shall effect delivery forthwith. All the interlocutory applications in the appeal are closed.

sd/-
P.B. SURESH KUMAR,
JUDGE