

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.10.2018

Pronounced on : 21.01.2019

CORAM

THE HONOURABLE MS. JUSTICE P.T.ASHA

**C.R.P(NPD).No.1234 of 2010
and M.P.No.1 of 2010**

1. Kasim Maraicair
 2. Kannuvappa @ Abubakkar
 3. Sathick Maraicair
- ... Petitioners

Vs.

Haji Kathija Beevi Trust

... Respondent

Prayer ::

The Civil Revision Petition is filed under Article 227 of the Constitution of India against the order dated 17.02.2010 made in W.O.P.No.2 of 2007 on the file of Subordinate Judge, Nagapattinam.

For Petitioners : Mr.M.Sriram

For Respondent : Mr.M.S.Palaniswamy

ORDER

The above Civil Revision Petition arises against the order of the Wakf Tribunal(Subordinate Court, Nagapattinam) in WOP.No.2 of 2007.

2. The brief facts which are necessary for disposing of the above Civil Revision Petition are as follows:

The respondent herein had preferred Wakf O.P.No.2 of 2007 on the file of the Wakf Tribunal(Subordinate Judge, Nagapattinam) for a decree of permanent injunction restraining the petitioners herein from interfering with their peaceful possession and enjoyment of the property scheduled in the original petition. According to the respondent herein the schedule property belongs to Haji Kathija Beevi trust. The founder trustee Haji Kathija Beevi constituted a trust comprising of herself and her husband Haji Abubucker Maraikair as trustees till their life time and thereafter nominated their son Vanjore Maricair and their daughter Latheefa Beevi as joint trustees. After the demise of the founder trustee and her husband, Vanjore Maricair and Latheefa Beevi assumed charge as trustees and they were administering the Trust. However Vanjore Maraikair started to deny the trusteeship of Latheefa Beevi and hence she filed a suit in O.S.No.45 of 1975 and obtained a decree for turn management, against which an appeal was filed before

this court and in the appeal, the decree was modified with regard to the sharing of surplus income by the turn trustees. It is the further case of the respondent that after Vanjore Maraicair, his son Azad @ Ibrahim Maraicair acted against the interest of the Trust and went to the extent of alienating the trust property. The respondent further contended that the deceased turn trustee Azad @ Ibrahim let out the shop building on the southern front side to the second petitioner herein and the second petitioner even without paying rent squatted over the property and even claimed that the property has been enjoyed by Vanjore Maraicair as his own property. The respondent also stated that since the petitioners attempted to take possession forcibly from them on 22.04.2007, they are compelled to file the Wakf O.P. for the relief of injunction.

3. The petitioners herein has resisted the above Original Petition by inter alia contending that the petitions were barred for non joinder as necessary parties, since the Wakf Board had not been impleaded as a party. They would further contend that the person who had initiated the proceedings as trustee namely Ummalhutha was not the eldest legal heir as contemplated under the trust deed dated 12.07.1939 and therefore the petition filed by her was not maintainable. It was their specific case that the trustee was Chinnachi Ponnu Nachiar and the

petition ought to have been filed by her. It was their case that the front portion of the Wakf property consisted of three shops with two shops being situate on the Northern side and one shop on the Southern side. The said shop on the Southern side is always enjoyed by Vanjore Maraicaire as his own property and on his death his son Ibrahim Marakkayar had been enjoying the property and after him his sons were in enjoyment. It was their specific case that the shop in question bearing Door No.71 and was all along enjoyed as a separate property. On 14.01.2003, Ibrahim Marakkayar had settled this property in favour of the second petitioner. It was also their case that by the trust not taking possession of the property from the date of the settlement was wrong and the second petitioner continued to live in the suit property. It was also the case that the tenant who had been residing in the said property had surrendered possession to the second petitioner and the possession of that property is in the hands of the second petitioner. It is being enjoyed as an extension of the hotel being run by the second petitioner in the premises. The petitioners would contend that their open possession of the said property as absolute owner has not been objected by the respondent trust and therefore it cannot now be questioned. On the contrary, it is the case of the petitioners, that it was the brother of the Trustee of the respondent who had forcibly entered the premises by breaking open

the lock.

4. In view of the objection taken by the defendant with reference to the non impleadment of Chinnasi Ponnu Nachiyar, the respondent herein had impleaded the said Chinnasi Ponnu Nachiyar as the fourth respondent in the above Original Petition. After notice had been served on the said fourth respondent, she would contend that Ummalhutha was not a trustee as she was not the eldest legal heir and therefore filing of the petition by her was wrong. The Chinnasi Ponnu Nachiyar further argued that she was the trustee of the property.

5. The respondent herein has filed the suit for an injunction restraining the petitioners from interfering with its possession and enjoyment of the petition property, which is an extent of 300 Sq. feet(20 feet North South and 15 feet East West) situate in the northern side of Survey No.1259 which is situated in Block 15 and Ward 1 of the Nagapattinam Municipality Ward.

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6. The Tribunal below after an extensive examination of the oral and documentary evidence came to the conclusion that the suit as filed is maintainable and that the respondent was entitled to the decree as prayed for. Challenging the said order the petitioners who were the

respondents in the W.O.P is before this Court.

7. Mr.M.Sriram, appearing on behalf of the petitioners would contend that the failure on the part of the respondent trust to implead the Wakf Board was fatal to the case, since under the provisions of Section 90 of the Wakf Act, 1995 (hereinafter referred to as the Act) it is mandatory to implead the Wakf Board as a party in all proceedings in which the issue relating to the title and possession of the Wakf property. He would further contend that Ummalhutha who had filed the petition was not the trustee since she did not come within the description of the trustee as provided under the Trust Deed. They would further contend that the petitioners have proved their continuous possession of the petition mentioned property and therefore the suit for bare injunction is liable to be dismissed. The Counsel would further argue that Chinnachi Ponnu Nachiar was the rightful trustee as per the dicta of the wakifs since she was the eldest heir of the branch of the first daughter of Jaila Nachiar and therefore her non-impleadment would be fatal to the case of the respondent Trust.

8. Per contra Mr.M.S.Palaniswamy, who entered appearance on

behalf of the respondent's trust would contend that the filing of the petition was very much in order. Since the Wakf Board had been intimated by way of a summons about the petition this would be in compliance of the provisions of Section 92 of the Act. He would further contend that possession of the suit property was with the respondent and therefore the suit as filed is maintainable.

9. Heard the petitioners and the respondents. A perusal of the papers particularly the trust Wakf Deed dated 07.12.1939 would show that the respondent trust had been created by Haji Kathija Beevi and her husband one Abu Bucker Maraikair. As per the terms of the Wakf deed the husband and wife were to act as trustees through their life and on their demise their son Vanjore Maraikair and daughter Latheefa Beevi were to administer the trust and thereafter the eldest among the legal heirs were to administer the trust. It is seen that after the death disputes arose between the legal heirs of the original Waqifs and this resulted in the filing of O.S.No.45 of 1971, which is subsequently taken up on Appeal No.572 of 1972.

10. This Court had directed that the son and daughter shall administer the trust under a turn system where each of them would be entitled to hold office for a period of one year. After the death of the

original trustees Vanjore Maraikair and Latheefa Beevi, Ibrahim Maraikair the son of Vanjore Maraikair and Jaila Nachiar the second daughter of Latheefa Beevi became trustees. Jaila Nachiar was no doubt, not the eldest member of the family, this was on account of the fact that the eldest daughter had predeceased her mother and on her mother's death it was Ummalhutha's mother who became the trustee and thereafter after her trusteeship the mantel fell on the shoulders of Ummal Hutha.

11. It further appears from the petition filed by the respondent that the suit 5th item of the property was vacated by the tenant and possession was handed over to the respondent trust. The petitioners herein who are the sons of Ibrahim Marakkayar had requested the respondent trust to give the said premises on lease to them. However considering the fact that they were not paying any rent with reference to another portion in their occupation the trustees refused to grant them a lease. Enraged by this refusal, the respondents on 22.04.2007 broke open the lock and tried to enter possession of the petition premises. On 23.04.2007 the petitioner trust gave a complaint to the Police, however no action is taken to date.

12. It is further seen that the petitioners are challenging the

order of the Wakf Tribunal on three grounds:-

- a) That the Wakf Board has not been made a party.
- b) Ummalhutha who had instituted the petition as the trustee was not the trustee as per the trust deed.
- c) the possession of the property was never with the trust but always with the revision petitioners.

13. As far as first objection, it is the case of the petitioner that under Section 90(1) of the Act, the Waqf Board has to be made a party to any proceedings initiated in respect of the Wakf property and failure to do so would render the proceedings to be invalid.

14. Section 90 of the Wakf Act, would read as follows:-

90. Notice of suits, etc., by Courts.—

(1) In every suit or proceeding relating to a title to or possession of a wakf property or the right of a mutawalli or beneficiary, the Court or Tribunal shall issue notice to the Board at the cost of the party instituting such suit or proceeding.

(2) Whenever any wakf property is notified for sale in execution of a decree of a Civil Court or for the recovery of any revenue, cess, rates or taxes due to the Government or any local authority, notice shall be given to the Board by the Court, Collector or other person under whose order the sale is notified.

(3) In the absence of a notice under sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the Court in this behalf.

(4) In the absence of a notice under sub-section (2), the sale shall be declared void, if the Board, within one month of its coming to know of the sale, applies in this

behalf to the Court or other authority under whose order the sale was held.

15. Reading of the above Section would clearly indicate that what is contemplated under the Act was only to put the Wakf Board on notice about any suit or proceeding pending in respect of the Wakf property particularly when that suit or the proceeding relates to the title or possession of a Wakf property, or the rights of mutawalli or the beneficiary.

16. In the instant case, as rightly pointed out by the tribunal below, in answer to the first point for consideration notice has been sent to the Wakf Board by the respondent herein by paying batta and summons, the summons has also been served on the Wakf Board. However the Wakf Board has not chosen to contest the said application. The down side of not issuing a notice under Sub Section (2) of Section 90 is that any decree or order being passed would be declared void if the Wakf Board within six months of its coming to know about the suit of proceeding and under Section 90(3) of the Act applies to the court in this behalf. In the instant case the petitioner has issued summons to the Wakf Board and the same has been received by them but however the Board has not chosen to enter appearance or file any application. Therefore the instant case will not come within the

mischief of sub section (2) & (3) of Section 90.

17. The next point that has been urged on the side of the revision petitioner was that the Ummalhutha was not clothed with the right to institute the suit as she was not the trustee of the respondent trust and that it was Chinnachi Ponnu Nachiar who was the trustee, this argument of the revision petitioners would also fail on account of the following reasons:

17.1. It is seen that the mother of Chinnachi Ponnu Nachiar, Ummani @ Syed Sulthan Beevi had predeceased her mother Latheefa Beevi and Chinnachi Ponnu Nachiar was her only daughter. Even during the life time of Latheefa Beevi, Jaila Nachiar was the surviving daughter and she was made the trustee even during the life time of the Latheefa Beevi. The recitals of the trust deed with reference to the administration of the trust stipulates that it is "*only the eldest legal heir of the deceased trustee*" who become the trustee. As already submitted though Chinnachi Ponnu Nachiar's mother was the eldest daughter, however since she had predeceased her mother, her sister Jaila Nachiar who was the next eldest had become the trustee and therefore on her demise and as per the terms of the trust deed Ummalhutha would automatically be treated as the trustee since she

was the eldest legal heir of the deceased trustee (Jaila Nachiar).

18. The last limb of the argument was that the possession of the property was with the revision petitioners. The tribunal below has extensively considered this issue and has come to the conclusion that the petitioners who claim to have vacant possession of the suit property from the tenant has not been proved that it was the suit property which the tenant had handed over. The suit property bears Door No.71 C, whereas the property which is described in the surrender letter Ex.R2, describes the Door Nos. as 71 A and 71 B. Therefore the petitioners have not proved that they have taken possession of the suit property from the tenant. The tribunal has also frowned upon the settlement deed Ex.R1 which has been executed by the Ibrahim Marakkayar in favour of the second defendant. Once the properties have been dedicated to the Wakf no individual would have any right, title or interest over the suit property and therefore any document of title created in respect of the said property is invalid. The tribunal below has also taken note of the discrepancy between the evidence of R.W.1 and R.W.2 with reference to the usage of the property in question and the cumulative reading of all these circumstances would clearly indicate that the petitioners are not in possession of the suit property. I find no infirmity in the order passed

by the Tribunal below.

19. In the result, the Civil Revision Petition therefore stands dismissed. The order passed in W.O.P.No.2 of 2007 dated 17.02.2010 on the file of Subordinate Judge, Nagapattinam, is confirmed. However there shall be no order as to costs. Consequently, the connected Miscellaneous petition is closed.

21.01.2019

Index : Yes

Internet : Yes

Speaking Order / Non Speaking Order

msvm

To

The Sub-Court[Wakf Tribunal],
Nagapattinam.

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P.T.ASHA,J.

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Pre-delivery Order in
C.R.P(NPD).No.1234 of 2010

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