

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**Reserved On :18.01.2017
Pronounced On : 24.01.2017**

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.1688 of 1993

1.Mrs.Elizabeth Antony(deceased)
2.Mr.A.A.Joseph
(appellant 2 brought on record as
LR of the deceased sole appellant
vide Order of the Court dated
30.04.2008 made in CMP.No.730/08
in SA No.1688 of 1993)

..Appellants/Defendant

/vs/

The Tamil Nadu Wakf Board,
Represented by its Secretary,
No.3, Santhome High Road,
Madras 600 004.

..Respondents/Plaintiffs

Prayer: Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.25 of 1990 dated 20.09.1993 on the file of the District Judge, Nilgiris, Ootacamund confirming the judgment and decree in O.S.No.4 of 1988 on the file of the District Munsif Court, Ootacamund.

For Appellants :Mr.T.Velumani

For Respondents :Mr.V.Lakshminarayanan

J U D G M E N T

The defendant is the appellant herein. The suit in O.S.No.4 of 1988 filed by the Tamil Nadu Wakf Board for delivery of possession and damages at

the rate of Rs.100/- per day for use and occupation was allowed by the trial Court and confirmed by the first appellate Court.

2. Aggrieved by the concurrent finding, the defendant has filed the present second appeal.

3. For the sake of convenience, the parties are described as per their rank and status shown in the original suit.

4. The brief facts leading to the second appeal is as follows:-

The suit property belongs to the Wakf Board. The defendant's father one by name Mathew was tenant paying rent of Rs.65/- per month in the suit building. The suit in O.S.No.103 of 1968 was filed by the Wakf Board against the defendant for recovery of possession, wherein the Court held that the defendant is the tenant under the plaintiff. Therefore, he is entitled for Statutory Notice under Section 106 of Transfer of Property Act, 1882. In the absence of notice, suit for recovery of possession is not maintainable.

5. The defendant aggrieved by the finding regarding the landlord and tenant relationship preferred an appeal in A.S.No.342 of 1971 before the High Court. However, it was dismissed for deficit Court fee. Since the defendant was in arrears of rent and refused to vacate the premises, the present suit in O.S.No.4 of 1988 was filed for recovery of possession and damages for use and occupation.

6. The defendant filed written statement contending that the plaintiffs are not the owners of the suit property, S.M.Zackariah Sait, who is the owner of the suit property executed a trust deed, which is in the nature of public trust and not in the nature of Wakf. The defendant's father came into possession of the property as early as 1942 and he was put in possession by one Ms.Glean and has made improvement of the suit property at his own cost. The defendants is not aware of wakf proceedings alleged to have been taken place in the year 1958. Since she is in occupation of the property on her own right based on possession neither the plaintiff nor their agent can claim any rent from her or recovery of possession.

7. The trial Court has framed the following issues based on the above pleadings:

"(1)Whether the suit property is wakf property?

(2)Whether the defendants late father M.G.Mathew was the monthly tenant under the plaintiff in respondent of the suit premises?

(3)Whether on death of M.G.Mathew, the defendant bearing his heir continued in possession of the suit premises as an tenant thereof?

(4)To what arrears of rent the plaintiff is entitled to?

(5)Whether the defendant has perfected her title

to use and occupation of the suit property?

(6)Whether the plaintiff is entitled to damages for use and occupation of the suit premises from the date of suit till delivery of possession? If so at what rate tender?

(7)Whether the Court fee paid is not correct?

(8)Whether the plaintiff is entitled to the relief of possession of the suit property?

(9)To what relief the plaintiff is entitled to?

Additional Issues:

Whether the claim of 12 years of rent as arrears is barred by time?"

8. After examining PW1 and DW1 and Exs.A1 to A10 and Exs.B1 to B11, the trial Court allowed the suit in favour of the plaintiffs and granted three months time to vacate and hand over the vacant possession and also held that the defendant is liable to pay damages for use and occupation.

9. On appeal, the first appellate Court has confirmed the finding of the trial Court and also fixed a sum of Rs.100/- per day towards damages. Aggrieved by the concurrent finding, the defendant has filed the present second appeal.

10. At the time of admission, this Court has formulated the following

Substantial Questions of Law for consideration:

"1. Whether the appellate Court is correct in fixing the past mesne profits at Rs.100/- per day when the trial Court has relegated the enquiry under Order 20, Rule 12 C.P.C, by way of separate proceedings?

2. Whether the appellate Court is justified all fixing the past mesne profit at Rs.100/- per day basing on Ex.B2 (the Commissioner's Report filed in O.S.No.103 of 1968) which related to only evaluating the value of the improvements?

3. Whether the Courts below are right in holding that the payment of various sums pursuant to the direction of this Hon'ble Court in C.M.P.No.8328 of 1971 in A.S.No.342 of 1971 dated 14.10.1971 would clothe the appellant as tenant under the respondent Wakf Board?

4. Whether Ex.B1 dated 17.12.1945 is a Trust Deed or a Wakf Deed?

5. Whether the defendant/appellant is estopped from putting forth her independent title in view of the judgment in O.S.No.103 of 1968 and the judgment in A.S.No.342 of 1971 which was not decided on merits?

6. *Whether the portion of the suit claim is not barred?"*

11. The learned counsel appearing for the appellants submitted that the Courts below have erred in holding that the suit property is a Wakf property inspite of the fact that the Trust deed Ex.B1 does not carry the essence of the Wakf viz., dedication, permanency, divesting inpresenti. Further, the learned counsel appearing for the appellants contended that the Courts below without appreciating the evidence afresh, has proceeded under the presumption that the landlord tenant relationship prevails between the plaintiffs and the defendant. The Courts below ought not to have relied upon the earlier proceedings O.S.No.103 of 1969, which was dismissed against the plaintiff.

12. The learned counsel appearing for the appellants also contended that the appellate Court, without proper enquiry, has fixed mesne profits at the rate of Rs.100/- per day by passing the procedure contemplated under Order 20 of the Civil Procedure Code. It was also contended by the learned counsel appearing for the appellant that the amount deposited and paid to the plaintiff in compliance with the direction of the Hon'ble High Court in the miscellaneous proceeding ought not to have been considered as recognition of the plaintiff as the landlord by the appellant.

13. In support of his argument, the learned counsel appearing for the appellants referred the judgments in ***Mohammed Khasim V. Mohammed Dastagir and others*** reported in [**2006(13) SCC 497**], wherein para 23 reads as under:

"23. A plain reading of the document dated 29th February, 1960 indicates that Mohd. Imam Saheb had intended that his properties, both movable and immovable, should remain in-tact for the objects indicated in the Deed. It is also clear from the recitals in the deed that he did not want his estate to be alienated by any of the trustees who would be in management, by reserving the power of alienation only to himself and that too for buying other properties which were to vest in the Trust. The objects for which the income from the properties were to be expended are mostly of a pious and religious nature. According to Mohammedan jurists, the term 'Wakf' literally means dedication or as noted by Mulla in his "Principles of Mohammedan Law", the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by Mussalman law as religious, pious or charitable. The desire of Mohd. Imam Saheb to tie up the properties so that they would not be dissipated and the objects on which the usufructs of the properties were to be spent, most certainly appears to have influenced the thinking of the trial court in holding that Mohd. Imam Saheb had wanted to create a wakf. The said reasoning was not accepted by the High Court. However, the High Court also went wrong in holding that a valid trust had not also been created by the document of 29th February, 1960. In fact, while we agree with the High Court on the first count, we are unable to agree with the High Court on the second count. In other words, we agree with the High Court's finding that no wakf had been created by the aforesaid document but at the same time, we are also of the view that it was Mohd. Imam Saheb's intention to create a valid trust."

14. The learned counsel appearing for the appellants referring the recitals of Ex.B1-Trust Deed pointed out that the author of the trust has reserved the right to alter (or) amend the trust and the use which literally mean that there is no permanency, dedication, divesting inpersenti. Therefore, considering the verdict of the Hon'ble Supreme Court, the deed can at the most deed considering as a secular trust deed and not a wakf deed, wherein the wakf board can enter the shoes of the trustee.

15. This Court is not convenced upon the said submission. For the simple reason that the suit property was notified as a Wakf property as early as 1958. This fact was made known to the defendant' father, when the earlier suit was filed in the year 1968. In this earlier suit, the very same defence was taken by the defendant's predecessor and negatived by the Courts. Therefore, the defendant is estopped from re-agitating the same issue, since the issue was already heard and decided finally in the previous proceedings.

16. In this case, the learned counsel appearing for the appellant submitted that the suit property was notified as wakf property, without following due procedure prescribed under the Wakf Act and mere declaration by the Wakf Board will not bind the person who was not put to notice before or after the declaration.

17. In support of his submission, the learned counsel appearing for the appellants relied upon the judgment of the Hon'ble Supreme Court in ***Karnataka Board of Wakf v. Government of India and others*** reported in ***[2004(4) Scale 856]***.

18. On reading the above said judgment, this Court find that the facts of the case cited are entirely different from the facts of the case in hand. In Karnataka Board case, the property was already notified under the Ancient Monuments Preservation Act, 1904. While the fact being so, after advent of Wakf Board Act, 1958, the notification under Section 4 was published declaring the Ancient Monuments as the Wakf Property in the year 1976. Under the said circumstances, the Hon'ble Apex Court has held that once the property being declared as Ancient Monuments, it becomes the property of Government of India. Therefore, it cannot be subsequently declared as Wakf Property by virtue of notification. The said observation was made, when the Government of India challenging the notification of the Wakf Board. That is not the case in hand. Till date, the defendant has not challenged the notification, inspite of the specific plea taken by the plaintiffs about the nature of the property.

19. The learned counsel appearing for the respondents submitted that in the previous proceedings in O.S.No.103 of 1968, the Court has categorically framed a issue, whether the dedication alleged is true and held that on 19.11.1958, the Government has published gazattee notification wherein the

suit property has been notified as a Wakf Property and in the absence of contra evidence to show that the suit property was not dedicated for a charitable purpose, it to be presumed to be a Wakf Property. When there is a specific issue framed, heard and decided finally by the competent Court, it acts as *res judicata* in the subsequent proceedings, even though on technical ground the defendant succeeded in the previous suit.

20. In support of this submission, the learned counsel appearing for the respondents referred a full Bench Judgment of the Kerala High Court reported in ***V.P.Mohankumar v. P.Balagangadhara Menon [1986 AIR (Ker) 251]***, wherein the Court reiterated the dictum laid down by the Hon'ble Supreme Court in the previous case in the following lines:

"if the final decision in any manner at issue between the parties is based by a Court on its decisions on more than one point-each of which by itself would be sufficient for the ultimate decision the decision on each of these points operates as res judicata between the parties."

This view has been reiterated by the Supreme Court in Gangappa Gurupadappa Gugwad v. Rachawwa and others (AIR 1971 SC 442). In this decision the Supreme Court has held thus:

"No doubt it would be open to a Court not to decide all the issues which may arise on the pleadings before it if it finds that the plaint on the face of it is barred by any law. If for instance the plaintiff's cause of

action is against a Government and the plaint does not show that notice under S.80 of the Code of Civil Procedure claiming relief was served in terms of the said Section it would be the duty of the Court to reject the plaint recording an order to that effect with reasons for the order. In such a case the Court should not embark upon a trial of all the issues involved and such rejection would not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. But, when the plaint on the face of it does not show that any relief envisaged by S.80 of the Code is being claimed, it would be the duty of the Court to go into all the issues which may arise on the pleadings including the question as to whether notice under S.80 was necessary. If the Court decides the various issues raised on the pleadings, it is difficult to see why the adjudication of the rights of the parties, apart from the question as to the applicability of S.80 of the Code and absence of notice thereunder should not operate as res judicata in a subsequent suit where the identical questions arise for determination between the same parties."

The Division Bench decision of this Court in S.V.Bhatta v. S.S.Bhatta (AIR 1972 Kerala 2451972 K.L.T.215) is in accord with the principles laid down by the Supreme Court in the above decisions. We concur with the ratio laid down in the said decision. In view of the aforesaid binding decisions of the Supreme Court, we do not think it necessary to discuss the various High Court decisions cited before us. It should also be remembered that there are no degrees of importance of

any issue, in deciding the question whether the trial of an issue, in a subsequent suit is prohibited which was directly and substantially in issue between the same parties in an earlier suit. (See Prem Das v. Jyothis (AIR 1971 Delhi 282))”

21. Regarding the Appellate Court fixing damages for use and occupation, without resorting Order 20 Rule 12 independently, the learned counsel appearing for the respondents referred the Judgment of the Hon'ble Supreme Court reported in ***Gopalakrishna Pillai and others v. Meenakshi Ayal and others [1967 AIR (SC) 155]***, wherein para 7 reads as under:

7. Order 20, Rule 12 enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims. With regard to past mesne profits, a plaintiff has an existing cause of action on the date of the institution of the suit. In view of O.7, R.1 and 2 and O.7, R.7 of the Code of Civil Procedure and S.7(1) of the Court Fees Act, the plaintiff must plead this cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay court-fees thereon. With regard to future mesne profits, the plaintiff has not cause of action on the date of the institution of the suit, and it is not possible for him to plead this cause of action or to value it or to pay court-fees thereon at the time of the institution of the suit. Moreover, he can obtain relief in respect of this future

cause of action only in a suit to which the provisions of O.20, R.12 apply. But in a suit to which the provisions of O.20, R.12 apply, the Court has a discretionary power to pass a decree directing an enquiry into the future mesne profits, and the Court may grant this general relief though, it is not specifically asked for in the plaint, see Basavayya v. Guruvayya, ILR (1952) Mad 173 at.p. 177 (FB). In Fakharuddin Mahomed Ahsan v. Official Trustee of Bengal, (1882) ILR 8 Cal 178 at p.189 (PC), Sir R.P.Collier observed:

"The plaint has been already read in the first case, and their Lordships are of opinion that it is at all events open to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due; but be that as it may, that are of opinion that, under S.196 of Act VIII of 1859, it was in the power of the Court if it thought fit, to make a decree which should give the plaintiff wasilat up to the date of obtaining possessions."

22. This Court, after considering the rival submissions and the judgments cited by the respective counsel, holds that the landlord tenant relationship between the plaintiffs and the defendant has been affirmed in the earlier proceedings and it acts as *res judicata* in the subsequent proceedings. Therefore, the appellants have no substantial defence to question the wakf

deed or the landlord tenant relationship in the present proceedings. Similarly, there is no error in fixing damages of Rs.100/- per day by the appellate Court which is inconsonance with the judgments of the Hon'ble Supreme Court cited supra. This court finds no reason to interfere with the findings of the Courts below. Hence, the second appeal is liable to be dismissed.

23. In the result, ***the second appeal is dismissed.*** No costs. Three months time is granted for vacating the premises. Consequently, connected Miscellaneous Petition is also closed.

24.01.2017

Index:Yes/No

Internet:Yes/No

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To

1.The District Judge, Nilgiris, Ootacamund.

2.The District Munsif Court, Ootacamund.

Dr.G.Jayachandran, J.

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Judgment made in
S.A.No.1688 of 1993

24.01.2017

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