Sayed Muhammed Mashur Kunhi Koya ... vs Badagara Jumayath Palli Dharas ... on 19 August, 2004

Equivalent citations: AIR 2004 SUPREME COURT 4365, 2004 AIR SCW 5033, (2004) 6 JT 556 (SC), (2004) 2 CLR 413 (SC), (2004) 2 CGLJ 416, (2004) 57 ALL LR 320, (2004) 21 ALLINDCAS 4 (SC), 2005 (1) ALL CJ 207, 2005 (1) SLT 469, 2004 (9) SRJ 259, 2004 (6) JT 556, 2005 ALL CJ 1 207, 2004 (7) SCC 708, 2004 (2) CLR 413, 2004 (3) LRI 947, 2004 (7) SCALE 53, (2004) 74 DRJ 62, (2004) 6 SUPREME 272, (2004) 7 SCALE 53, (2005) 1 CIVILCOURTC 670, (2005) 1 LANDLR 192, (2005) 1 MAD LJ 194, (2004) 97 REVDEC 426, (2004) 56 ALL LR 737, (2004) 3 RECCIVR 785, (2004) 2 WLC(SC)CVL 498, (2004) 22 INDLD 86, (2004) 4 ALL WC 2893, (2004) 4 CIVLJ 791, (2004) 4 CURCC 1, (2004) 112 DLT 298

Author: Shivaraj V. Patil

Bench: Shivaraj V. Patil, B.N. Srikrishna

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           CASE NO.:
Appeal (civil)  1864 of 2003

PETITIONER:
Sayed Muhammed Mashur Kunhi Koya Thangal

RESPONDENT:
Badagara Jumayath Palli Dharas Committee & Ors.

DATE OF JUDGMENT: 19/08/2004

BENCH:
Shivaraj V. Patil & B.N. Srikrishna

JUDGMENT:
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J U D G M E N T Shivaraj V. Patil J.

The first respondent (plaintiff) filed the suit O.S. No.91/84 for declaration of its title and for recovery possession of the plaint schedule property. The appellant (defendant no. 2) filed written statement in the suit contending that the suit was not maintainable; the plaintiff had no title to the plaint schedule land; the agreement dated 13.2.1973 did not confer any title on the plaintiff and the said agreement was signed only by five members of the tarwad out of about 100 members and it did not convey legal or valid title over the properties in question on the plaintiff. In addition, the defendant no. 2 resisted the suit on some more grounds. Trial court, after a full dressed trial,

appreciating the evidence placed on record, decreed the suit declaring that the plaintiff-committee has got title to the property as mutawalli in management of the mosque and common graveyard. The trial court also granted decree for recovery of possession of plaint schedule property from the defendant no. 2 with a direction that the defendant no. 2 should demolish the alterations made by him during the pendency of the suit and surrender possession of the premises with the structure that existed prior to the institution of the suit. The defendant no. 2 was also restrained by permanent injunction from demolishing or altering the tomb which existed on the property at the time of the institution of the suit. The defendant no. 2 filed appeal A.S. No. 187/87 in the court of the District Judge. The first appellate court, on consideration and reappreciation of evidence recorded the findings against the plaintiff. It allowed the appeal and dismissed the suit holding that the plaintiff failed to establish its entitlement to the suit property and that it was not entitled for recovery of possession of the same. The first appellate court also found against the defendant no. 2 in regard to his claim of title over the suit property. Aggrieved by the judgment and decree of the first appellate court, the plaintiff filed second Appeal No. 638/88-A in the High Court. The defendant no. 2 also filed cross objections in so far as the findings of the district court were against him. The learned Single Judge of the High Court referred the appeal to a Division Bench for consideration and decision on the following question of law "The question to be decided is whether Section 85 will operate in respect of the pending proceedings which has not become final."

The Division Bench of the High Court allowed the second appeal filed by the plaintiff and dismissed the cross objections filed by the defendant no. 2. The High Court, by the impugned judgment, held that transfer of mutawalliship in favour of the plaintiff was not valid. It also held that Exbt. A-2, the agreement dated 13.2.1973, was not valid in the eye of law but at the same time the Division Bench held that the plaintiff- committee was entitled to sue for recovery of possession of the plaint schedule property. The High Court also gave directions to the State Wakf Board to exercise its power under Section 63 of the Act to appoint a mutawalli in place of the plaintiff. Hence defendant no. 2 is in appeal before us calling in question the validity and correctness of the impugned judgment and decree.

The High Court in the impugned judgment has recorded that the following substantial questions of law arose for consideration:-

> "1. Whether this court is competent to decide the question of Wakf in view of Section 85 of the Wakf Act, 1995?
>
> 2. Whether the right of Mutawalli is transferable?
>
> 3. Was the court below correct in holding that the plaintiff was not legally entitled to file the suit?"

On the first two questions, the High Court found against the plaintiff observing that the civil court had jurisdiction to try the suit and the transfer of mutawalliship was not valid. In dealing with the third question, the High Court accepted the alternative argument of the learned counsel for the plaintiff that even if Exbt. A-2, the agreement dated 13.2.1973, was invalid, since the plaintiff was

acting as a mutawalli in fact, he was entitled to recover possession. In doing so, the High Court took note of the definition of mutawalli given in the Wafk Act, 1954 that mutawalli includes a person who acts as mutawalli; referred to the written statement filed by the Wakf Board wherein it had been stated that the plaintiff-committee was very regular in submitting annual statement of accounts to the Wakf Board and in payment of annual contribution to the Board as per the provisions of the Act. The High Court relying on the decisions in Moideen Bibi Ammal vs. Rathnavelu Mudali [AIR 1927 Madras 69] and Syed Mustafa Peeran Sahib & Anr. Vs. State Wakf Board rep. by its Secretary, Madras [AIR 1969 Madras 66] concluded that a person acting as a mutawalli is entitled to the rights and duties of the mutawalli. In this view, the High Court held that the plaintiff-committee was entitled to sue for recovery of possession. The High Court rejected the contention of the second defendant that the document created in favour of the first defendant was valid. The case of the second defendant that his father was in possession from 1948 was also rejected. In the result, by the impugned judgment, the judgment of the first appellate court was set aside and a decree was passed entitling the plaintiff to recover possession of the plaint schedule property from the second defendant. A further direction was given to the Wakf Board to exercise its power under Section 63 of the Wakf Act and to appoint a mutawalli in place of the plaintiff making it clear that the decree granted to the plaintiff could be executed by the plaintiff or if the plaintiff is removed, by another mutawalli appointed by the Wakf Board. It may be stated that the plaintiff-committee appeared to be satisfied with the impugned judgment as it has neither filed any appeal nor cross- objections aggrieved by it.

Shri R.F. Nariman, the learned senior counsel for the appellant, contended that the High Court committed a serious error in reversing the judgment of the first appellate court on a so-called substantial question of law without formulating it so as to put the parties on notice; such a course adopted by the High Court was contrary to the mandatory requirement of Section 100 of Civil Procedure Code. The reversal of the judgment of the first appellate court on a question of fact under Section 100 of Civil Procedure Code, that too in the absence of any pleading issue and supporting evidence, cannot be sustained. In opposition, Shri T.L.V. Iyer, the learned senior counsel for the respondents, made submissions supporting the impugned judgment. According to him, having regard to the definition of mutawalli given in Section 3(f) of the Wakf Act, 1954, the plaintiff-committee was mutawalli by virtue of the fact that it was acting as a mutawalli even assuming that Exbt. A-2, the agreement dated 13.2.1973, was invalid. The learned senior counsel, referring to the very judgments referred in the impugned judgment, in particular the case of Moideen Bibi Ammal (supra), submitted that no fault can be found with the impugned judgment. He added that when the High Court has done substantial justice by the impugned judgment, this Court may not interfere with the same exercising jurisdiction under Article 136 of the Constitution; doing so may amount to allowing a trespasser, i.e., the appellant, to continue in possession of the suit property.

It does appear to us from the impugned judgment that the substantial questions of law were formulated for consideration in the course of writing the judgment. The learned Single Judge referred the second appeal to the Division Bench only on one question of law already referred to above. Be that as it may, the parties were not made known about the substantial questions of law if formulated that arose for consideration as required under Section 100 of Civil Procedure Code so

that they could address on such a substantial question of law. In this case, although findings have been recorded against the plaintiff on questions 1 and 2, on the third question, the defendant No. 2 had no opportunity to put forth his case. This, in our view is a serious infirmity being contrary to requirement of Section 100 of Civil Procedure Code. It is plain and well-settled that in order to claim a decree for declaration of title and for recovery of possession in the civil suit the plaintiff had to essentially plead necessary facts so that the defendant could meet that case in the written statement and the parties could adduce evidence on such claims. Our attention was drawn to plaint to show that there was no such pleading. It is clear from the perusal of the plaint that the plaintiff did not plead the case that alternatively it was acting as mutawalli as a matter of fact even though Exbt. A2 was illegal and mutawalliship could not be validly transferred. No issue was raised by the trial court as to whether the plaintiff was a mutawalli as per Section 3(f) of the Wakf Act 1954. Even before the first appellate court, the only point that was taken up for consideration was "Whether the first respondent is entitled to the declaration of title to the plaint schedule property, recovery of possession of the plaint schedule property along with the building situated therein on the strength of plaintiff's title and for a permanent prohibitory injunction restraining the appellant from demolishing or altering the existing building, tomb, situated in the plaint schedule property". No doubt, it was brought to our notice that the trial court in its judgment has stated that the plaintiff-committee was actually acting as a mutawalli but the first appellate court has clearly pointed out that the definite case pleaded by the plaintiff was based on the title to the plaint schedule property by virtue of Exbt. A-2 and that it was not a specific case in the pleading of the plaintiff that by virtue of definition of mutawalli under 1954 Wakf Act the plaintiff-committee actually acting as a mutawalli was entitled for relief. In this case, the first appellate court in para 26 of its judgment has observed thus:-

> "26. It would appear from a reading of the judgment of the lower court that the lower court proceeded on the footing that once it is found that the title on the plaint schedule property set up by the appellant is not established the first respondent who filed the suit for declaration of title and recovery of possession on the strength of title on the plaint schedule property is entitled to succeed in the suit. It appears that the lower court forgot the cardinal principle in a suit for declaration of title and recovery of possession on the strength of title, the plaintiff can succeed only on establishing his title to the plaint schedule property and he cannot succeed on the weakness of the case put forward by the defendant. My foregoing discussions clearly establish that the first respondent has not succeeded in establishing its title to the plaint schedule property to obtain the declaration of title and recovery of possession of the plaint schedule property though rival title to the plaint schedule property set up by the appellant is also found against by him. Therefore, it is clear that the first respondent is not entitled to the declaration of title to the plaint schedule property and recovery of possession of the plaint schedule property along with the building situated therein on the strength of the plaintiff's title and for the permanent prohibitory injunction restraining the appellant from demolishing or altering the existing building tomb situated in the plaint schedule property."

As is evident from the impugned judgment, the High Court took into consideration the written statement filed by the Secretary, Wakf Board wherein it has been stated that the plaintiff-committee was very regular in submitting annual statement of accounts to the Wakf Board and in payment of annual contribution to the Board as per the provisions of the Act in support of the view that the plaintiff was actually acting as a mutawalli. This approach, in our view, is not correct. The written statement filed by Wakf Board could not bind the defendant no. 2. Further any statement made in the said written statement could not be accepted against the defendant No. 2 unless it was established on the basis of evidence. The decision of Moideen Bibi Ammal (supra), in our view, does not help the plaintiff. To apply the said decision, necessary facts ought to have been pleaded and established. In the case on hand, as already noticed above, neither there was pleading specifically in that plaint as to the plaintiff actually acting as a mutawalli to come within the scope of Section 3(f) of 1954 Wakf Act nor acceptable and sufficient evidence was placed on record to prove it as a fact. In the situation, the aforementioned decision has no application to the case of the plaintiff. When the plaintiff came forward specifically pleading that he was entitled for declaration of title and for recovery of possession of the plaint schedule property based on the agreement Exbt. A-2 dated 13.2.1973, it could succeed only on the basis of validity of Exbt. A-2 and the validity of transfer of mutawalliship in its favour. Since all the courts have concurrently found that mutawalliship could not be validly transferred in favour of the plaintiff-committee under Exbt. A2, the suit filed by the plaintiff ought to have been dismissed. The plaintiff could only succeed on the strength of its case and not on the weakness found in the case of the defendant, if any. The first appellate court having elaborately considered the evidence placed on record in the light of the pleadings of the parties had come to the right conclusion in dismissing the suit of the plaintiff. The High Court in second appeal, in our view, was not right in upsetting the findings of fact recorded by the first appellate court, that too without putting the parties on notice on the substantial question of law. Even otherwise, the finding of the High Court on question no. 3 cannot be sustained when such a case did not arise for consideration in the absence of necessary pleading in the plaint in that regard. More so when the case of the plaintiff was based clearly on title said to have been derived under Exbt. A-2.

Under the circumstances and in the light of what is stated above, the impugned judgment cannot be sustained. In the result, the appeal is allowed, the impugned judgment is set aside except the direction given to the Wakf Board to act under Section 63 of the Wakf Act, 1995 and the suit filed by the plaintiff is dismissed. In other words, the direction given by the High Court to the Wakf Board to exercise power under Section 63 of the Wakf Act, 1995 is maintained. In case any of the parties wants to challenge that the property in question is not a wakf property, it is open to such party to seek appropriate remedy in accordance with law. No costs.