

CASE NO.:  
Appeal (civil) 6975 of 2004

PETITIONER:  
M.P. Wakf Board

RESPONDENT:  
Subhan Shah (D) By LRs. & Ors.

DATE OF JUDGMENT: 31/10/2006

BENCH:  
S.B. Sinha & Dalveer Bhandari

JUDGMENT:  
J U D G E M E N T  
WITH

CIVIL APPEAL NO. 6976 OF 2004

S.B. SINHA, J.

These two appeals involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

One Hazrat Sha Walli was a Peer. He was called Shan Shah-E-Malwa. On his death, a Dargah was established in his memory. Erstwhile Maharaja Holkar Darbar, a Hindu king granted Mafi Inayat Land to the Dargah. Allegedly, the land in question was held to be not forming a part of Wakf in terms of the provisions of the Wakf Act, 1954 (for short "the 1954 Act"). One Munna Bai filed an application for getting her name mutated in respect of the property in question. It was dismissed on 4.2.1967. She thereafter filed an application under Section 25 of the 1954 Act for registering the Dargah as a Wakf. A notice was issued to Subhan Shah and others who were the heirs of the said Hazrat Sha Walli (hereinafter referred to as "the private parties"). They filed their show cause denying and disputing that the property in question was a Wakf property. It was contended that Munna Bai filed the aforementioned application as she was denied her claim to occupy the post of a Mujaawarship. It was further contended:

"That there has been 50 Bighas land under the Sanad but when we were minors and Mahboobsha the husband of the lady was the person in charge of the office of Mujaawarship, the Jahagirdar has snatched away about 40 Bighas, but since ours taking charge of it we are most aptly managing the property and property looking after the Dargah. It is wrong to say that there is a managing committee for this Dargah."

On or about 18.3.1968, the properties were declared as Wakf property and the Dargah was registered as Wakf by an order dated 18.3.1968. The private parties' application for recall of the said order was rejected by the Madhya Pradesh Wakf Board (for short "the Board") by an order dated 24.6.1968 stating that registration of the Dargah as Wakf was legal. A committee was thereafter constituted by the Board for managing the affairs of the Dargah. Possession of the private parties was allegedly forcibly taken

over.

A suit thereafter was filed in Civil Court for a declaration that the orders passed by the Board are null and void and for recovery of possession of the suit property inter alia contending that the order registering the Dargah as Wakf was vitiated in law. It was also contended that the application filed by the said Munna Bai under Section 25 of the 1954 Act was barred by limitation.

The Parliament enacted the Wakf Act, 1995 (for short "the 1995 Act"). The 1954 Act was amended by the State of Madhya Pradesh. The State of Madhya Pradesh constituted the M.P. Wakf Tribunal (for short "the Tribunal"). It also amended the provision of the said Act in terms whereof all civil suits stood transferred to the Tribunal. The suit filed by private parties was also transferred.

Before the Tribunal, the Board did not adduce any evidence. It, however, allegedly filed a gazette of the year 1984. The Tribunal passed an order framing a scheme for managing the affairs of the said Dargah. Both the Board and the private parties aggrieved thereby filed revision applications before the High Court. By reason of the impugned judgment, the High Court dismissed both the applications holding:

- (i) In view of the admission made before the Tribunal that they are not averse to the property being declared Wakf, if they are declared to be the Mujawar thereof.
- (ii) The Tribunal had the requisite jurisdiction to frame a scheme.

Both the Board and the private parties are, thus, before us:

Contention of Mr. Shakil Ahmed Syed, learned counsel appearing on behalf of the Board is that power to frame a scheme vests in the Board and not in the Tribunal and, thus, the High Court committed an illegality in passing the impugned order.

Mr. Syed Ali Ahmad, learned counsel appearing on behalf of the private parties, on the other hand, submitted that the High Court proceeded on a wrong premise that the private parties admitted that the property in question was a Wakf property.

"Wakf" has been defined in Section 3(1) of the 1954 Act to mean "the permanent dedication by a person professing Islam or any other person of any movable or immovable property for any purpose recognized by the Muslim law as pious, religious or charitable". Section 4 provides for survey of Wakfs. According to the private parties, upon survey the Dargah was not found to be a Wakf property. Only when a property is found to be a Wakf property, a registration thereof can be made. Section 5 of the 1954 Act, reads, thus:

"5. Publication of list of wakfs \026 (1) On receipt of a report under sub-section (3) of Section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under sub-section (1) and publish, in the Official Gazette, a list of wakfs in the State, or as the case may be, the part of the State, whether in existence at the commencement of this Act or coming into existence thereafter to which the report relates, and containing such particulars as may be prescribed."

Under Section 5 of the 1954 Act, a civil suit in regard to the dispute as to whether a particular property specified as Wakf property in the list of

Wakfs maintained under Section (2) thereof is a Wakf property or not, a civil suit will be maintainable. Section 6-A of the 1954 Act provides for power of Tribunal to determine disputes regarding wakfs.

Maintainability of the suit, therefore, is not in question. The property was dedicated to the Dargah, if any, a long time back. An application for registration of the said property as a Wakf property in terms of Section 25 of the 1954 Act, therefore, could have been filed only within the period specified thereunder, viz., nine months from the date of coming into force of the said Act. Registration of Wakfs whether created before or after the commencement of the said Act is governed by Section 25. A copy of the Wakf deed was also required to be enclosed with such an application. Sub-section (7) of Section 25 of the 1954 Act provides for making of an inquiry into the correctness or otherwise of the contents of the said application.

We may notice that Section 104 of the 1995 Act is in pari materia with Section 66-C of the 1954 Act, which reads as under:

"104. Application of Act to properties given or donated by persons not professing Islam for support of certain wakf. \027Notwithstanding anything contained in this Act where any movable or immovable property has been given or donated by any person not professing Islam for the support of a wakf being\027

(a) a mosque, idgah, imambara, dargah, khangah or a maqbara;

(b) a Muslim graveyard;

(c) a choultry or musafirkhana,

then such property shall be deemed to be comprised in that wakf and be dealt in the same manner as the wakf in which it is so comprised."

Section 83 of the 1995 Act provides for constitution of the Tribunal. The jurisdiction of the Tribunal as contained in sub-section (5) of Section 7 of the 1995 Act reads as under:

"(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be."

The Tribunal noticed the sources of title of the private parties in the suit property. In determining the respective contentions of the parties to the suit, the Tribunal framed the following issues:

"1. Whether Mazar Nahar Shah Ali Baba is the property of plaintiffs of Siranam and the order of defendant No. 1 of dated 24.4.68 and 13.4.68 are illegal and of no consequences?

2. Whether plaintiffs are entitled to regain the business on the disputed Mazar."

The issues framed were not wholly apposite to the rival contentions of

the parties. They do not reflect the requisite issues before the parties in the light of their pleadings. The Tribunal moreover did not analyse the evidences adduced by the parties before it. Applicability or otherwise of the notification issued in the year 1984 was also not considered. It declared the property to be a Wakf property stating:

"\005Defendant No. 1 Wakf Board led no evidence in its favour, but Madhya Pradesh Wakf Board has produced the copy of Madhya Pradesh Gazette and Register of Registration of Wakf in which disputed Majar has been depicted as the property of Wakf and year of (billing) cultivation. The plaintiffs have not objected to this. The most important this is that the plaintiffs have admitted in evidence that Majawar in question is their inherited property and their forefathers had been working as Mujawar in the Dargah. Therefore, the opportunity may be given to them to serve as Mujawar at Dargah."

It purported to have taken into consideration the admission of the private parties that Majawar in question is their inherited property and their forefathers have been working as Mujawar in the Dargah. On the basis of the said purported admission on the part of the private parties, the Tribunal opined that there exists no dispute that there existed a Wakf which was situated in village Nozarana Indore of Hazrat Nahar Ali Shah which has been legally registered by the Board.

Title to a property has a definite connotation. It is not the same as user. The Tribunal failed to deal with the question as to whether the Board had the requisite jurisdiction to entertain the application filed by Munna Bai being barred by limitation, insofar as whereas period of limitation provided for under sub-section (8) of Section 25 is merely three months, Munna Bai filed an application after 12 years after coming into force of the 1954 Act.

We are not unmindful of the fact that the Board itself could have initiated proceedings in terms of Section 27 of the 1954 Act but then no suo motu proceeding was initiated by it. No notice in this behalf has been issued.

In M/s. D.N. Roy and S.K. Bannerjee and Others v. State of Bihar and Others [(1970) 3 SCC 119], the law is stated in the following terms:

"It is true that the order in question also refers to "all other powers enabling in this behalf". But in its return to the writ petition the Central Government did not plead that the impugned order was passed in exercise of its suo moto powers. We agree that if the exercise of a power can be traced to an existing power even though that power was not purported to have been exercised, under certain circumstances, the exercise of the power can be upheld on the strength of an undisclosed but undoubted power. But in this case the difficulty is that at no stage the Central Government intimated to the appellant that it was exercising its suo moto power. At all stages it purported to act under Rules 54 and 55 of the Mineral Concession Rules, 1960. If the Central Government wanted to exercise its suo moto power it should have intimated that fact as well as the grounds on which it proposed to exercise that power to the appellant and given him an opportunity to show cause against the exercise of suo moto power as well as against the grounds on which it wanted to exercise its power. Quite clearly the Central Government had not given him

that opportunity. The High Court thought that as the Central Government had not only intimated to the appellant the grounds mentioned in the application made by the 5th respondent but also the comments of the State Government, the appellant had adequate opportunity to put forward his case. This conclusion in our judgment is untenable. At no stage the appellant was informed that the Central Government proposed to exercise its suo moto power and asked him to show cause against the exercise of such a power. Failure of the Central Government to do so, in our opinion, vitiates the impugned order."

If the proceeding was initiated by the Board for which it had no jurisdiction whatsoever, its order would be 'coram non judice'. [See *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 and *MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*, (2004) 9 SCC 619] Unfortunately, the attention of the Tribunal or the High Court was not drawn to this aspect of the matter.

It is also not in dispute that the purported admission on the part of the private parties was a conditional one; by reason whereof, the nature of the property being wakf had not been admitted. An admission of a party must be clear and explicit in a case where an inference is required to be drawn in regard to the fact that thereby he had admitted the title of the other. Generally speaking, even no title can be created by admission. [See *Thayyil Mammo and Another v. Kottiath Ramunni and Others*, AIR 1966 SC 337]

If the nature of dedication of the property does not constitute a wakf within the meaning of the provisions of the Act, it must be proved that it became a wakf by reason of long user. No such finding has been arrived at.

We may notice, although no final verdict has been pronounced, it has been contended before us that a purported dedication of a property by a Hindu for constitution of wakf is legally impermissible. Our attention has been drawn to *Motishah and others v. Abdul Gaffar Khan* [AIR 1956 Nagpur 38] wherein the law has been declared in the following terms:

"A wakf may be defined to mean the detention of the 'corpus' in the ownership of God in such a manner that its profits may be applied for the benefit of His servants. As a general rule it may be stated that all persons who are competent to make a valid gift are also competent to constitute a valid wakf. Islam is not a necessary condition for the constitution of a wakf.

Any person of whatever creed may create a wakf but the law requires that the object for which dedication is to be made should be lawful according to the creed of the dedicator as well as the Islamic doctrines. A cemetery or graveyard is a consecrated ground and is not a private property. Whether a place is a 'makbara' (burial ground) or not depends on the number of persons buried there or evidence of dedication derived from the testimony of witnesses of reputation"

However, yet again, in *Arur Singh and others v. Badar Din and others* [AIR 1940 Lahore 119], the law is stated in the following terms:

"Secondly, there seems to be no clear authority to show that dedication of land by a Hindu for the

purpose of a Muslim graveyard would be invalid either according to Hindu or Muslim law..."

If the property in question was not a Wakf property and the order registering the property as a Wakf property was invalid in law, the matter might have ended there. But, the Tribunal has gone a step further and directed framing of scheme.

The Wakf Act is a self-contained code. Section 32 of the 1995 Act provides for powers and functions of the Board. Sub-section (2) of Section 32 of the 1995 Act enumerates the functions of the Board without prejudice to the generality of the power contained in Sub-section (1) thereof. Clauses (d) and (e) of sub-section (2) of Section 32 of the 1995 Act reads as under:

"(d) to settle schemes of management for a wakf:

Provided that no such settlement shall be made without giving the parties affected an opportunity of being heard;

(e) to direct\027

(i) the utilisation of the surplus income of a wakf consistent with the objects of a wakf;

(ii) in what manner the income of a wakf, the object of which are not evident from any written instrument, shall be utilized;

(iii) in any case where any object of wakf has ceased to exist or has become incapable of achievement, that so much of the income of the wakf as was previously applied to that object shall be applied to any other object, which shall be similar, or nearly similar or to the original object or for the benefit of the poor or for the purpose of promotion of knowledge and learning in the Muslim community:

Provided that no direction shall be given under this clause without giving the parties affected an opportunity of being heard.

Explanation.\027For the purposes of this clause, the powers of the Board shall be exercised\027

(i) in the case of a Sunni wakf, by the Sunni members of the Board only; and

(ii) in the case of a Shia wakf, by the Shia members of the Board only:

Provided that where having regard to the number of the Sunni or Shia members in the Board and other circumstances, it appears to the Board that the power should not be exercised by such members only, it may co-opt such other Muslims being Sunnis or Shias, as the case may be, as it thinks fit, to be temporary members of the Board for exercising its powers under this clause;"

The Tribunal had been constituted for the purposes mentioned in Section 83 of the 1995 Act. It is an adjudicatory body. Its decision is final and binding but then it could not usurp the jurisdiction of the Board. Our

attention has not been drawn to any provision which empowers the Tribunal to frame a scheme. In absence of any power vested in the Tribunal, the Tribunal ought to have left the said function to the Board which is statutorily empowered therefor. Where a statute creates different authorities to exercise their respective functions thereunder, each of such authority must exercise the functions within the four corners of the statute.

It is trite that when a procedure has been laid down the authority must act strictly in terms thereof. [See Taylor v. Taylor, (1875) 1 Ch D 426]

We, therefore, are of the opinion that the matter requires fresh consideration at the hands of the Tribunal. We direct accordingly. Orders of the Tribunal and the High Court are set aside. The appeals are disposed of with the aforementioned directions. The Tribunal is directed to consider the matter afresh as expeditiously as possible preferably within a period of three months from date. Having regard to the facts and circumstances of the case, the parties shall pay and bear their own costs.