

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

APPEAL SUIT No.638 of 1997

JUDGMENT:

This appeal is preferred by defendant No.3 aggrieved by the decree and judgment dated 29.04.1997 in O.S.No.202 of 1988 on the file of Subordinate Judge, Nellore whereby the learned Judge decreed the suit for eviction and delivery of vacant possession.

2) The parties in the appeal are referred as they stood before the Trial Court.

3) The factual matrix of the case is thus:

a) Plaintiff—Wakf Board filed the suit for eviction of D3—New Talkies Picture Palace from suit premises and to deliver vacant possession and also for past and future profits. Plaintiff's case is that suit schedule property was endowed by Arcot Nawab in 1860 to Khatib Abdul Hak for performance of Khatib service of Jumma Mosque and Eidgah at Nellore; it was notified under the Wakf Act in A.P. Gazette dated 02.05.1963 in Sl.No.207 as service inam; the suit schedule property was leased out to the association of five persons headed by Md. Nazeer Mohammed Saheb Ahmed Ansari by Khatib Mohammed Khadir Mohiddin on payment of premium of Rs.533.54 ps. on an annual rent of Rs.170/- and now D3 is in possession; Khatib Mohammad Khadir Mohiddin was rendering services to Khatib institutions and after his death in 1931 issueless, there were rival claims among his legal heirs;

one of such legal heirs—Mohammad Hussain Farooqi was ultimately declared as Khatib to the institutions; later the Administrator of Wakf Board, A.P., Hyderabad in his proceedings A-1/83065/970, dated 01.11.1966 removed him from Khatib ship as he alienated the properties endowed to Khatib institutions and he ceased to be the Khatib; then he filed writ petition questioning the orders of the Wakf Board administration and the same was allowed directing the Wakf Board to give him fresh opportunity and enquire; the said Mohammad Hussain Farooqi died on 13.07.1970; later plaintiff issued fresh show cause notice on 04.11.1975 to D1 and D2 who are his legal representatives, but they refused to appear for enquiry and continued to alienate the properties without any rights in collusion with D3 who claimed to be paying rents to D1 and D2; then plaintiff—Board issued Notification No.A-1/830/66 dated 07.05.1981 assuming direct management of the institution and after notification, it issued notice dated 12.06.1981 to D3 calling upon him to pay lease amount to Khatib service but he sent reply with irrelevant averments; D3 has neither attorned his tenancy nor paid rents to the plaintiff in spite of repeated demands made by Inspector/Auditor of the plaintiff—Board; hence the possession of D3 in respect of suit land is that of a trespasser; though D1 and D2 have no connection with the suit schedule property they are formally added as parties; there is no landlord and tenant relationship between plaintiff and D3.

Hence the suit for eviction and delivery of vacant possession.

b) D1 filed written statement. While denying the plaint averments pleaded that plaint schedule properties are not Wakf properties and plaintiff is not entitled to any relief; originally one Mohammad Khadar Mohiddin was the absolute owner of the plaint schedule land and he leased out the same in 1926 on an yearly rent of Rs.170/- to five persons named in the lease agreement and he was receiving the rents from them during his life time; D3 is the successor in interest of the lessees and has been in possession of the said land and paying the rent to the lessor; while so, the lessor died in 1931 issueless and D1's father succeeded to his estate as nearest heir and enjoying his estate including plaint schedule properties and he was receiving the rents due in respect of plaint schedule land from D3; he died on 13.07.1970 and thereupon D1 and his mother i.e. D2 became entitled to his estate including plaint schedule property; since then D3 has been paying rents to D1 and D2 who are the absolute owners of plaint schedule property; the Khatib service at Jumma Mosque or Eidgah are not relevant and plaint schedule property has nothing to do with Khatib service; D1's father was never removed from Khatib service; after the death of his father, D1 continued in the said service and he is entitled for Khatib service; he thus prayed for dismissal of the suit.

c) D2 adopted the written statement of D1.

d) D3 filed separate written statement while denying the plaint averments pleaded that Khatib Mohammed Khadir Mohiddin leased out schedule property under permanent lease deed dated 22.01.1926 to five lessees in compliance of permission granted to him by Government of

Madras; one of the lessees—Soudagar Ahmad Khan is the managing partner and father of D3; the annual rent is Rs.170/- and premium of Rs.533/- was paid to the lessor; the theatre under the name and style New Talkies Picture Palace was constructed in 1933 by spending huge amount and they have been paying rents regularly; while so, D3 received notice on 21.10.1969 from the Wakf Board and he issued reply on 08.12.1970 stating that in view of the death of original lessor lease amount could not be paid as there was dispute between the successors of original lessor; lot of correspondence was exchanged between the plaintiff, D1 and D3; D3 has been requesting the plaintiff to get a direction from a court of law to receive the rents; D1 is the successor of original lessor whom the plaintiff also recognised at one point of time; inasmuch as the permanent lease enables the lessor to evict this defendant in case of default of annual rents continuously for 5 years; D3 has been paying rents regularly to D1; simultaneously he was requesting the plaintiff to take a direction from the court to receive the rents; the allegation that plaintiff assumed the management of Wakf properties is not to his knowledge and he is not a trespasser; since the plaintiff is in no way better than that of manager succeeding to the office of original lessor, the act of original lessor in granting permanent lease is binding on the plaintiff as his successor; D3 improved the suit land by constructing super structure under the permanent lease; plaintiff having demanded possession under communication dated 21.10.1969 failed to take any action and thus the suit claim for possession is barred by limitation; he made improvements and value of the theatre is Rs.60 lakhs and plaintiff cannot be allowed to

enrich himself without compensating the value to D3; he is not in illegal possession and he has been paying rents regularly.

e) D3 filed amended written statement stating that plaintiff—Board filed O.S.No.18 of 1974 before Sub-Court, Nellore for recovery of Khatib Inam wherein the plaint schedule property was described as part and parcel of said Khatib Inam; while filing the suit, plaint schedule property and eastern part of vacant site which was said to be the part of Khatib Inam were given up; hence the present suit is barred under Order II Rule 2 CPC.

f) He also filed further amended written statement pleading that in any event if the permanent lease is held as invalid or void, it may be held that he perfected the title of suit property by adverse possession; he thus prayed for dismissal of the suit.

g) Plaintiff—Board filed 1st rejoinder contending that O.S.No.18 of 1974 was filed for possession and the present suit is for eviction of D3 as tenant of suit property; in O.S.No.18 of 1974 the defendants therein were not tenants but purchasers of the property; therefore, the facts of both the suits are different and cause of action is also different; hence, though the present suit property is a part and parcel of S.No.257/IA in T./D./No.522, the parties of this suit were not included in that suit; the present suit properties are notified Wakf properties and none of the defendants have any right whatsoever.

h) Plaintiff filed 2nd rejoinder against the plea of adverse possession and contended that after completion of entire trial D3 came forward with an amendment claiming adverse possession which was not maintainable.

i) Basing on the above pleadings, the Trial Court framed the following issues for trial:

- 1) *Whether the plaint schedule property is not the Wakf property?*
- 2) *Whether the plaint schedule property is that of the property of the defendants?*
- 3) *Whether the plaintiff is entitled for the mesne profits as prayed for?*
- 4) *Whether the plaintiff is liable to pay compensation to 3rd defendant for the improvement made by him in the plaint schedule property?*
- 5) *Whether the plaintiff is entitled for possession of the plaint schedule property?*
- 6) *To what relief?*

Additional issue framed on 22.03.1996

Whether the 3rd defendant perfected his title to the suit property for adverse possession?

Additional issues framed on 28.11.1996

1. *Whether the suit is barred by time?*
2. *Whether the suit is also barred by virtue of Order II Rule 2 CPC?*

j) The Trial Court on appreciation of both oral and documentary evidence held on issue Nos.1 and 2 that plaint schedule property is Wakf property and it is not the absolute property of D1 and D2; on additional issue (framed on 22.03.1996) held that D3 has not perfected its title to the suit schedule property by adverse possession; on additional issues 1 and 2 (framed on 28.11.1996) held that suit is not barred by time and also

not hit under the provisions of Order II Rule 2 CPC; on issue No.5 it held plaintiff is entitled to possession of plaint schedule property; on issue No.3 it held that plaintiff is entitled for past mesne profits of Rs.36,000/- at the rate of Rs.1,000/- per month and also future profits till delivery of possession; on issue No.4 it held D3 is not entitled to compensation.

The Trial Court ultimately decreed the suit directing D3 to vacate and deliver vacant possession of that much extent of suit property which has been in its possession, after removing the super structures within four months and awarded past mesne profits of Rs.36,000/- and future profits at the rate of Rs.1,000/- per month from the date of suit till delivery of vacant possession. The Trial Court directed the plaintiff to consider the possibility of selling the suit property to D3 on market value as contemplated under Section 51 of Transfer of Property Act.

Hence the appeal by D3.

4) Pending appeal, R2 died and hence respondents Nos.4 to 9 were brought on record as his LRs. as per Court order dated 15.09.2015 in A.S.M.P.No.1653 of 2015.

5) Heard Sri N.Chandra Sekhar, learned counsel for appellant and Sri Shafath Ahmed Khan, learned Standing Counsel for Wakf Board.

6 a) Fulminating the judgment of the Court below, learned counsel for appellant would firstly argue that the Trial Court misread the documentary and oral evidence and held as if the suit property is Wakf property though record would clinchingly show that grant was in favour

of individual—Khatib Abdul Hak for doing Khatib service. Therefore, the grant is in favour of individual burdened with services. Merely because in Ex.A.1 the property is denoted as “Devadayam”, by itself it will not become a Wakf property and thereby the plaintiffs cannot lay any claim in the suit property. To buttress his argument, he cited *P.Radhakrishnaiah, J.Venkatarama Reddy, Tanguturu Raghava Reddy and Tanguturu Rami Reddy vs. Andhra Pradesh Wakf Board rep. by its Secretary and The Fathekhan Pet Mosque (Kalam Mosque) Managing Committee*¹. He would further argue, since the original grantee had executed a permanent lease in favour of five persons who are predecessors in interest of D3, plaintiff cannot seek for eviction of D3 from the premises. On this ground suit is liable to be dismissed.

b) Secondly, he would contend that even assuming that the suit property is the Wakf Property, still the suit is not maintainable as it was barred by limitation. In expatiation, learned counsel would argue, Khatib Mohammed Khadir Mohiddin Saheb, the original Khatib leased out the property in the year 1926 and he died in 1931. However, the Mosque authorities have not filed the suit for recovery of the suit schedule property from the defendants till 1988, though the authorities harped that the suit property is a Wakf property but not the service inam of the individual and the lessor had had no right to create lease, much-less permanent lease. Taking the Court through Article 134-B of the Limitation Act, 1908, learned counsel vehemently argued that the Manager of the Mosque was obligated to file the suit within 12 years

¹ MANU/AP/0657/2007=2007 Law suit (AP) 736

from the date of death, resignation or removal of the original lessor. Since the lessor admittedly died in 1931 and no suit was brought within 12 years thereafter, the suit was hopelessly barred. Learned counsel argued, the Trial Court committed grave error in holding suit was within time by relying on Article 96 of Limitation Act, 1963 and Section 66-G of Wakf Act, 1954. He would submit that when the suit is barred under the relevant provisions of an old Act, the plaintiff cannot take recourse under a new Act, which sets out a different period of limitation. On this proposition, he relied on the decision reported in *T.Kaliamurthi and another vs. Five Gori Thaikal Wakf and others*².

He thus prayed to allow the appeal.

7) Per contra, while supporting the judgment learned counsel for respondent argued that the Trial Court on consideration of oral and documentary evidence has rightly held that the suit property is the Wakf property. Defendants 1 and 2 who claimed independent right in the suit property have not filed any appeal and therefore, the appellant who is only a lessee under the predecessor of defendants 1 and 2 and as he has not been claiming any independent right in the suit property, he cannot challenge the finding of the Trial Court. He cited the decision in *Atyam Veerraju and others vs. Pechetti Venkanna and others*³ He vehemently contended that the finding against defendants 1 and 2 will be binding against D.3 being their lessee and therefore, he cannot, in this appeal challenge the right of the plaintiff over suit schedule property.

² AIR 2009 SC 840

³ AIR 1966 SC 629

Nextly, on the aspect of limitation, he would argue that the AP Wakf Board was constituted on 04-03-1961 and as per Section 66-G of Wakf Act, 1954, the suit was filed within 30 years from the date of such constitution and therefore, the suit was well within time. He would argue that Section 66-G would prevail over the Limitation Act, 1963. He would further argue that limitation cannot be reckoned from the date of death of the original lessor. He thus prayed to dismiss the appeal.

8) In the light of above rival arguments, the points for determination in this appeal are:

- 1) *Whether suit property is the Wakf property and whether appellant/D.3 being a lessee can challenge the finding of the Trial Court in this regard in the absence of appeal filed by D.1 and D.2?*
- 2) *Whether the suit claim is barred by limitation?*
- 3) *To what relief?*

9) **POINT No.1:** The case of the plaintiff is that the suit schedule property was endowed by Arcot Nawab in the year 1860 to Khatib Abdul Hak for the performance of Service of Jamia Mosque and Edgah at Nellore. It was a Wakf property but not the individual property. However, the Khatib had created permanent lease under Ex.B.1 to the association of five persons headed by Md. Nazeer Mohammed Saheb Ahmed Ansari on a payment of a premium of Rs.533.54ps on an annual rental of Rs.170/-. D.3 who is the successor of one of the original lessees is in possession. The original Khatib Mohammad Khadir Mohiddin died in 1931 issueless. There were rival claims between the legal heirs of

Khatib Khadir Mohiddin. One of the legal heirs i.e, Mohd. Hussain was ultimately declared as Khatib to the institution. Later the administrator of Wakf board in his proceedings No.A-1/83865/970 dated 01-11-1966 removed the said Mohd. Hussain Farooqi from his Khatibship as he alienated some of the properties endowed to the Mosque. He filed a Writ Petition in A.P High Court questioning his removal and the said Writ Petition was allowed directing the Wakf Board to give the fresh opportunity and enquire into the matter. He died on 13.07.1970. Later, the plaintiff Board issued fresh show cause notice on 04.11.1975 to D.1 and D.2 who are the son and wife of Khatib Mohd. Hussain Farooqi. They refused to appear for the enquiry and continued to alienate the properties without any right whatsoever. Further, they in collusion with D.3 received rents. While-so, the plaintiff issued notification on 07.05.1981 No.A-1/830/66 assuming the direct management of the Jamia Mosque and big Edgah services at Nellore. After assuming charge, the Inspector-Auditor, Nellore issued notice dated 25.06.1981 to D.3 calling upon him to pay the lease amount due to the Khatib services to the plaintiff. D.3 gave an irrelevant reply as if he was paying rents to D.1 and D.2 who had no right to receive. Hence the suit.

10) D.1 and D.2 in their turn denied the title of the plaintiff. Their case was that one Mohd. Khadir Mohiddin was the absolute owner of the plaint schedule land which he leased out under Ex.B.1 to five persons during his lifetime, he was receiving the rents. D.3 is the successor in interest of the original lessees and he is in possession of the same. Mohd.

Khadir Mohiddin died in the year 1931 issueless. D.1's father succeeded to his estate being his nearest heir and enjoying the same. He was receiving the rents from D.3. He died on 13.07.1970. On his death, D.1 and D.2 succeeded his properties including the plaint schedule property. Thus, since the death of D.1's father, D.3 has been paying rents to them. Plaintiff has nothing to do with the suit properties and hence he has no right to seek for recovery of possession.

11) Whereas D.3's case is that the schedule property was leased out under Ex.B.1-permanent lease to five lessees by Khatib Mohd. Khadir Mohiddin in compliance of the permission granted by the Government of Madras. One of the lessees by name Soudagar Ahmad Khan, who is Managing Partner, is the father of D.3. A Theatre under the name and style "New Talkies Picture Palace" was constructed in the year 1933 by incurring huge expenditure. The said Theatre is now owned by the firm called "The New Talkies Picture Palace", Nellore. D.3 and his predecessors have been paying annual rents regularly besides non-agricultural assessment tax. The plaintiff issued a communication on 21.10.1969 requiring the D.3 to handover possession of the schedule mentioned property. D.3 replied that since other defendants were seeking rent as the LR's of the original lessor, the plaintiff can get a direction from the Court of Law to receive the rents and lot of correspondence was exchanged between them in this regard. D.3 contended that he is in lawful possession of the property. It is his further case that in any event,

if the permanent lease is held to be invalid or void in law, his right to property by way of adverse possession may be declared.

12) I have given anxious consideration to the above pleas of the respective parties and also the evidence led by them and the judgment of the Trial Court. Having regard to the entries made in Ex.A.1—Inam Fair Register and Ex.A.2—Resettlement Register, wherein the property is mentioned as “Devadayam” and also having regard to the other entries, the Trial Court opined that the recitals in Exs.A.1 and A.2 would prove that the suit property bearing No.TD 522 was a service Inam property endowed to perform service in religious institutions but the property was not a personal inam. The Trial Court also took into consideration Ex.A.3—copy of Commissioner’s Survey Report and Ex.A.4—Gazette notification and observed that they would show that the suit property is the Khatib Inam service property endowed to perform Khatib services. The Trial Court observed, under Section 6 of the Wakf Act, after a publication was made under Section 5 declaring any property as Wakf property, the Board or Muthavalli or any person interested therein may institute a suit in Civil Court within one year but the defendants did not challenge the said Gazette Notification. The Trial Court further observed, the defendants did not produce any documents to show that the suit property was the personal property of D.1’s father or the original lessor. Ultimately, the Trial Court held that the suit property as the Wakf property.

13) I have gone through the findings of the Trial Court with reference to the above oral and documentary evidence and I find no illegality or irregularity therein. Apart from this, it is pertinent to note that the defendants 1 and 2 who claimed independent title to the suit property through their predecessor, did not carry-out any appeal. Therefore, as rightly contended by the counsel for respondent, the finding of the Trial Court regarding the title of the plaintiff became final as against defendants 1 and 2. In that view, the appellant/D.3 who is only a lessee under the predecessor of D.1 and D.2 cannot independently challenge the title of the plaintiff and also the finding of the Trial Court. Running the risk of pleonasm, it is reminded that D.3 both in his pleadings and evidence, only confined himself as a lessee and did not setup any independent title. Therefore, in this appeal, the argument of learned counsel for appellant that the suit property is a grant in favour of individual burdened with service and mere mentioning of the property as Devadayam will not make it as a Wakf property, cannot be accepted. Consequently, the decision in *P.Radhakrishnaiah, J.Venkatarama Reddy, Tanguturu Raghava Reddy and Tanguturu Rami Reddy*'s case (1 supra) is of no avail. This point is answered accordingly.

14) **POINT No.2:** The appellant claims that the suit is barred by virtue of Article 134-B of Limitation Act, 1908. The said Article reads thus:

Description of Suit	Period of limitation	Time from which period beings to run
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Article 134B: By the Manager of a Hindu, [Muslim] or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by previous manager for a valuable consideration.	Twelve years	The death, resignation or removal of the transferor
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His contention is that since the original Khatib namely Khatib Mohammed Khadir Mohiddin, who gave the suit property on permanent lease under Ex.B.1-lease deed dated 22.01.1926, died in 1931, the Successor-Manager of the Mosque ought to have filed the suit for recovery of the suit property within 12 years after his death but the suit was not instituted. While-so, after constitution of A.P Wakf Board, the Inspector-Auditor though issued notice under Ex.B.2—dated 21.10.1969 to D.3 stating that the suit property is a Wakf property and demanded D.3 to handover the property, he too did not institute the suit immediately. Ultimately the suit was filed only in the year 1987. Hence the suit is barred by limitation.

15) Whereas the Trial Court observed that A.P Wakf Board was constituted on 04.03.1961 and the limitation for filing the suit starts from the date of constitution of the Wakf Board. It further observed that Section 66-G of Wakf Act, 1954 which deals with the limitation for recovery of Wakf properties, was introduced under Wakf (Amendment) Act, 1954 and notified on 23.06.1986 and came into force since the said date. Section 66-G prescribed a period of 30 years for filing of a suit for recovery of possession of immovable properties notwithstanding anything contained in the Limitation Act, 1963. The Trial Court thus held

that in the instant case the period of limitation of 30 years commences from 04.03.1961 and therefore, the suit had to be instituted on or before 1991, whereas the suit was instituted on 19.11.1987 which was well within the period of limitation.

16) On a careful scrutiny of the provisions of Limitation Act, 1908 and Limitation Act, 1963 and also the provisions of Wakf Act, 1954, it must be held, the Trial Court committed mistake in computation of limitation. Admittedly, the suit property was leased out by the Khatib under Ex.B.1—lease deed dated 22.01.1926 and he died in 1931. As per Sec.134-B of Limitation Act, 1908 which was in vogue, the suit for recovery of the property had to be filed within 12 years from the date of his death, if the Mosque authorities were of the view that the Khatib had no right to enter into a permanent lease agreement. However, they have not initiated any proceedings till long after Wakf Board was constituted. It is trite law that limitation once starts will not stop in the middle. This aspect has been clarified under similar circumstances by a Division Bench of this High Court in *C.V.Purushotham vs. Chinna Jeeyangar Mutt Tirupati*⁴. Brief facts are that, the plaintiff-mutt filed suit in 1965 for a declaration that permanent lease executed by the-then Mathadipathi in 1898 and subsequent alienation on 19.04.1940 made by the father of defendants are void, inoperative and not binding on the plaintiff-mutt and for possession and for mesne profits. The plaintiffs contended, the permanent lease constituted an alienation which is not binding on the plaintiff-mutt. The defendants *inter alia* contended that the suit was

⁴ AIR 1975 AP 153

barred by limitation. The Trial Court dismissed the suit holding that the defendants perfected their title by adverse possession. In the appeal preferred by the plaintiff, a Single Judge held suit was not barred by limitation and accordingly decreed the suit. The Defendants preferred Letters Patent Appeal before the Division Bench. Before the Division Bench it was argued that Article 134-B under old Limitation Act, 1908 would apply but not Article 96 of new Limitation Act, 1963. The difference between these two provisions is that whereas under Article 134-B suit has to be filed within 12 years after the death, resignation or removal of the transferor, such a suit under Article 96 can be filed within 12 years from the date of death, resignation or removal of the transferor **or the date of appointment of plaintiff as Manager of the endowment, whichever is later.** It was contended that when the limitation prescribed was expired under old Act i.e, Indian Limitation Act, 1908, the new Act i.e, the Limitation Act, 1963 will not enable to file the proceedings as per Section 31 of the Limitation Act, 1963.

The above argument was found favour with the Division Bench. It held that the cause of action which once accrues continues and the right of the mutt would be extinguished in regard to that property at the end of the period prescribed by law of Limitation. Each succeeding Muhanth does not get revival of the cause of action in his favour. The appointment of successor was never considered to give fresh start of limitation under the law as it stood prior to 1963. It further held, as the suit had to be filed within 12 years from the date of death, resignation or removal of the

transferor under Article 134-B of Limitation Act, 1908, the period of limitation prescribed by that Act had expired before the commencement of the new Act. Hence, by reason of Section 31 of the Act, nothing in the Act would enable any such suit to be instituted. Hence Article 96 had no application and the suit was barred.

a) In similar case, Hon'ble Apex Court in *T.Kaliamurthi*'s case (2 supra) has held that Article 134-B of Limitation Act, 1908 would apply but not Article 96 of Limitation Act, 1963.

17) In the light of above precedential jurisprudence, it is clear that in the instant case the right to file suit was barred by 1943. Therefore, the provisions of Limitation Act, 1963 or Section 66-G of Wakf Act, 1954 which came into force w.e.f. 23.06.1986 have no application. Unfortunately, the Trial Court has not considered these aspects. The point is answered accordingly.

18) **POINT No.3:** In the result, this appeal is allowed by setting aside the impugned decree and judgment passed by the Trial Court. Consequently, the suit in O.S.No.202 of 1988 on the file of Subordinate Judge, Nellore is dismissed. The parties shall bear their own costs throughout.

As a sequel, pending miscellaneous petitions, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 22.09.2017
Murthy/scs