Supreme Court of India
Salem Muslim Burial Ground ... vs State Of Tamil Nadu And Ors. on 18 May, 2023
Author: V. Ramasubramanian
Bench: V. Ramasubramanian, Pankaj Mithal

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 7467-7470 OF 2014

SALEM MUSLIM BURIAL GROUND
PROTECTION COMMITTEE …APPELLANT

VERSUS

STATE OF TAMIL NADU AND ORS. …RESPONDENTS

PANKAJ MITHAL, J.

1. Under challenge in these appeals is the judgment and order passed by the Division Bench of the High Court of Judicature at Madras allowing the writ appeals whereby and wherein the judgment and order of the learned Single judge dated 29.04.2005 declaring the suit land as wakf property has been set aside.

2. The controversy in the present appeals centers around land in Signature Not Verified Zamin Survey Nos. 5105 and 5108 in Salem Zameen Estate Digitally signed by POOJA SHARMA Date: 2023.05.18 which corresponds to O.T.S. Nos. 2253 and 2210 respectively. 16:24:19 IST Reason:

The O.T.S. 2253 has been allotted New Town Survey No. 1 (T.S.

No.1) and O.T.S 2210 has been allotted New Town Survey, i.e. T.S. Nos. 113 & 70.

3. In the present appeals, we are only concerned with the Zamin Survey No.5108 (O.T.S.2210, now T.S. Nos.113 & 70) only which henceforth shall be described as “suit land”.

4. The appellant herein is Salem Muslim Burial Ground Protection Committee, Salem1. The State of Tamil Nadu (Revenue Department) is respondent No.1, and respondent Nos.2 and 3 are Commercial Taxes and Religious Endowments and the Director of Survey and Settlement Office respectively, who are formal parties. Respondent Nos.4 to 23 are the claimants, who alleged that they are residing over the “suit land” and are the settlers thereon from times immemorial having acquired rights over it through their predecessors-in-interest. The old records reveal that the “suit

land" at one point of time was used as a burial ground paramboke but the municipality ordered its closure for health reasons somewhere in the year 1867 and an alternative site was allotted for use as a burial ground. hereinafter referred to as "appellant Committee"

5. One of the claimants respondents, Perumal Chettiar claimed Ryotwari patta in the "suit land". Three other sets of respondents claimants' namely, A. Ramaswamy Chettiar, Govinda Pillai and appellant Committee through Sri Abdul Salim Sahib also set up their claims in the suit land. Accordingly, Assistant Settlement Officer, Salem2 in March, 1959 initiated inquiry under Section 11(a) of the Tamil Nadu Estate (Abolition & Conversion into Ryotwari) Act 19483.

6. The aforesaid Section 11 of the Abolition Act, 1948 provides that every ryot in an estate shall with effect from the notified date, be entitled to a ryotwari patta in respect of ryotwari lands which as per Madras Estate Land Act, 19084 means cultivable land in an estate other than the private land excluding certain types of lands, such as village sites and those set apart for common use of the villagers.

7. In the aforesaid inquiry initiated by the ASO under Section 11(a), Perumal Chettiar claimed that the "suit land" was assigned to him by the zamindar of Salem vide Exhibit A1 dated 20.01.1935. He relied upon Exhibits A2 and A3 which were 2 hereinafter referred to as "ASO" 3 hereinafter referred to as "Abolition Act, 1948" 4 hereinafter referred to as "Estate Act" pattas granted to him in respect of the suit land by the then zamindar. On the basis of the aforesaid assignment and the pattas, he claimed himself to be in possession of the "suit land" ever since the date of assignment and contends that the muslims have never buried their dead bodies on the said land.

8. Simultaneously, A.Ramaswamy Chettiar claims to have purchased some portion of the suit land from one Ramaswami Pillai, Manickam Pillai, Subhu Pandaram and Vasudeva Chettiar for a sum of Rs.5000/- some time in the year 1954. He asserted his claim on the basis of mortgage deeds (Exhibits B2 to B7) executed by him in respect of the "suit land" in favour of various parties.

9. The other claimant Govinda Pillai staked his claim over the suit land, on the basis of title of his predecessors-in-interest as told to him by his father whereas the appellant Committee asserted that it is a burial ground, and it can't be settled with any private person.

10. The ASO vide order dated 31.03.1959 dismissed the claims of all parties observing that the "suit land" is communal in nature and that any assignment of the said land was not possible without the declaration of the Collector under Section 20A of the Estate Act. The ASO further observed that there had been no burials on the "suit land" for the last 60 years and that there exist only 2 tombs on T.S. No.2253 and there is absolutely no sign of any burial on the "suit land" which in fact was never used as a burial ground.

11. Both the claimants - Perumal Chettiar and A. Ramaswamy Chettiar filed separate revisions against the above order of the ASO before the Settlement Officer, Salem. The revisions were dismissed by the Settlement Officer on the same reasoning as that of ASO vide order dated 03.10.1959. It was held that the claimants are not entitled to ryotwari patta on the "suit land".

12. The orders of the ASO and the Settlement Officer were taken up by means of revisions before the Director of Survey & Settlement by the above two claimants respondents, but even those revisions came to be dismissed on 31.01.1960. Subsequently, the revision petitions before the Board of Revenue were also dismissed. Aggrieved by the above orders starting from that of the ASO, Settlement Officer, Director of Survey & Settlement and Board of Revenue, writ petitions were filed by different claimants in respect of the "suit land", including writ petition Nos.903 and 1258 of 1960 by A.Ramaswamy Chettiar and Perumal Chettiar respectively and both of them claimed ryotwari patta under Section 11 of the Abolition Act in respect of the "suit land".

13. The writ court by means of a common judgment and order dated 03.05.1962 dismissed all the petitions holding that the character of the land once burial ground would not change only for the reason that it had not been used for burial purposes since 1900 or that no burial has taken place on the said land. It was also observed that the "suit land" was never used as a burial ground and that the burial ground must have been on part of T.S. 2253 and the two sites stand separated by a trunk road.

14. Not satisfied by the decision of the writ court, the claimant A.Ramaswamy Chettiar along with some others preferred writ appeals before the Division Bench. The writ appeals were dismissed vide judgment and order dated 12.01.1965 but with the following observation:

> "... in each of these cases, we would commend the claim of the concerned petitioner to a recognition by government, of his right to continue in possession under section 19A of Madras Act 26 of 1948, subject, of course to all consideration that could be urged to the contrary effect by the Muslim Burial Ground Committee, or any person interested in claiming, even at present time the communal user or nature of the property in question. Further, our remarks are subject to the condition that the petitioners claiming under section 19A of Act 26 of 1948 are bonafide alienees for value, who have taken such properties and put them to private uses, in the genuine belief that they were dealing with land in the private ownership of vendors from the Zamindar and not with communal land.
>
> The erection of buildings thereon by these persons may also be considered as evidence of bonafides and a fact entitling them, on equitable considerations to the benefit of action under section 19A of the Act."
>
> 15. The above observation and direction of the Division Bench is the bone of contention leading to the present appeals.

16. The aforesaid direction of the Division Bench was not questioned by any party in any higher forum or even otherwise rather the appellant Committee herein accepted the said order by participating in the consequential proceedings without any reservation.

17. The Director of Survey and Settlement on the strength of the above directions of the Division Bench of the High Court initiated proceedings under Section 19A of the Abolition Act and finally

accepted the claims set up by claimants A.Ramaswamy Chettiar and others vide order dated 31.01.1975. It was held that they have purchased the "suit land" for valuable consideration from persons who occupied the "suit land" for a very long time and that it was not required for the purposes of burial.

18. Aggrieved by the decision of the Director of Survey and Settlement conferring rights upon claimants under Section 19A of the Abolition Act, the appellant Committee preferred revision before the Commissioner of Land Revenue, Madras. It was dismissed on 20.04.1976. The Revenue department issued G.O.Ms.No.453 dated 14.03.1990, accepting and confirming the order of the Director of Survey and Settlement allowing the claimants respondents to remain in possession over the "suit land". At this stage, the appellant Committee invoked the writ jurisdiction of the High Court by filing writ petition No.6300 of 1990 challenging the Government order issued by the Revenue department. Another writ petition to the same effect was preferred by A.Annamalai and 13 others. It was contended that the Commissioner of Land Revenue had dismissed the revision against the order of the Director of Survey and Settlement without affording proper opportunity of hearing to them. The said writ petitions were dismissed whereupon the appellant Committee filed writ appeals which were allowed on 08.07.1999 and the matter was remitted to the Government to rehear it and to redecide it within three months.

19. Consequent to the above directions, the matter was reconsidered at the level of the Government and G.O.Ms.No.676 dated 23.12.1999 was issued observing that since the "suit land" vests in the Government, it is open for it to grant permission to the claimant respondents under Section 19A of the Abolition Act to remain in possession of the same.

20. The appellant Committee again preferred writ petition challenging the above G.O.Ms.No.676 dated 23.12.1999 by filing a fresh writ petition No.5985 of 2000. The writ petition was allowed vide order dated 29.04.2005 on two counts: (i) that the "suit land" is notified to be a wakf property and as such it cannot be alienated in exercise of powers under Section 19A of the Abolition Act; and (ii) even if Section 19A is exercised no rights could be conferred upon the claimants respondents in the absence of any material to show that they were put in possession by the land holders.

21. The claimant respondents, aggrieved by the aforesaid judgment and order of the writ court filed writ appeal Nos.1327 and 1348 of 2005 respectively which has been allowed by the impugned judgment and order dated 06.08.2009, after setting aside the order of the writ court, holding that OTS 2253 is registered as a muslim burial ground which has been handed over to the Wakf Board whereas the "suit land" (OTS 2210 now T.S. Nos. 113 and

70) is merely recorded as a rudra bhumi with no sign of muslim burial and as such has rightly not been held to be a wakf property in the order dated 31.01.1975 of the Director of Survey and Settlement. There is no material on record to establish any dedication of the suit land as a wakf property and that the notification dated 29.04.1959 regarding the "suit land" as a wakf is unacceptable; first for the reason that the said notification was not pressed by the appellant Committee till 1999 before any authority in any case; and secondly, for reason that no evidence was brought on record to establish that any preliminary survey as contemplated under Section 4 of the

Wakf Act, 1954 was conducted before issuing the said notification under Section 5 of the Wakf Act.

22. It is in the above background that these appeals have been preferred and have come up for consideration before us.

23. We had heard Mrs. June Chaudhari, learned senior counsel for the appellant Committee and Shri Narendra Kumar and Ms. N.S. Nappinai counsel appearing for the respondents.

24. Only two arguments were advanced by Mrs. June before us. The first is that once a wakf is always a wakf and, therefore, mere non burial of the dead bodies on the "suit land" over the last 60 years or so would not alter its nature so as to confer any right upon the claimants respondents much less that of ryotwari patta in exercise of power under Section 19A of the Abolition Act; secondly, the claims of claimants respondents in the suit land having been dismissed by the ASO, Settlement Officer, Director of Survey and Settlement, Board of Revenue and by the High Court in writ jurisdiction, the Division Bench of the High Court in exercise of its appellate power could have either dismissed or allowed the writ appeals but could not have directed for consideration of the claims under Section 19A of the Abolition Act that too while dismissing the writ appeals.

25. Under the Muslim law, a wakf can be created in several ways but primarily by permanent dedication of any movable and immovable property by a person professing Islam for any purpose recognized by Muslim law as pious, religious or charitable purpose and in the absence of such dedication, it can be presumed to have come into existence by long use.

26. Ordinarily, a wakf is brought into existence by any express dedication of movable or immovable property for religious or charitable purpose as recognized by Muslim Law. Once such a dedication is made, the property sought to be dedicated gets divested from the wakif, i.e., the person creating or dedicating it and vests in the Almighty Allah. The wakf so created acquires a permanent nature and cannot be revoked or rescinded subsequently. The property of the wakf is unalienable and cannot be sold or transferred for private purpose.

27. The dedication resulting in the creation of a wakf may at times in the absence of any express dedication may also be reasonably inferred from the facts and circumstances of the case such as long usage of the property as a wakf property provided it has been put to use for religious or public charitable purposes. In this regard, reference may be had to the Constitution Bench decision of this Court in M. Siddiq (D) thr. L.Rs. Vs. Mahant Suresh Das and Ors.5

28. In the case at hand, there is no iota of evidence from the very inception as to any express dedication of the suit land for any pious, religious or charitable purpose by anyone professing Islam. Therefore, on the admitted facts, the wakf by dedication of the suit land is ruled out.

29. The only issue, therefore, is whether the suit land would constitute a wakf by user as it was used as a burial ground which practice has been stopped at least for the last over 60 years since the year 1900 or 1867. There is even no concrete evidence on record to prove that the suit land prior to the year 1900 or 1867 was actually being used as a burial ground (kabristan). Therefore, the alleged use

of the suit land as burial ground prior to 1900 or 1867 is not sufficient to establish a wakf by user in the absence of evidence to show that it was so used. Thus, it cannot constitute a wakf by user also. The alleged recording of the suit land as a kabristan or as a burial ground is a misnomer or a misconstruction inasmuch as the suit land, if at all, came to be recorded as a rudrabhoomi which denotes 5 (2020) 1 SCC 1 Hindu cremation ground and not a burial ground or a kabristan.

It was only Zamin Survey No.5105 or O.T.S. No.2253 (new T.S. No.1) with two tombs existing which alone was recorded as a burial ground. The said land is specifically demarcated and separated from the suit land. The said burial land had already been handed over to the Wakf Board and its recording as such would not impact upon the nature of the suit land so as to constitute it to be a burial ground or a kabristan. Therefore, the suit land was not proved to be a wakf land by long usage also. There is no evidence to prove creation of a wakf of the suit land either by dedication or by usage.

30. The another limb of the argument is that the suit land has been declared to be a wakf property vide notification dated 29.04.1959. In this regard, it has to be noted that such a declaration has to be in consonance with the provisions of the Wakf Act, 1954 or the Waqf Act, 1995. Both the aforesaid Acts lay down the procedure for issuing notification declaring any property as a wakf.

31. The Wakf Act, 1954, which actually is relevant for our purpose, provides that, first, a preliminary survey of wakfs has to be conducted and the Survey Commission shall, after such inquiry as may be deemed necessary, submit its report to the State Government about certain factors enumerated therein whereupon the State Government by a notification in the official Gazette direct for a second survey to be conducted. Once the above procedure of survey is completed and the disputes arising thereto have been settled, on receipt of the report, the State Government shall forward it to the Wakf Board. The Wakf Board on examining the same shall publish the list of wakfs in existence with full particulars in the official Gazette as contemplated under Section 5 of the Act. Similar provisions exist under the Waqf Act, 1995.

32. A plain reading of the provisions of the above two Acts would reveal that the notification under Section 5 of both the Acts declaring the list of the wakfs shall only be published after completion of the process as laid down under Section 4 of the above Acts, which provides for two surveys, settlement of disputes arising thereto and the submission of the report to the State Government and to the Board. Therefore, conducting of the surveys before declaring a property a wakf property is a sine qua non. In the case at hand, there is no material or evidence on record that before issuing notification under Section 5 of the Wakf Act, 1954, any procedure or the survey was conducted as contemplated by Section 4 of the Act. In the absence of such a material, the mere issuance of the notification under Section 5 of the Act would not constitute a valid wakf in respect of the suit land. Therefore, the notification dated 29.04.1959 is not a conclusive proof of the fact that the suit land is a wakf property. It is for this reason probably that the appellant Committee had never pressed the said notification into service up till 1999.

33. In Tamil Nadu Wakf Board Vs. Hathija Ammal (Dead) by Lrs. Etc.6, it was observed that the Wakf Board should follow the procedure as required under Section 4, 5 and 6 or Section 27 of the

Wakf Act before notifying the wakfs under Section 5 of the Act.

34. In Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal7, it was observed as under:

> "16. Thus, it is amply clear that the conducting of survey by the Survey Commissioner and preparing a report and forwarding the same to the State or the Wakf Board precedes the final act of notifying such list in the Official Gazette by the State under the 1995 Act (it was by the Board under the 1954 Act). As mentioned supra, the list would be AIR 2002 SC 402 7 (2017) 13 SCC 174 prepared by the Survey Commissioner after making due enquiry and after valid survey as well as after due application of mind. The enquiry contemplated under sub-section (3) of Section 4 is not merely an informal enquiry but a formal enquiry to find out at the grass root level, as to whether the property is a wakf property or not. Thereafter the Wakf Board will once again examine the list sent to it with due application of its mind and only thereafter the same will be sent to the Government for notifying the same in the Gazette...."

35. It may be noted that Wakf Board is a statutory authority under the Wakf Act. Therefore, the official Gazette is bound to carry any notification at the instance of the Wakf Board but nonetheless, the State Government is not bound by such a publication of the notification published in the official Gazette merely for the reason that it has been so published. In State of Andhra Pradesh Vs. A.P. State Wakf Board and Ors.8, this Court consisting of one of us (V. Ramasubramanian, J. as a Member) held that the publication of a notification in the official Gazette has a presumption of knowledge to the general public just like an advertisement published in the newspaper but such a notification published at the instance of the Wakf Board in the 2022 SCC OnLine SC 159 State Gazette is not binding upon the State Government. It means that the notification, if any, published in the official Gazette at the behest of the Wakf Act giving the lists of the wakfs is not a conclusive proof that a particular property is a wakf property especially, when no procedure as prescribed under Section 4 of the Wakf Act has been followed in issuing the same.

36. In view of the aforesaid facts and circumstances, we do not find any substance in the argument that the suit land is or was a wakf property and as such would continue to be a wakf always. In the absence of any evidence of valid creation of a wakf in respect of the suit property, it cannot be recognized as a wakf so as to allow it to be continued as a wakf property irrespective of its use or disuse as a burial ground.

37. Now coming to the second argument of learned counsel for the appellate Committee that the High Court hearing the writ appeal was only obliged to either allow the writ petition or to dismiss it and when it had decided to dismiss it, it had no authority of law to issue any direction to the Government to consider claims under Section 19A of the Abolition Act.

38. The argument, though in the first blush, appears to be attractive but upon deeper scrutiny is found to be bereft of merits for two reasons; first, the appellant Committee was never aggrieved by such a direction as it never questioned or challenged it in any higher forum; secondly, the appellant

Committee appears to have accepted the said decision and the direction contained therein by participating in the subsequent proceedings before the Director of Survey and Settlement without any protest or taking any objection in this regard. In such an event and participation of the appellant Committee in the consequential proceedings debars it from turning around so as to agitate a point to which it had acquiesced and had virtually given up or accepted.

39. To bring home the point that the appellant Committee had participated in the proceedings before the Director of Survey and Settlement pursuant to the directions of the Division Bench of the High Court contained in the judgment and order dated 12.01.1965, it is relevant to reproduce paragraph 10 of the order of the Director of Survey and Settlement dated 31.01.1975 whereunder the claimants respondents have been granted relief in exercise of powers under Section 19A of the Abolition Act:

> "The case was posted to 11.00 A.M on 17.1.75. The Secretary of the Muslim Burial ground protection committee who was present then said that his lawyer is attending the case. He never request any adjournment. But the lawyer did not attend till 12:00 noon. The case was heard by me and the Secretary was also present. At 1.50 P.M the advocate for the Muslim Burial ground protection committee was present and filed necessary vakalat. All of a sudden he requested adjournment and he was informed that no adjournment would be given at this state since the case was heard in the presence of the parties who were present in the morning. He wanted to file written objection statement and was permitted to file it before the rising of the court; at 4 P.M on 17.1.75; the secretary filed his written objection statement."

40. After having lost in proceedings before the Director of Survey and Settlement, the appellant Committee had preferred a revision before the Board of Revenue which was also dismissed. In the revision also no argument was raised that the directions issued by the High Court are without jurisdiction and not binding upon it.

41. The proceedings before the Director of Survey and Settlement and the Board of Revenue as aforesaid clearly indicate that the appellant Committee had accepted the directions of the High Court and in pursuant thereof had participated in the proceedings without any hitch and as such disentitled itself from raising any objection in this regard at such a belated stage for the first time before this Court.

42. The submission that the direction of the Division Bench of the High Court is patently without jurisdiction and the issue of jurisdiction can be raised by the party aggrieved at any stage is also not of substance inasmuch as it would not apply to a case where the party has succumbed to the jurisdiction by participating in the proceedings thereto taking chance of success and failure. In the present case, the appellant Committee has not challenged the directions of the Division Bench of the High Court as without jurisdiction rather consented/accepted to the said directions by participating in the consequential proceedings. Once the appellant Committee has accepted the order and has participated in the proceedings, it is estopped in law from questioning the jurisdiction of the court in issuing such a direction. In such a view, it cannot be said that the appellant Committee has a right to

raise the question of jurisdiction at this stage.

43. The Principle of Acquiescence has been explained in Black's Law Dictionary, 9th Edition, as a person's tacit or passive acceptance or implied consent to an act. It has been described as a principle of equity which must be made applicable in a case where the order has been passed and complied with without raising any objection. Acquiescence is followed by estoppel. A Constitution Bench of the Supreme Court in Pannalal Binjraj v. Union of India9, six decades ago, had an occasion to explain the scope of estoppel. It says that once an order is passed against a person and he submits to the jurisdiction of the said order without raising any objection or complies with it, he cannot be permitted to challenge the said order, subsequently, when he could not succeed. The conduct of the person in complying with the order or submitting to the jurisdiction of the order of the Court by participation, disentitles him to any relief before the Court.

44. It is settled that law does not permit a person to both approbate and reprobate as no party can accept and reject the same instrument. A person cannot be permitted to say at one time that the transaction is valid and to obtain advantage under it and on the other hand to say that it is invalid or incorrect for the purposes of securing some other advantage.

45. The position in the case at hand is similar and identical as in the above referred case and as such the appellant Committee AIR 1957 SC 397 having participated in the subsequent proceedings pursuant to the Division Bench decision of the High Court on being unsuccessful therein cannot be allowed to raise or dispute the validity of such an order.

46. In view of the aforesaid facts and circumstances, we do not find any substance in either of the two points canvassed on behalf of the appellant. The appeals as such lack merit and are dismissed with no order as to costs.

..... J.

(V. RAMASUBRAMANIAN) ..... J.

(PANKAJ MITHAL) New Delhi;

May 18, 2023.