

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.09.2016

CORAM

THE HON'BLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE R.MAHADEVAN

W.A.No.1702 of 1997

United Chemicals,
through Partner S.Hussian Nijamudeen. ... Appellant/2nd
Respondent

Vs.

1. A.S.M.Mohamed Yousuf ... Respondent/Petitioner
2. Tamilnadu Wakf Board,
No.3, Santome High Road,
Madras-4.
3. Anam Shahul Hameed
4. Nagoor Meeral Beevi
5. Mohammed Beevi
6. Minor Nagoor Meeral Beevi,
rep. by mother Mohammed Beevi. ... Respondents/Respondents

Appeal filed under Clause 15 of Letters Patent against the order dated 03.12.1997 made in W.P.No.2272 of 1988 on the file of this Court.

W.P.No.2272 of 1988 : Petition under Article 226 of the Constitution of India to call for the records to the order of the 1st Respondent being item No.III of 1987 bearing of RC.6055/79/TNV dated 30.01.1988 and quash the same.

For Appellant : Mr.M.Md.Ibrahim Ali

For Respondents : Mr.A.S.Kaizer for R2

JUDGMENT

(Judgment of the Court was made by The Hon'ble Chief Justice)

This appeal has been preferred by the appellant against the order of the learned Single Judge in W.P.No.2272 of 1988, dated 03.12.1997, quashing the proceedings of the Wakf Board dt. 30.1.1988.

2. The facts leading to the filing of the writ appeal is as follows:-

(a) An extent of 4 acres and 22 cents of lands comprised in R.S.No.569/A and T.S.No.3424 of Keela Veeraraghavaapuram village, Melapalaiyam Taluk was endowed by Anam Mohamed Meeran Mohideen Tharaganar, Anam Sheik Madar Tharaganar and Anam Kasim Tharaganar to conduct the Lighting Charity for Nagoor Shahul Hameed Andavar Pallivasal Lighting Charities Wakf and Anam Mohamed Meera Mohideen Tharaganar was appointed as first Muthavalli. The said wakf property was partitioned into two halves vide deed of partition dated 24.2.1947 and arrangements were made to continue the lighting charity by Mohamed Yusuf Tharaganar, son of Mohamed Meera Mohideen Tharaganar as Muthavalli for the northern half and southern half by the Muthavallis AMS Abdul Samed and AMS Syed Mohamed respectively. AMS Syed Mohamed died leaving his minor son Shahul Hameed as his heir and Anam Abdul Sameed was acted as the sole Muthavalli of the southern half of the above said property and Anam Abdul Samed appointed the first respondent herein as the Muthavalli.

(b) The second respondent herein vide proceedings dated 17.4.1980 appointed Sahul Hameed as the Muthavalli for a period of two years. First respondent initiated civil proceedings and the same were dismissed on the ground that succession to Muthavalliship was on hereditary basis and Abdul Samed had no right to appoint the first respondent. Proceedings were also initiated by Shahul Hameed against Abdul Samed. Abdul Samed died, while S.A.No.1007 of 1976 was pending before the High Court. The endeavour of the first respondent herein to get himself impleaded as legal heir of Abdul Samed in S.A.No.1007 of 1976 was dismissed and the High Court directed the Wakf Board to take possession of the wakf property. Accordingly, Wakf Board took possession of the property on 27.6.1979.

(c) As the period of two years of Shahul Hameed expired in 1982 itself, the first respondent filed a petition before the Wakf Board on 8.9.1987 to recognise him as a fit person to act as Muthavalli of the aforesaid Wakf, as Shahul Hameed forfeited his rights to act as such Muthavalli, by his illegal acts in alienating the wakf property without sanction of the Wakf Board.

(d) Case of the first respondent is that the northern half of the above mentioned property (2.11 acres) was sold by respondent Nos.3 to 6, who are not Muthavallis on 27.7.1978 to the appellant herein for a meagre consideration of Rs.16,000/-. When proceedings for appointing a Muthavalli for the properties were pending from 1975, on 17.4.1980, Shahul Hameed was recognised as Muthavalli for two years. According to the first respondent, respondent Nos.3 to 6 have no right to alienate the properties in favour of the appellant, as the said properties were inalienable. Regarding the sale made, civil suit in O.S.No.199 of 1982 was filed by the Wakf Board before the District Munsif Court, Tirunelveli against the vendors and the appellant herein for declaration that the sale was invalid and also for recovery of possession. The said suit was decreed. Aggrieved by the same, the appellant has filed A.S.No.31 of 1983 before the District Court, Tirunelveli and the same was allowed. S.A.No.949 of 1984 is stated to have been filed by the Wakf Board.

(e) The appellant has filed a petition before the Wakf Board for rectification of the sale deed dated 27.7.1978 executed by respondent Nos.3 to 6 in favour of the appellant, wherein notice was issued to the first respondent to submit his objection. The first respondent filed W.P.No.12767 of 1987 praying to issue a writ of prohibition against the Wakf Board prohibiting it from ratifying the sale transaction dated 27.7.1978 and the said writ petition was dismissed observing that objections should be raised before the Wakf Board. Accordingly, the first respondent submitted his objections. Without considering the objections made by the first respondent, the Wakf Board ratified the sale deed vide impugned order dated 30.1.1988 and the same was challenged in the writ petition.

3. The appellant has filed the counter-affidavit stating that the grounds taken by the first respondent are unsustainable in law to challenge the impugned order. The Wakf Board is having power to ratify a sale after the sale transaction and has passed the impugned order mainly taking the paramount welfare and intent of the wakf.

4. As the issues involved in S.A.No.949 of 1984 and W.P.No.2272 of 1988 are relate to the same property between the same parties, the learned Single Judge has taken up both the matters together and disposed by common order holding that the ratification of the alienation dated 27.7.1978 is invalid and without jurisdiction and that the resolution dated 30.1.1988 is also invalid and inoperative. Aggrieved by the order made in W.P.No.2272 of 1988, the present appeal has been preferred.

5. Aggrieved by the judgment in S.A.No.949 of 1984 dated 03.12.1997, the appellant herein had preferred Petition for Special Leave to Appeal (Civil) CC 4868 of 1999 before the Hon'ble Supreme Court. The Hon'ble Supreme Court, while dismissing the petition, on 10.01.2000, observed as under:-

"In the event of petitioner succeed in the writ appeal said to have been pending before the High Court, they may make a fresh application for revival of the Special Leave Petition. This Petition is dismissed accordingly."

6. Thereafter, W.A.No.1702 of 1997 was taken up for hearing. Upon hearing the counsels, the Division Bench of this Court dismissed the appeal on 28.3.2008 as not maintainable, however, directed the parties to approach the Tribunal constituted under the Waklf Act. The Division Bench of this Court also observed that in view of the dismissal of the writ petition, no further orders are necessary regarding the second appeal. Aggrieved by the judgment of the Division Bench of this Court dated 28.03.2008, the first respondent herein has preferred Civil Appeal No.2951 of 2013 before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide order dated 8.8.2013 allowed the appeal setting aside the said order and restored the writ appeal to the file of the High Court for hearing afresh and disposal on merits in accordance with law. In the said order, the Hon'ble Supreme Court also observed that "in case writ appeal is allowed by the Division Bench of the High Court, the appellant herein shall be at liberty to prosecute the remedy as observed in the order dated 10.1.2000 passed in Special Leave Petition (Civil) CC.No.4868 of 1999."

7. We have taken the writ appeal for final hearing and heard the learned counsel for parties and perused the materials on records.

8. The legal question that arises for consideration is qua the transfer of immovable property by the Muthavalli without prior sanction, but post approval, in the conspectus of the applicability of Section 36A of the Wakf Act, 1954.

9. The Wakf Act, as it originally stood, did not contain restriction, but the amendment introduced through Section 36A by the Amendment Act 34 of 1964 brought such a restriction. The relevant provision reads as under:-

"36A. 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."

10. There was once again an amendment to Section 36A by the Wakf Amendment Act 69 of 1984 and the relevant provision reads as under:-

"36A. Alienation of wakf property without sanction of the Board to be void. - (1) Notwithstanding anything contained in the wakf deed, any gift, sale, exchange or hypothecation of any immovable property which is wakf property, shall be void unless such gift, sale, exchange or hypothecation is effected with the prior sanction of the board."

11. It is the difference on the wordings of two amendments which required to be examined as in terms of the original Section 36A, the phraseology used was that transfer of immovable property would not be "valid without previous sanction of the Board", while in terms of the amended provision, the phraseology is, "shall be void unless it is effected with the prior sanction of the Board".

12. The property being wakf property is not in issue, nor is that the alienation is without prior sanction of the Wakf Board. We have emphasised this for the reason that the appellant cannot claim the property in question to be a private property, having been given up in the Courts below and thus, the only plea urged before us is based on the interpretation of the original provision and the amended provision of Section 36A and its effect. This is in the context of the fact that while the property was sold on 27.07.1978, there was no prior sanction obtained from the Wakf Board, but post facto sanction was granted in the form of ratification on 30.1.1988 on the vendee paying additional consideration of Rs.50,000/- and also making donation of Rs.25,000/- to the Tamil Nadu Wakf Board Welfare Fund.

13. In terms of the impugned order, on the plea of the first respondent, the decision of the Wakf Board has been quashed on the ground that there could not have been any ratification, as the transaction was void and thus incurable.

14. We are in agreement with the submission made by the learned counsel for the appellant as well as the Wakf Board/respondent No.2 that what appears to have been lost site of is the consequences of the phraseology being used differently in the two provisions. The opinion of the learned Single Judge would be correct, if the amended provisions as per Amendment Act 69 of 1984 were to apply, as the transaction would be void without prior sanction of the Board. However, when the transaction took place, it was unamended Section 36A, introduced by the Amendment Act 34 of 1964, which was in force and the requirement was that the transaction could not be valid without the previous sanction of the Wakf Board.

15. The learned counsel for the appellant has relied upon the judgment of the Hon'ble Supreme Court in Wakf Board of Andhra Pradesh v. Biradavolu Ramana Reddy, reported in 1999 (6) SCC 582, to contend that there is no doubt about the legal position - that the Amended Act of 1984 would not apply retrospectively. Amendment Act 69 of 1984, in fact, was not notified in so far as its applicability to Tamil Nadu is concerned, till the present Wakf Act, 1995 came into force. Thus, the transaction would have to be tested on the touch stone of the provision of Section 36A as originally introduced vide Amendment Act 34 of 1964.

16. We have the benefit of the guidance in the form of judicial precedent in respect of the interpretation of this provision in P.S.Abdul Kadir v. The Mahlarathul Kadiria Sabha Kayalpatnam, rep. by its President Vilak Mohideen Thambi Kulam Sathak Thambi brought on record, reported in AIR 1953 Madras 143, where it has been opined that sanction can be subsequently granted through ratification. This was held more so as the proceeds from the sale of the property in that case were invested in another property. In fact, the factual matrix is apposite in the present case, as we are also dealing with a case, where the property was sold exclusively on the ground that it was not fetching enough revenue and the proceeds were re-invested to obtain better returns.

17. In Ganapathy Naicker and another v. The Special Officer for Wakfs, reported in (1974) 1 MLJ 239, it has been observed that the intent of introducing the provision was to accord statutory recognition to the provisions of Mohamedan Law and such sanction could be obtained prior to the transaction or even post transaction.

18. In order to obtain further clarity on this issue, we would like to refer to some of the paragraphs of the judgment in P.S.Abdul Kadir case (supra) as under:-

"9. Notwithstanding the opinion of the text writers, Wilson and Ameer Ali, we are inclined to follow the decision in - 'Nemaichand v. Golan Hossein, 37 Cal 179, which, as already mentioned, has been consistently followed in other courts. The sanction of the Kazi was evidently intended to be a safeguard against improper alienations. That purpose will be amply served by insisting upon sanction of the Court, either previous or subsequent, so long, of course as there is an assurance that the transaction could be examined on its merits, and there is an enquiry as to whether it is supported by legal necessity or benefit to the trust.

.....
12. Ameer Ali in his text book, has summarised the result of the authorities thus:

"The general result of the authorities seems to be that the wakf (mutawalli?) may lawfully change the wakf property, in other words, alter the investment provided he has reserved, at the time of dedication, power to that effect. Otherwise, no alteration can be effected without the leave of the Kazi or Judge, who has the power to authorise a change of investment whenever he considers it beneficial for the wakf"

13. No doubt, the sanction of the Kazi contemplated in these texts is sanction prior to the transaction. But we entirely agree with the learned Judges of the Calcutta High Court that no different should be made between antecedent and subsequent sanction of the court which now takes the place of the Kazi."

19. We are thus of the view that the Wakf Board was within its authority to have accorded sanction subsequent to the transaction in question, carried out vide sale deed dated 27.7.1978, in terms of its decision on 30.1.1988.

20. The appeal is accordingly allowed and the impugned order passed in W.P.No.2272 of 1988 is set aside, leaving the parties to bear their own costs.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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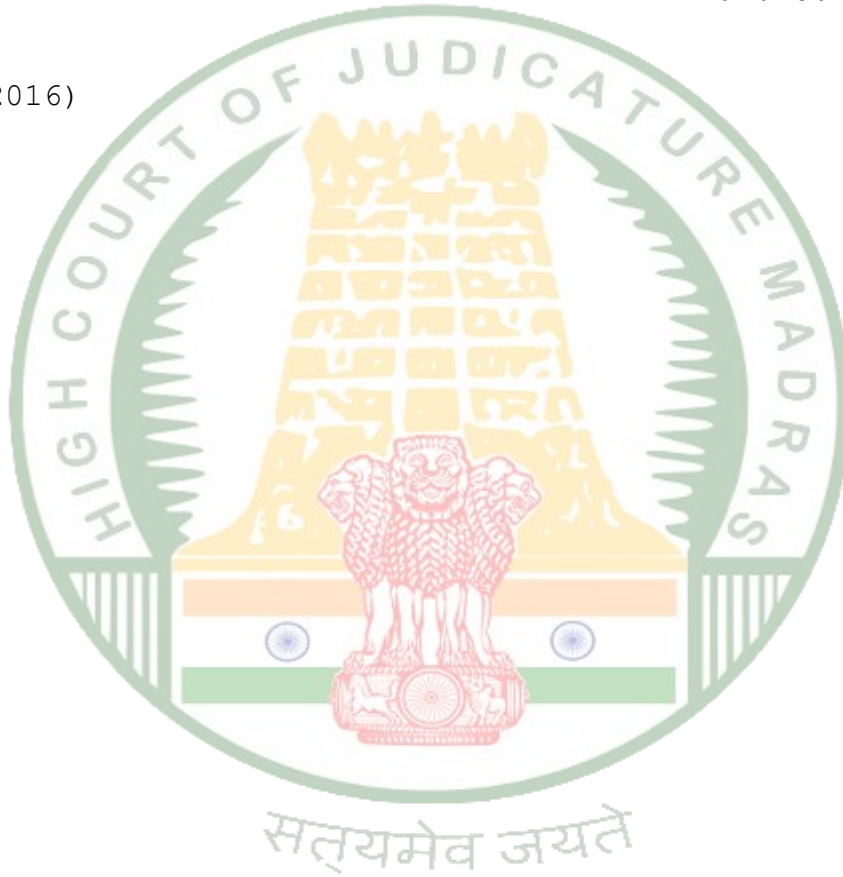
To

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+1cc to Mr.Md.Ibrahim, Advocate, S.R.No.53592

W.A.No.1702 of 1997

VGI (CO)
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