

*** THE HON'BLE SRI JUSTICE A.V. SESA SAI**

+ WRIT PETITION No. 18581 OF 2008

% Dated 05-12-2016

Venati Sujathamma & others.

Petitioners

VERSUS

\$ The Andhra Pradesh Wakf Boar,
rep., by its Chief Executive Officer,
Haj House Building, Nampally,
Hyderabad.

Respondent

! Counsel for petitioners : Sri V.L.N.G.K. Murthy,
learned Senior counsel.

^ Counsel for the respondent : Sri Shaik Mohammed,
learned Standing counsel.

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? Cases referred

1. (1998) 3 SCC 331

THE HON'BLE SRI JUSTICE A.V. SESA SAI**WRIT PETITION No. 18581 of 2008****ORDER:**

The present writ petition challenges the notice, dated 08.07.2008, issued by the Chief Executive Officer, A.P. State Wakf Board.

Heard Sri V.L.N.G.K. Murthy, learned Senior counsel for the petitioners and Sri Shaik Mohammed, learned Standing counsel for the respondent – Wakf Board apart from perusing the material available before the Court.

According to the petitioners, they purchased an extent of Ac.0.50 cents equivalent to 2420 square yards in C.A.S.No.463/2 situated at Gayakasaya Pallam (near C.A.M. High School), Nellore Bit-1, Nellore for consideration of Rs.9,00,000/- under a registered Agreement of sale-cum-General Power of Attorney on 19.05.2005 from one Polu Lakshmi Reddy of Nellore and ever since they have been in possession and enjoyment of the said property. It is averred in the writ affidavit that an extent of Ac.0.24 ½ cents out of the above said land originally belonged to Shaik Mohammad Abdul Hafiz Shab which he got in a partition with one Mohamad Ghouse Shab under a registered partition deed, dated 07.05.1948, and that the said Abdul Hafiz Shab sold the said property to one Mypati Vanama, w/o. Panchalaiah under the registered sale deed, dated 26.07.1958, for Rs.1,250/-. It is further averred that another extent of Ac.0.24 ½ cents out of the above said property originally belonged to the very same Abdul Hafiz Shab which he got under the registered partition deed, dated 07.05.1948, and that he sold the said property to one Mallireddy Venku Reddy under a registered sale deed, dated 26.07.1958, for Rs.1,250/- and the said Mypati Vanamma sold the said property to one Kathala Narasamma for Rs.1,500/- under a registered sale

deed, dated 04.11.1968. It is also averred that one Polu Lakshmi Reddy, vendor of the petitioners, purchased Ac.0.26 cents (found on measurement) in the above said survey number from the said Narasamma under registered sale deed, dated 04.10.1989, for Rs.6,500/- and similarly, an extent of Ac.0.25 cents (found on measurement) was sold by Mallireddy Venku Reddy to the vendor of the petitioners - Polu Lakshmi Reddy under a registered sale deed, dated 26.10.1989, for Rs.6,500/-. Thus, the vendor of the petitioners, Polu Lakshmi Reddy, came to be the owner of Ac.0.51 cents, and she sold an extent of Ac.0.50 cents to the petitioners under the aforesaid registered agreement of sale-cum-general power of attorney. It is the case of the petitioners that the respondent instituted O.S.No.19 of 1978 against their predecessors-in-title and the said suit was dismissed for default and later the restoration applications were also dismissed, as the respondent failed to prosecute further.

According to the petitioners, in respect of other property situated on the western side, the respondent instituted O.S.No.151 of 1975 against one Birudavolu Ramana Reddy for recovery of possession on the ground that the said property is a public wakf property and the said suit was decreed in favour of the respondent. Against the said judgment and decree, an appeal was preferred before this Court and the same was allowed, setting aside the decree granted by the trial Court and thereafter the respondent filed Civil Appeal No.3568 of 1999 before the Hon'ble Apex Court and the same also ended in dismissal. With the above background, contending that the impugned notice, dated 08.07.2008, is highly illegal, arbitrary and without jurisdiction, the present writ petition came to be filed.

This Court while ordering Rule Nisi on 02.09.2008 in WPMP.No.24180 of 2008 granted order of status quo. Responding to the said Rule Nisi, a counter affidavit is filed by the respondent, denying the averments and the allegations

made in the affidavit filed in support of the writ petition and in the direction of justifying the impugned action.

Learned Senior counsel for the petitioners contended that the questioned notice is highly illegal, arbitrary, unconstitutional and violative of Articles 14, 21 and 300A of the Constitution of India and as the respondent having failed before the competent civil Court in the suits instituted by it, it is absolutely not open for it to issue the impugned notice under Section 54 of the Wakf Act, 1995 (for short, “the Act”). Learned Senior counsel submitted that as the issue as regards the right in the subject property attained finality in the earlier proceedings, the impugned notice is totally one without jurisdiction, and that in the absence of any dispute as regards the title to the property, the petitioners cannot be asked to approach the Wakf Tribunal under Section 83 nor they can be asked to face the enquiry under Section 54 of the Act. It is also submitted that the respondent lost O.S.No.151 of 1975 instituted by it and the Hon’ble Supreme Court also confirmed the same in respect of western half of the property. In support of his submissions and contentions, learned Senior counsel placed reliance on the judgment of the Hon’ble Supreme Court in **Tirumala Tirupati Devasthanams v. K.M. Krishnaiah**¹.

On the contrary, reiterating the averments in the counter affidavit filed by the respondent, the learned Standing counsel for the respondent – Wakf Board submitted that the present writ petition filed under Article 226 of the Constitution of India is not maintainable before this Court in view of the availability of effective alternative remedy under Section 83 of the Act, and that as the petitioners did not respond to the notice issued by the respondent under Section 54 of the Act, they cannot approach this Court directly by way of the present writ petition. It is further submitted that the petitioners have no locus standi to maintain the present

¹ (1998) 3 SCC 331

writ petition in the absence of any title, and that since the petitioners are raising various factual aspects, the same cannot be gone into under Article 226 of the Constitution of India.

In the above background, now the issues, which this Court is called upon to consider and answer in the present writ petition, are:

1. Whether the present writ petition filed under Article 226 of the Constitution of India is maintainable in view of the availability of alternative remedy under Section 83 of the Act as contended by the respondent?
2. Whether the petitioners are justified in approaching this Court without offering any explanation to the impugned notice, dated 08.07.2008?
3. Whether the respondent is justified in issuing the questioned notice, dated 08.07.2008 under Section 54 of the Act?
4. Whether the petitioners have locus standi to maintain the present writ petition? and
5. Whether the petitioners are entitled for any relief from this Court under Article 226 of the Constitution of India?

As per the information available before this Court, one Shaik Mohammad Abdul Hafiz Shab and Mohamad Ghouse Shab, who are the brothers, partitioned their properties in which an extent of Ac.0.48 ½ cents situated on the eastern side fell to the share of Shaik Mohammad Abdul Hafiz Shab and another extent of Ac.0.48 ½ cents situated on the western side fell to the share of Mohammad Ghouse Shab. In the present writ petition the petitioners claim to be the owners of the property situated on the eastern side and are tracing out their title under a registered agreement of sale-cum-general power of attorney, dated 19.05.2005, through one Polu Lakshmi Reddy of Nellore. There is no dispute that earlier the

respondent instituted O.S.No.19 of 1978 against Mallireddy Venku Reddy and others for recovery of the subject property and the same was dismissed for default on 05.11.1985 and the restoration petition vide I.A.No.678 of 1985 was also dismissed for default on 26.07.1989 and I.A.No.547 of 1989 filed for restoration of I.A.No.678 of 1985 was also dismissed on merits on 10.04.1982. There is also no controversy that in respect of the western half of the property, the respondent Wakf Board also instituted O.S.No.151 of 1975 on the file of the Court of the Subordinate Judge, Nellore, against one Birudavolu Ramana Reddy and the same was decreed in favour of the respondent – Wakf Board. Aggrieved by the said order, Birudavolu Ramana Reddy filed appeal before this Court and the same was allowed. Questioning the same, the respondent– Wakf Board filed Civil Appeal No.3568 of 1989 before the Hon'ble Apex Court and the Hon'ble Supreme Court dismissed the said Appeal while refusing to interfere with the judgment rendered by this Court. According to the learned Standing counsel, in O.S.No.19 of 1978 there was no decision on merits and the decision in O.S.No.151 of 1975 cannot be the basis for the petitioners to claim the relief in the present writ petition.

In this context, learned Senior counsel, appearing for the petitioners has placed reliance on the judgment of the Hon'ble Apex Court in **Tirumala Tirupati Devasthanams (supra)**, wherein the Apex Court while dealing with the provisions of Sections 13, 40 and 44 of the Indian Evidence Act and the evidentiary value held as under:

“8. It was argued by the learned counsel for the plaintiff-respondent that the earlier judgment in O.S.No.51 of 1937 dated 15.06.1942 was rendered in favour of the TTD against Hathiramji Mutt, that the plaintiff was not a party to that suit and hence, any finding as to TTD's title given therein is not admissible as evidence against the present plaintiff in this suit.

9. In our view, this contention is clearly contrary to the rulings of this Court as well as those of the Privy Council. In *Srinivas Krishnarao Kango v. Narayan Devji Kango* (AIR 1954 SC 379) speaking on behalf of a Bench of three learned Judges of this Court, Venkatarama Ayyar, J. held that a judgment not inter partes is admissible in evidence under Section 13 of the Evidence Act as evidence of an assertion of a right to property in dispute. A contention that

judgments other than those falling under Sections 40 to 44 of the Evidence Act were not admissible in evidence was expressly rejected. Again B.K.Mukherjea, J. (as he then was) speaking on behalf of a Bench of four learned Judges in *Sital Das v. Sant Ram* (AIR 1954 SC 606) held that a previous judgment not inter partes, was admissible in evidence under Section 13 of the Evidence Act as a “transaction” in which a right to property was “asserted” and “recognized”. In fact, much earlier, Lord Lindley held in the Privy Council in *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani* (ILR (1902) 29 Cal 190 (PC)) (ILR at p.198) that a previous judgment, not inter partes was admissible in evidence under Section 13 to show who the parties were, what the lands in dispute were and who was declared entitled to retain them. The criticism of the judgment in *Dinomoni v. Brojo Mohini* (ILR (1902) 29 Cal 190 (PC)) and *Ram Ranjan Chakerbati v. Ram Narain Singh* (ILR (1895) 22 Cal 533: 22 IA 60 (PC)) by Sir John Woodroffe in his *Commentary on the Evidence Act* (1931. p.181) was not accepted by Lord Blanesburgh in *Collector of Gorakhpur v. Ram Sundar Mal* (AIR 1934 PC 157).

10. For the aforesaid reasons, we reject the contention of the learned counsel for the respondent-plaintiff and hold that the TTD could rely on the judgment in O.S.No.51 of 1937 as evidence to prove its title in regard to the suit property, even though the present plaintiff was not a party to that suit. Point 1 is held accordingly against the respondent.”

In view of the above principle laid down by the Hon’ble Apex Court, the contention of the learned Standing counsel for the respondent – Wakf Board that the judgment rendered in O.S.No.151 of 1975, which went up to the Hon’ble Apex Court in Civil Appeal No.3568 of 1989, cannot be pressed into service by the petitioners, in the considered opinion of this Court, cannot be approved and the same is liable to be rejected. Therefore, the said judgment can be relied upon in the instant case.

Yet another submission made by the learned Standing counsel is with regard to the availability of alternative remedy under Section 83 of the Act. It is to be noted that in the instant case, already finality was attained in view of the judgment of the Hon’ble Apex Court in Civil Appeal No.3568 of 1989. In view of the same and in the absence of any dispute for determination, the contention of the learned Standing counsel on the aspect of availability of alternative remedy under Section 83 of the Act also cannot be sustained.

Another contention raised by the learned Standing counsel is that the notice impugned in the instant writ petition is only a show cause under the provisions of

Section 54 of the Act and it is open for the petitioners to respond to the said notice, but without availing the said benefit, the present writ petition is filed. It is true that under Section 54 of the Act, the Chief Executive Officer is empowered to issue notice upon an alleged encroacher to show cause. Perusal of the impugned notice, dated 08.07.2008, in vivid terms, discloses that the Chief Executive Officer issued said notice to the vendor of the petitioners to remove the alleged encroachment and to deliver the possession of the land. In the considered opinion of this Court, the said notice is not at all a show cause as pointed out by the learned Standing counsel. Therefore, the contention advanced by the learned Standing counsel is also rejected.

Coming to the locus standi of the petitioners to maintain the writ petition as pointed out by the learned Standing counsel, it is required to be noted that it is the categorical case of the petitioners that by way of a registered agreement of sale-cum-general power of attorney, dated 19.05.2005, one Polu Lakshmi Reddy sold the property in favour of the petitioners and they were put in possession of the property on the said date. Since the possession of the petitioners is not in dispute, it is not open for the respondent to contend that the petitioners have no locus standi to maintain the writ petition. Being in possession of the property, in the considered opinion of this Court, the petitioners can maintain the writ petition under Article 226 of the Constitution of India to protect their possession and therefore such contention cannot be sustained.

Yet another contention advanced by the learned Standing counsel is that in view of involvement of various factual controversies the present writ petition cannot be sustained. The above narration clearly and candidly discloses that in view of the various proceedings, as mentioned supra, it cannot be contended by the respondent that there is a dispute with regard to the right of the property.

Therefore, in the facts and circumstances of the case, this Court has absolutely no hesitation nor any doubt to hold that the impugned notice, dated 08.07.2008, cannot be sustained in the eye of law.

For the aforesaid reasons, the writ petition is allowed, setting aside the impugned notice, dated 08.07.2008, issued by the respondent.

Miscellaneous petitions, if any, shall stand closed. No order as to costs.

A.V. SESA SAI, J

Date: 05.12.2016

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L.R. copies to be marked.

