

Karnataka Board Of Wakf vs Government Of India & Ors on 16 April, 2004

Bench: S. Rajendra Babu, G.P. Mathur

CASE NO.:

Appeal (civil) 16899 of 1996

PETITIONER:

Karnataka Board of Wakf

RESPONDENT:

Government of India & Ors.

DATE OF JUDGMENT: 16/04/2004

BENCH:

S. RAJENDRA BABU & G.P. MATHUR

JUDGMENT:

J U D G M E N T [With C.A.Nos. 16900/1996 & 16895/1996] RAJENDRA BABU, J. :

Three suits were filed by the first respondent in each of these cases seeking for a declaration that notifications issued by the Karnataka Board of Wakf, i.e., the appellant before us, showing some of the defendants to be illegal and void or in the alternative, to declare the first respondent as owner of the suit properties on the ground that they have perfected their title by adverse possession and consequential relief for permanent injunction. There are three sets of properties in each of these three matters. One is CTS No.24 of Ward No.VI, described as "Karimuddin's Mosque", another is CTS No.36 of Ward No.VI, described as "Macca Masjid" and the other is CTS No.35 of Ward No. VI, described as " Water Tower". All of them were situated at Bijapur.

The claim made by the first respondent is that they acquired the suit property under the Ancient Monuments Preservation Act, 1904 (Ancient Monuments Act) and a notification has been published in that regard and the suit property had been entered in the Register of Ancient Protected Monuments incharge of the Executive Engineer. Thereafter, the Government of India enacted the Ancient Monuments And Archaeological Sites and Remains Act, 1958 and the suit property came to be under the management of the Department of Archeological Survey, Government of India. It is asserted by the first respondent that in all the relevant records, the name of the Government of India has been shown as the owner of the suit property and that they came to know that the defendants got published a notification No.KTW/531/ASR-74/7490 dated 21.4.1976 showing that the suit property as having been declared as 'Wakf Property' in terms of section 26 of the Wakf Act, 1954 and was

also stated to have been published in the Gazette. Inasmuch as the suit property since inception was under the ownership of the plaintiff with lawful possession thereof, defendants could not have made any claim thereto nor get the same declared as Wakf property. The defendants contested this claim of the plaintiffs in the original suits and that after following due procedure publication has been made in the Karnataka Gazette in terms of Section 67 of the Karnataka Land Revenue Act and the order passed by the concerned officer is binding on the plaintiff and, therefore, the plaintiff cannot claim any ownership on the ground of adverse possession.

While this is the stand of the Wakf Board, the appellant before us, and the other defendants described as to be "mutawallis" of the Wakf property, stated that one of the Arab Preachers, Peer Mahabari Khandayat came as a Missionary to Deccan as early as AD 1304 and occupied whole Arkilla and erected "Mecca Masjid" according to established customs to offer prayer which is surrounded by a vast open area. The said property had all along for seven centuries been treated as Wakfs and have been since after the time of Peer, managed, looked after and maintained by Sajjada Nashin from time to time. No one has interfered with their right. They claim that they have appropriate sanads to show that the property in question is Wakf property and that another portion of the suit property also belongs to the Darga of Peer Mahabari Khandayat and Chinni Mahabari Khandayat Darga Arbkillia, Bijapur and, therefore, the same has been appropriately entered in the Wakf Register.

The trial court raised several issues in the matter and gave a finding that on a consideration of the oral and documentary evidence in the case it is clear that even prior to the introduction of the Survey Department at Bijapur, the Government of India had taken these properties as ancient monuments and they are protecting them by keeping appropriate watch over these monuments but now the defendants have come forward contending that these properties are Wakf properties and they have nothing to show that even after the demise of Peer Mahabari Khandyayat they remained in the possession of the same. The properties in question were acquired by the Government of India as long back as 1900 and they started preserving them as important historical monuments and they remained in possession and enjoyment of them. This was clear both from oral and documentary evidence and on that basis, the Trial Court held that they are owning and managing the suit properties. The Trial Court also gave a finding that the Wakf Board itself declared these properties as Wakf properties without properly following the relevant provisions of the Wakf Act and without following due procedure prescribed therein and in a case where there is a dispute as to who is a stranger to the Wakf, a mere declaration by the Wakf Board will not bind such person and on that basis the Trial Court decreed the suit.

The matter was carried in appeal. A Division Bench of the High Court examined the matter once over again and affirmed the findings of the Trial Court. The Division Bench also noticed that at the end of the arguments the appellant made a submission that as they have not produced some of the important documents, the matter may be remanded to the Trial Court in order to enable them to produce the said documents and with a direction to the Trial Court for a fresh disposal in accordance with law. The High Court did not allow the plea raised by the appellant that there are documents in question which will go to the root of the matter or which would be necessary in terms

of Order XLI, Rule 27, CPC to permit them to adduce further evidence and on that basis rejected that claim. The High Court affirmed the various findings given by the Trial Court.

In the circumstances, the learned counsel for the appellant, reiterated the claim made before the High Court that they should be permitted to adduce further evidence before the court to substantiate their claim but when the matters were pending before the Trial Court and the High Court they had ample opportunity to do so. If they had to produce appropriate documents, they could have done so and also it is not clear as to the nature of the documents which they seek to produce which will tilt the matter one way or the other. The scope of Order XLI, Rule 27, CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the court to pronounce proper judgment. In this view of the matter, we do not think there is any justification for us to interfere with the orders of the High Court. However, in view of the arguments addressed by the learned counsel for the appellant, we have also gone into various aspects of the matter and have given another look at the matter and our findings are that the view taken by the High Court is justified. However, one aspect needs to be noticed. The High Court need not have stated that the first respondent is entitled to the relief even on the basis of adverse possession. We propose to examine this aspect.

The case advanced by the Appellants is; that one Arabian saint Mahabari Khandayat came to Bijapur by around 13th century, acquired certain properties (suit property) and constructed 'Mecca Mosque' which is under the management of the lineal descendants of the said saint; that by virtue of Notification bearing No. KTW/531 ASR/74/7490 dated 21/04/1976 issued by Appellant and Karnataka Gazette Notification page No. 608/Part VI dated 08/07/1976 they became absolute owners and title holders of the suit property; that pursuant to the circulars dated 08/06/1978 and 22/01/1979 the Deputy Commissioner of the Districts were instructed to handover possession of any Wakf Properties that are under the possession of any Government Department; that by virtue of the said circular Assistant Commissioner, Bijapur held enquiry under section 67 of the Karnataka Land Revenue Act, 1964 and arrived at the conclusion that the suit property is a Wakf Property; that the alleged acquisition by the Respondent itself is a concocted story; that the Notification and the Gazette publication itself is a notice to all concerned and the Respondent failed to reply to this notice; that the original suit is bad by limitation; that the original suit itself is not maintainable since there is no notice under section 56 of the Old Wakf Act; that the plea regarding title of the suit property by the Respondent and the plea of adverse possession is mutually exclusive; that therefore the appeal is to be allowed.

Pertaining to the ownership claim of Appellants over the suit property there is no concrete evidence on record. The contention of Appellants that one Arabian saint Mahabari Khandayat came to India and built the Mosque and his lineal descendants possessed the property cannot be accepted if it is not substantiated by evidence and records. As far as a title suit of civil nature is concerned there is no room for historical facts and claims. Reliance on borderline historical facts will lead to erroneous conclusions. The question for resolution herein is the factum of ownership, possession and title over the suit property. Only admissible evidence and records could be of assistance to prove this. On the other hand, Respondent produced the relevant copy of the Register of Ancient Protected

Monuments maintained by the Executive Engineer in charge of the Ancient Monuments (Exb P1) wherein the suit property is mentioned and the Government is referred to as the owner. Since the manner of acquisition is not under challenge the entry in the Register of Ancient Protected Monuments could be treated as a valid proof for their case regarding the acquisition of suit property under the appropriate provisions of the Ancient Monuments Act. Gaining of possession could be either by acquisition or by assuming guardianship as provided under section 4 thereof. Relevant extracts of Exb P2 - CTS records fortifies their case. It shows that the property stands in the name of Respondent. Moreover, the evidence of Syed Abdul Nabi who is the power of attorney holder (of defendants 2A and 2B in the Original suit) shows that the suit property has been declared as a protected monument and there is a signboard to this effect in the suit property. He also deposed that the Government is in possession of the suit property and the Government at its expenditure constructed present building in the suit property. On a conjoint analysis of Exb P1, P2 and deposition of Syed Abdul Nabi, it could be safely concluded that the Respondent is in absolute ownership and continuous possession of the suit property for the last about one century. Their title is valid. The suit property is government property and not of a Wakf character.

The Old Wakf Act is enacted "for the better administration and supervision of wakfs." Under section 4 of the Old Wakf Act, Survey Commissioner(s) could only make a " survey of wakf properties existing in the State at the date of commencement of this Act." Wakf Board could exercise its rights only over existing wakf properties. Since the suit property itself is not an existing wakf property the Appellant cannot exercise any right over the same. Therefore, all the subsequent deeds based on the presumption that the suit property is a Wakf Property are of no consequence in law. The Notification bearing No. KTW/531 ASR/74/7490 dated 21/04/1976 issued by the Appellant and Karnataka Gazette Notification page No. 608/Part VI dated 08/07/1976 is null and void. The same is liable to be deleted. In view of this, the aspects relating to treating Gazette Notification as notice and limitation need not be looked into. As regards the compliance of notice under section 56 of the Old Wakf Act, the High court based on evidence and facts ruled that the same is complied with. This is a finding of fact based on evidence.

Now we will turn to the aspect of adverse possession in the context of the present case. Appellants averred that the plea of the respondent based on title of the suit property and the plea of adverse possession are mutually exclusive. Thus finding of the High Court that the title of Government of India over the suit property by way of adverse possession is assailed.

In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See : S M Karim v. Bibi Sakinal AIR 1964 SC 1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D N Venkatarayappa v. State of

Karnataka (1997) 7 SCC 567). Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. (Dr. Mahesh Chand Sharma v. Raj Kumari Sharma (1996) 8 SCC

128).

Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See: S M Karim v. Bibi Sakinal AIR 1964 SC 1254). In P Periasami v. P Periathambi (1995) 6 SCC 523 this Court ruled that - "Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property." The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar (1996) 1 SCC 639 that is similar to the case in hand, this Court held:

"As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

As we have already found, Respondent obtained title under the provisions of Ancient Monuments Act. The element of Respondent's possession of the suit property to the exclusion of the Appellant with the *animus* to possess it is not specifically pleaded and proved. So are the aspects of earlier title of Appellant or the point of time of disposition. Consequently, the alternative plea of adverse possession by Respondent is unsustainable. High Court ought not have found the case in their favour on this ground.

In the result, these appeals stand dismissed.