

**IN THE HIGH COURT FOR THE STATE OF TELANGANA,
HYDERABAD**

* * * *

C.R.P.No.1168 of 2021

Between:

Habib Alladin & Two Others

Petitioners

VERSUS

Mohammed Ahmed

Respondent

JUDGMENT PRONOUNCED ON: 21.12.2021

HON'BLE SRI JUSTICE UJJAL BHUYAN

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? : **Yes**

UJJAL BHUYAN, J

*** HON'BLE SRI JUSTICE UJJAL BHUYAN**

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! Counsel for Petitioner : Sri Prabhakar Sripada

^ Counsel for the respondents : Sri Mohammed Omer Farooq

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> HEAD NOTE:

? Cases referred

¹ (2017) 13 SCC 174

² (1998) 2 SCC 642

³ (1996) 8 SCC 377

⁴ (2015) 8 SCC 331

⁵ (1976) 4 SCC 780

⁶ (2010) 14 SCC 588

⁷ 2014 (5) ALD 35

THE HON'BLE SRI JUSTICE UJJAL BHUYAN

C.R.P.No.1168 OF 2021

ORDER:

Heard learned counsel for the parties.

2 By filing this Civil Revision Petition under Article 227 of the Constitution of India, petitioners seek quashing of order dated 28.07.2021 passed by the Telangana State Waqf Tribunal at Hyderabad in I.A.No.345 of 2021 in O.S.No.63 of 2021.

3 Petitioners are defendants in O.S.No.63 of 2021 instituted by the respondent as the plaintiff before the Telangana State Waqf Tribunal at Hyderabad (briefly, 'the Tribunal', hereinafter).

4 Be it stated that plaintiff has instituted the said suit before the Tribunal seeking a decree against the defendants to restrain them perpetually from interfering with and causing hindrance to the plaintiff and other musallies visiting the schedule mosque i.e. Mahmood Habib Masjid and Islamic Centre situated at ground floor in the apartment complex known as Mahmood Habib Apartments, bearing Municipal No.8-2-584/1 to 3 and 8-2-584/7B to 11B, Road No.9, Banjara Hills, Hyderabad.

5 Case of the plaintiff is that he is a permanent resident of Road No.3, Banjara Hills, Hyderabad and a regular musalli to the schedule mosque. He has been offering prayers therein for the last 13 years. The schedule mosque was established 13 years ago by the developer of the apartment complex known as Mahmood Habib Apartments to provide a place of worship to the residents of the apartments.

6 In the schedule mosque there is a regular Imam and Peshimam to look after the religious and other pious activities. It is stated that the schedule mosque is a 'Waqf by user', as defined under Section 3(r) of the Waqf Act, 1995 (briefly, 'the Act', hereinafter).

7 Of late, the defendants have been putting up obstruction and hindrance to the plaintiff and other musallies preventing them from having free ingress and egress to the schedule mosque. It appears that some disputes have cropped up between the defendants and the developer regarding contractual issues. Taking advantage of such disputes, the defendants are illegally preventing the plaintiff and other musallies from having access to the schedule mosque.

8 Plaintiff approached local police i.e. Banjara Hills Police Station on 24.6.2021. But the police were not inclined to accept any first information lodged by the plaintiff against the defendants on the pretext that the matter is a sensitive one and is civil in nature.

9 In such circumstances, plaintiff instituted the related suit before the Tribunal under Section 83 (1) of the Act seeking the relief as indicated above.

10 Defendants filed a petition under Order VII Rule 11 (a) and (d) of the Civil Procedure Code, 1908 (CPC) for rejection of the plaint in O.S.No.63 of 2021. The said petition was registered as I.A.No.345 of 2021. According to the defendants, the property in question is purely a private property and is not a Waqf property. It

has not been notified as a Waqf property in the Official Gazette. No preliminary survey has been conducted under Section 4 of the Act. As a result, there is no publication of the schedule property as a Waqf property as prescribed under Section 5 of the Act. It was contended that if a particular property is not mentioned in the Section 5 list, any aggrieved person may institute a suit before the Tribunal for a decision on the question of inclusion and non-inclusion. But the limitation for institution of such suit is one year which period had long expired. No application has been made either by the plaintiff or by any other person for registration of the schedule property as Waqf property. Therefore, the Tribunal had no jurisdiction to entertain the suit. Reliance was placed on a decision of the Supreme Court in the case of **Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal**¹. In the building permission accorded by the Greater Hyderabad Municipal Corporation, there is no provision for setting up of a mosque. Therefore, setting up of a mosque is an illegality. It violates Sections 2 (d) and 24 of the Telangana Apartments (Promotion of Construction and Ownership) Act, 1987. Defendants had moved the Municipal Commissioner for closure of the so called mosque, but without any success.

11 Insofar claim of the plaintiff that the schedule property was 'waqf by user', it is stated that as per Mohammedan Law for a property to be 'waqf by user', it must fulfill the criteria of being in use since time immemorial. A period of 13 years cannot be construed to be a period which is of time immemorial.

¹ (2017) 13 SCC 174

12 That being the position, defendants sought for rejection of the plaint under Order VII Rule 11 (a) and (d) CPC.

13 Plaintiff filed counter affidavit to the above Interlocutory Application filed by the defendants. Plaintiff contended that Order VII Rule 11 (a) and (d) CPC was not at all applicable inasmuch as the plaint discloses a definite cause of action for institution of suit and that the suit so instituted is not barred by any law. The schedule property is a mosque established 13 years ago where five times daily prayers are being offered by the plaintiff and other musallies on regular basis. It was further contended that when the schedule property is 'waqf by user', there is no requirement of notifying the same in the Gazette in terms of Section 5 of the Act. Insofar the decision of the Supreme Court in **Madanuri Sri Rama Chandra Murthy** (supra) is concerned, it was contended that the said decision was not relevant inasmuch as it did not deal with the concept of 'waqf by user'; rather the said decision dealt with non-inclusion of the property in the Gazette notification. Relying on the decision of the Supreme Court in **Sayyed Ali Vs. Andhra Pradesh Waqf Board, Hyderabad**², it is contended that once a property is a Waqf property, it would always remain a Waqf property.

14 It was further contended that Commissioner of Greater Hyderabad Municipal Corporation had passed a detailed speaking order dated 24.06.2021 holding that the schedule mosque is not in violation of the building plan and is not prohibited as per the zoning regulations.

² (1998) 2 SCC 642

15 In the circumstances plaintiff sought for dismissal of the Interlocutory Application filed by the defendants.

16 After hearing the matter, Tribunal passed order dated 28.07.2021 dismissing the I.A. filed by the defendants. It has been held that the plaint shows a clear cause of action and it is not barred by any law. Therefore, there are no sufficient grounds to reject the plaint.

17 It is this order which is under impugment in the present revision petition.

18 Learned counsel for the petitioners (defendants) submits that the Tribunal committed a manifest error in rejecting the I.A filed by the defendants for rejection of the plaint. He submits that even if it is claimed that the schedule property is a 'waqf by user', then also it should be notified in the Official Gazette under Sections 4 and 5 of the Act. Unless the schedule property is so notified, it cannot be deemed to be a Waqf property. In this connection, reliance has been placed on the decision of the Supreme Court in **Madanuri Sri Rama Chandra Murthy** (supra). He further submits that even according to the case of the plaintiff which has been accepted by the Tribunal, the schedule property is being used as a mosque for the last 13 years; on that basis it is being construed to be a 'waqf by user'. His submission is that as per Mohammedan Law, for a property to be a 'waqf by user', it has to be in use since time immemorial. In other words, what is contemplated under Mohammedan Law is immemorial user and not a mere user for a property to be construed as 'waqf by user'. On this ground itself,

the plaint should have been rejected. Referring to Section 6 of the Act, he submits that a suit can be instituted in the Tribunal in respect of disputes pertaining to Waqf property, including the question as to whether a particular property is Waqf property or not, within a period of one year. The present suit having been instituted in the year 2021 is, thus, barred by limitation under the Act. He, therefore, submits that the plaint filed by the plaintiff is clearly barred by law and the same should be rejected.

19 In support of his contentions, learned counsel for the petitioners has submitted a compilation of judgments.

20 On the other hand, learned counsel for the respondent (plaintiff) submits that to consider as to whether there is cause of action for institution of a suit or whether the plaint is barred by any law, it is the averments in the plaint only which are required to be considered and no other document. Regarding the scope of enquiry under Order VII Rule 11 CPC, he submits that it is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred by any law. At the stage of exercise of power under Order VII Rule 11 CPC, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. Learned counsel for the respondent further submits that even if there is no actual delivery of possession, the mere fact that members of the Mohammedan public are permitted to offer prayers is adequate to indicate that the Waqf is complete and irrevocable. Proceeding further, he submits that once a property is a Waqf property, it will always remain a Waqf property. He, therefore,

submits that the Tribunal was justified and correct in law in dismissing the petition filed by the defendants for rejection of the plaint. In support of his submissions, learned counsel for the respondent has submitted a compilation of judgments, relying therefrom the following decisions:- 1) **State of Orissa Vs. Klockner**³, 2) **PV Guru Raj Reddy Vs. P. Neeradha Reddy**⁴, 3) **Syed Mohd Salie Labbai Vs. Mohd. Hanifa**⁵, and 4) **Board of Waqf, West Bengal Vs. Anis Fatima**⁶.

21 Submissions made by learned counsel for the parties have received the due consideration of the Court.

22 At the outset, provisions of Order VII Rule 11 CPC may be adverted to. The said provision is extracted hereunder:

11. Rejection of plaint:-

The plaint shall be rejected in the following cases:—

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;
- (f) where the plaint fails to comply with the provision of Rule 9;

Provided that the time fixed by the Court for the correction of the valuation of supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

³ (1996) 8 SCC 377

⁴ (2015) 8 SCC 331

⁵ (1976) 4 SCC 780

⁶ (2010) 14 SCC 588

23 Insofar the present case is concerned, petitioners had filed the petition for rejection of plaint under Clauses (a) and (d) of Rule 11 of Order VII CPC.

24 From the above, it is clear that a plaint can be rejected where it does not disclose a cause of action {Clause (a)}; it can also be rejected where the suit appears from the statement in the plaint to be barred by any law {Clause (d)}.

25 Supreme Court in **PV Guru Raj Reddy** case (4 supra) dealt with the provision of Order VII Rule 11 CPC. Observing that rejection of a plaint under Order VII Rule 11 CPC is a drastic power conferred on the Court to terminate a civil action at the threshold, it was stressed upon that the conditions precedent to the exercise of power under Order VII Rule 11 CPC are stringent. Only the averments in the plaint have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII Rule 11 CPC stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint *ex facie* do not disclose a cause of action or of a reading thereof the suit appears to be barred under any law, the plaint can be rejected. In all other circumstances the claims will have to be adjudicated in the course of the trial.

26 Before adverting to the pleadings in the plaint, it would be apposite to refer to some of the relevant provisions of the Act.

27 The Waqf Act, 1995 (already referred to as 'the Act' hereinabove) has been enacted for better administration of waqf (since substituted by the word Auqaf) and for matters connected therewith or incidental thereto. "Waqf" is defined in Section 3 (r) in the following manner:

"waqf" means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes-

- (i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;
- (ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record,
- (iii) "grants", including mashrut-ul-khidmat for any purpose recognized by the Muslim law as pious, religious or charitable; and
- (iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognized by Muslim law, and "waqif" means any person making such dedication."

28 Thus, "Waqf" would mean permanent dedication by any person of any movable or immovable property for any purpose recognized by the Muslim law as pious, religious or charitable and includes a "Waqf by user".

29 At this stage, we may mention that a single bench of this Court in **S.Manikya Reddy Vs. Andhra Pradesh State Waqf Board**⁷ dealt with the above definition of "Waqf" and thereafter took the view that a Waqf is created either by dedication or by user and it is not necessary that deed of Waqf is essential to create a Waqf.

30 Learned counsel for the respondent goes to show that a waqf as defined above, once created continues to be a waqf for all times to come.

⁷ 2014 (5) ALD 35

31 Section 4 of the Act deals with survey of Waqf by the Survey Commissioner and submission of report to the State Government. This is followed by publication of list of Waqf by the State Government in the Official Gazette under Section 5. As per Section 6 of the Act, if any question arises as to whether a particular property specified as Waqf property in the list of Waqf is Waqf property or not, or any person aggrieved etc., may institute a suit in the jurisdictional Tribunal for a decision on the question and the decision of the Tribunal in respect of such matter shall be final. As per the first proviso, no such suit shall be entertained by the Tribunal after expiry of one year from the date of publication of the list of Waqf.

32 Section 83 of the Act deals with constitution of Tribunals etc. As per sub-Section (1), the State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a Waqf or Waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under the Act and define the local limits and jurisdiction of such Tribunals.

33 Having noticed the above, the plaint may now be adverted to. In paragraph No.5 of the plaint, plaintiff has stated that the schedule mosque was established 13 years ago by the developer of the apartments known as Mahmood Habib Apartments, so that the residents of the apartments along with other musallies of the surrounding area can offer prayers. In paragraph No.7 it is stated that there is a regular Imam and Peshimam in the schedule

mosque for rendering five times prayers daily and for carrying out other religious and pious activities. It is, therefore, contended that the schedule mosque is a 'Waqf by user' as defined under Section 3(r) of the Act. In paragraph No.11 of the plaint, it is stated that the defendants have of late started creating unnecessary obstruction and hindrance to the plaintiff and other musallies thereby preventing them from having free ingress and egress to the schedule mosque. This is reiterated in paragraphs Nos.12 and 15 of the plaint. Further in paragraph No.19 of the plaint it is stated that plaintiff had approached the Banjara Hills police station on 24.06.2021 for lodging a First Information Report against the defendants. However, police did not accept the same on the pretext that the matter is sensitive and civil in nature.

34 From a reading of the averments made in the above paragraphs of the plaint as a whole, it cannot be said that the plaint does not *ex facie* disclose any cause of action for institution of the suit or that the suit is barred under the Act.

35 Reliance placed by the petitioners on the decision of the Supreme Court in **Madanuri Sri Rama Chandra Murthy** (supra) as well as contention of the petitioners that to be a 'Waqf by user' the property has to be in such use since time immemorial, would be of no assistance inasmuch as the decision of the Supreme Court in the said case is factually distinguishable.

36 In **Madanuri Sri Rama Chandra Murthy** (supra), plaintiff had challenged the sale deed on the ground that the suit property which was purchased was a Waqf property. Therefore, the sale

deed did not convey any right, title or interest in favour of the defendants. Supreme Court found that the property in question did not find place in the Gazette Notification published under Section 5 of the Act. In other words, the property in question was not notified in the Official Gazette as a Waqf property. Such non-inclusion was never questioned by any person, including by the Waqf Board. It was in such circumstances, Supreme Court took the view that averments in the plaint did not disclose a cause of action for filing the suit. The suit was found to be manifestly merit less and vexatious. Accordingly, order of the Waqf Tribunal rejecting the plaint was upheld.

37 Thus, as would be evident, the above case is not at all applicable to the facts of the present case.

38 Moreover, since the expression 'waqf by user' finding place in Section 3 (r) (i) of the Act is a defined expression and is not qualified by any word to suggest that it has to be of immemorial user, the Court would have to confine or restrict itself to the definition as provided by the statute.

39 In the light of the above, Court is of the view that there is no error or infirmity in the view taken by the Tribunal in passing the order dated 28.07.2021. Consequently, Court finds no good ground to interfere with the same. However, it is clarified that the discussions made in this order are restricted to the issue as to whether a case for rejection of plaint was made out or not. Those should not be construed to be an expression on merit of the rival contentions which shall be gone into by the Tribunal in the course

of the trial. All contentions would be available to the parties to advance during the course of the trial.

40 Subject to the observations made above, the Civil Revision Petition is dismissed. No order as to costs. Miscellaneous petitions, if any, pending in this revision petition shall also stand dismissed.

UJJAL BHUYAN, J

Date: 21.12.2021

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