Supreme Court of India
Sayyed Ali And Others vs Andhra Pradesh Wakf Board ... on 28 January, 1998
Equivalent citations: 1998 IAD SC 666, AIR 1998 SC 972, JT 1998 (1) SC 304
Bench: A Anand, V Khare
ORDER

Judgement Pronounced by V.N. Khare, J.

1. This appeal is directed against the judgement of the High Court of Andhra Pradesh dated 6.8.84 passed in Appeal No. 89 of 1976 whereby the High Court allowed the appeal and decreed the original suit filed by the first respondent herein.

2. The facts leading to the filing of the civil appeal are these:

3. The first respondent herein is the Andhra Pradesh Wakf Board thereinafter referred to as the "Wakf Board" constituted under the wakf Act (hereinafter referred to as the "Wakf Act"). The Wakf board is entrusted with the duty of administering and supervising all wakfs within the State of Andhra Pradesh, whether created before or after the commencement of the Wakf Act. One of such wakfs is by the name "Syed Ali Ishaq Madina Vali Dargah" having about Ac. 358-53 cts. land in Devada Mokhasa village covered by title Deed No. 42. It was alleged by the Wakf Board that the aforesaid property was endowed by the Nizam of Hyderabad for support and the services of the Dargah in the port area of district Visakhapatnam. It was further alleged that, from the property the income was being utilized for the maintenance and performance of services of the said Dargah from time immemorial and after Constitution of the Wakf Board, the first respondent herein, notified the said property as Wakf property in the Andhra Pradesh Gazette dated 30.11.1961. It was also alleged that the Mutawallis managing said the property without any kind of right, executed long term leases in favour of other defendants, who on their turn, executed long term sub-leases. Since the Mutawallis have no right or authority to execute long term leases, the Wakf Board on 8.8.1967 filed the suit in the Court of Subordinate Judge, Visakhapatnam for cancellation of various leases or sub-leases in respect of the property and for recovering the possession thereof. The case of Wakf Board was that long term leases being illegal, do not bind the Dargah as the property is a Wakf property. The suit was contested by the sub-lessees and the defence taken by them was that the grant was not in favour of Dargah and the property was not a Wakf property and, in fact, the grant was in favour of named individuals burdened with the service. The learned Subordinate Judge by judgement dated 14.2.75 dismissed the suit holding that the inam was in favour of the named individuals and the property did not belong to the Dargah and that the Wakf Board is estopped from contending that the property in dispute is part of Wakf property in view of the judgment of the High Court in Writ Petition No. 1726 of 1968. In this context it may be mentioned here that, before filing the suit, the Tahsildar made a suo motu enquiry under Section 3 of the Andhra Pradesh (A.A.) Inams (Abolition and Conversion into Ryotwari) Act, 1956 thereinafter referred to as the "Inam Act") for the purposes of grant of pattas on three points, viz, firstly, whether the property in dispute is an inam land; secondly, whether such inam land is in a ryotwary, zamindari or inam village and, thirdly, whether such inam land is held by any institution. The Tahsildar by his order dated 17.1.67 held that the land specified below is an inam land; that the land is in the inam village of Devada Mokhasa of Visakhapatnam Taluk in Visakhapatnam District: and that the land is not held by an institution. T.D.No. S. No. Classification Extent Remarks 42 1 to 211 Devada Mokhasa Ac. Cts. 3091...46 Wet and Dry

It may be mentioned here that the Tahshildar by his subsequent order dated 2.6.77 held the following land is an inam land and is in village Devada Mohkhasa of Viaskhapatnam Taluk and is not held by any institution.

ID No. S.No. Classification Extent Remarks 42 212 to 216 Devada Mokhasa Ac. 2216 .35

4. Against the order of the Tahsildar an appeal was preferred before the Revenue Divisional Officer Visakhapatnam which was dismissed on 21.8.67. Subsequently, the orders of Tahsildar and the Revenue

Divisional Officer were challenged before the High Court of Andhra Pradesh by means of a petition under article 226 of the Constitution but the same was dismissed by order and judgment dated 22.4.1970. To complete the chain of events the Wakf Board after dismissal of its suit preferred first appeal before the High Court of Andhra Pradesh which was allowed and the Wakf Board's suit was decreed.

5. Learned counsel appearing for the appellant advanced number of submissions in support of appellants case. He contended that the view taken by the High Court that the property is a Wakf is erroneous. Learned counsel took us to various documents which are on record of the case and argued that the property was in fact a grant made to individuals and not a Wakf property. The documents relied upon by the High Court for coming to the conclusion that the property is a Wakf, are Ex. B 3 dated 1.12.63 which is an extract from the Inam fair Register, Ex. B-4 is a certified copy of the decree dated 17.12.1903, Ex. A-20 is a certified copy of compromise decree dated 7.2.1910 and Ex. A-1 is a survey report dated 2.4.1956. It is true that the grant or sanad dedicating the property is not on record. Further, there is no evidence on record to show as to who granted inam, in whose favour and in what year. In the absence of such documents what is to be considered is, whether taking an overall view of the evidence on record, the Wakf Board has succeeded in establishing that there is a permanent dedication of the property as Wakf. Ex. B.3 and Ex. A-20 throw sufficient light on the character of the disputed property. Ex. A.20 shows that the grant was made of land in Devada Mokhasa and the Mokhasa village was resumed and the title deed earlier issued by the Inam Commission was cancelled in July, 1902, as the grantees were not rendering service at the Dargah. The Mokhasadar challenged the resumption of land by means of a suit filed before the District Judge, visakhapatnam being Suit No. 16/1902 and the District Judge decreed the suit by the judgment dated 17.12.1903 (Ex. B.4). The government preferred an appeal against the said judgement before the Madras High Court where the dispute between the government and the Mokhasadar was compromised, vide Ex. A-20, the relevant Clauses of which are extracted below:

"(1) ...

(2) That the Mokhasadwar and their heirs do permanently enjoy the suit properties performing the duties connected with the Dargah subject to the following conditions viz.

(3) Out of the annual net income of the Mokhasa of Devada for the Dargah not less than Rs. 120.00 a year shall be spent by the Mokhasadwar on the distribution of Khayraat among travelling Fakirs or if the whole amount cannot be so appropriated, the remainder shall be spent on any suitable charity among the Mohammedans of Visakhapatnam with the approval of the Collector.

(b)Out of the annual net income not less than Rs. 1125.00 shall be spent for the Moharram, monthly festivals and general upkeep of the Dargah and Rs. 75.00 on annual repairs and lighting. The repairs are to be done to the satisfaction of the Collector of Visakhapatnam.

(c) ...

(3) (a) That out of the mesne profits upto the end of Fasli 1317 of the Mokhasa of Devada in the hands of Government, 2/9 be constituted into a charitable fund for Mohammedan education or their charity to be determined and administered by the Municipal Council of Vishakhapatnam and that the said sum be invested in Government Promissory notes or other Trust Securities in the name of the Municipal Council;

(b)That a sum equal to 1/9 of the accumulated mesne profits be spent by the Mokhasadwar on restoring the Dargah to the satisfaction of the Collector of Visakhapatnam; and

(c) ...

(4) That the costs incurred by the Government amounting to Rs. 1024.11.0 be paid in equal shares from the mesne profits to be paid to the plaintiffs and from the amount to be set apart for a charitable fund for Mohammedan education, and that the plaintiffs do bear their own costs.

(5) That an account be rendered every year by the Mokhasadwar to the Collector on the 15th of April every year, of the expenditure on charity, Dargah and ceremonies under separate heads.

(6) That the grant be resumable, if the terms of the compromise are not fulfilled."

6. A glance of the terms of the compromise would show that the compromise decree obligated the Mokhasadwar to spend a portion of income not less than Rs. 1125 for performing Muharrum, monthly festivals and general upkeep of Dargah and Rs. 75 on annual repair and lighting in Dargah which were to be done to the satisfaction of the Collector of Visakhapatnam. Further, a sum of Rs. 120 was required to be spent by Mokhasadwar on distribution of (Khayraat) charity amongst the travelling Fakirs and if the whole amount is not spent, the remainder was to be spent on suitable charity among Mohammedans of Visakhapatnam with the approval of the Collector. Clause 3(a) of the compromise decree also stipulated that out of mesne profit upto the end of fasli 1317 of Mokhasa in the hand of Govt, 2/9th of which be constituted into a charitable fund for Mokhasadwar' education fund or their charity to be determined and administered by Municipal Council of Visakhapatnam and the said sum be invested in govt. promissory notes or other trust securities in the name of Municipal Council. Further a sum equal to 1/9th of the accumulated mesne profits be spent by Mokhasadwar on restoring the Dargah. It was also stipulated that if the terms of compromise are not fulfilled, the grant would be resumable. These terms of compromise do indicate that the nature of the property is a service Inam. The grant in favour of the Mokhasadwar was subject to the condition that they render service at the Dargah and perform the various obligations imposed on them. It was not left to the Mokhasadwar to neglect the Dargah not to incur any expenditure for the upkeep of Dargah or performing Muharrum & Ors festivals. The purpose for which the Mokhasadwar were obligated was for purpose under the Muslim law as pious, religious or charitable. It is true that the compromise decree constituted inam as a service inam, but under the Wakf Act such a grant answers to the description of Wakf even if the Mokhasadwar were allowed to enjoy the property, subject to this restriction that they would render service as stipulated in the compromise decree.

7. The Andhra Pradesh High Court in. R. Doraswamy Reddy V. Board of Wakf, (1978) 2 APLJ 399, relied upon by the High Court, has correctly summed up the legal position of a service inam as under:

"It is true that the land was granted to an individual to perform service. But it does not mean than he acquires title to that property. Similarly, if the land can be resumed for non-performance of service and can be regranted to another person for rendering service, it does not mean that the original grantor continues to be the owner of the property. When once the Wakf was created it continues to be a Wakf. When the inam is resumed and regranted it does not mean that there is revocation of the service. It only means that the Wakf property is entrusted to another individual to perform the service."

8. Ex. B.3 shows that an enquiry was conducted wherein it was found that the inam which was classified as Devadayam was granted for the support of Dargah of Visakhapatnam and was free of tax. The enquiry further revealed that the services were being performed by the legal representatives of three ancestors whose names were noted and appear under the words Dargah as Ansar Saheb, Madina Saheb and Mohammed Saheb. The inam was confirmed and title deed No. 42 was issued. Further, Column 8 of the Inam Fair Register indicates that the inam was granted for support of Dargah, Visakhapatnam. Column 10 shows that the grant was to continue so long as the service is performed. These entries in the Inam Fair Register establish the ingredients of Wakfs as defined under Section 3(1) of the Act. For the purposes of that definition, it is not necessary that dedication should be in favour of Dargah. It is sufficient if the dedication is made for the purpose recognized by the Muslim law as pious, religious or charitable. Thus, we are of opinion that grants by way of service inams for the purposes recognized by the Muslim law as pious, religious or charitable would clothe the property with the character of "Wakf" We, therefore, find that the view taken by the High Court that disputed

property is Wakf as defined in Section 3(1) of the Wakf Act is correct in law and the same does not suffer from any legal infirmity.

9. The Second argument of learned counsel for the appellant is that the findings recorded by the High Court as regards the character of the property in its judgment dated 22.4.70 rendered in writ petition No. 1726 of 1968, arising out of the order passed by the Revenue Divisional Officer, Visakhapatnam, constituted res judicata. The parliament has enacted Wakf Act to provide for better administration and supervision of Wakfs. Under Sub-section(2) of Section 5 of the Act the Board is required to publish in the official Gazette the list of Wakf properties whether in existence at the commencement of the Act of coming into existence thereafter. Section 6 of the Wakf Act further provides that if any question arises whether a particular property specified as Wakf property in the list of Wakf published under the Act, is a Wakf property or not, the Board or Mutuwallis of the Wakf or any person interested therein, may institute a suit in a Civil Court of competent jurisdiction for decision of the question and the decision of the Civil Court in respect of such matter shall be final. It is also provided therein that no such suit shall be entertained by the civil court after the expiry of one year from the date of the publication of the list of Wakf under Sub-section(8) of Section 5 of the Act. Sub-section(4) of Section 6 further provides that the list of Wakfs published under Sub-section(2) of Section 5 shall, unless it is modified in pursuance of a decision of the civil court under Sub-section(1), be final and conclusive. Therefore, any dispute relating to the character of Wakf property is to be decided in the manner provided under the Wakf Act. Subject to the result of a civil suit, if filed, the list of Wakfs published in the official gazette is final and conclusive. In the present case, the disputed property was shown as Wakf property in the A.P. Official Gazette on 30.11.1961 and no suit having been filed challenging the Wakf property, the entries in the official gazette describing the property as Wakf became final and conclusive. Under Section 3 of the Inams Act, Tahsildar may suo motu make an enquiry for the purpose of grant of patta on three points, one of them being, whether inam land is held by any institution. While making an enquiry in the present case as to find out whether the inam land was held by the Dargah, the Tahsildar was not required to enquire into and adjudicate upon the character of the Wakf property mentioned in the list of Wakfs published in the official gazette under Sub-section(2) of Section 5 of the Wakf Act, as the dispute in that regard as to its character could only be decided in the manner provided in Section 6 of the Wakf Act. Assuming that the Wakf property was not found to be held by the Dargah under Section 3 of the Inam Act, it was not open to the Tahsildar to adjudicate upon the character of the Wakf property as the same was a grant by way of service inam for purposes recognized by the Muslim law as pious, religious or charitable which constituted the property as Wakf. Thus, we find that finding of the Tahsildar that the property was not Wakf, was wholly erroneous and beyond his jurisdiction. Consequently, the finding of the Tahsildar that the property is not a Wakf property would not constitute res judicata in the subsequent suit filed by the Wakf Board. It is well settled that if a decision of a court or a tribunal is without jurisdiction, such a decision or finding cannot operate as res judicata in any subsequent proceedings. The plea of res judicata presupposes that there is inexistence a decree or judgment which is legal but when the judgment is non est in law, no plea of res judicata can be founded on such a judgment. It would be appropriate here to quote the following passage from "Res-judicata" Spencer Bower and Turner, 2nd Edition, page 92:-

"Competent jurisdiction is an essential condition of every valid res judicata, which means that, in order that a judicial decision relied upon, whether as a bar, or as the foundation of an action, may conclusively bind the Article, or (in the case of in rem decisions) the world, it must appear that the judicial tribunal pronouncing the decision had jurisdiction over the cause or matter and over the parties, sufficient to warrant it in so doing."

10. In Mathura Prasad V. Dossibai, , this Court

observed as follows:

"A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit Similarly, by an erroneous decision if the Court assumes jurisdiction which it does not posses under the statute the question cannot operate, as res

judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise."

11. In Richpal Singh V. Dalip, , this Court held thus:

"A salutary and simple test to apply in determining whether the previous decision operates as res judicata or on principles analogous thereto is to find out whether the first Court, herein the Revenue Court, could go into the question whether the respondent was a tenant in possession or mortgagee in possession. It is clear in view of language mentioned before that it could not. If that be so, there was no res judicata. The subsequent civil suit was not barred by res judicata."

12. In Pandurang Mahadeo Kavade V. Annaji Balwant Bokil, , it was held that in order to operate res judicata it must be established that the previous decision was given by a Court which had jurisdiction to try the present suit and the plea of res judicata would not be available if the previous decision was by a Court having no jurisdiction. Learned counsel for the appellant referred to a decision of this Court in the case of Mohanlal Goenka V. Benoy Krishna Mukherjee & Ors, [1953] S.C.R. p. 377, in support of his argument. In this case it was held that the principle of res judicata will also apply to execution proceedings. But this case has no bearing on the controversy which is before us and, therefore, learned counsel cannot derive any assistance from this decision. Thus, it is well settled that doctrine of res judicata does not apply to a decision of a Court or tribunal which lacked jurisdiction.

13. In the light of the above legal position, we hold that the decision of the Tahsildar under Section 3 of the Inams Act as to the character of the Wakf property which was upheld by the High Court of Andhra Pradesh being one passed without jurisdiction, cannot operate as res judicata and the High Court of Andhra Pradesh was justified in ignoring the said decision and in not giving effect to it.

14. It was then contended by the learned counsel for the appellant that the suit filed by the wakf Board was not maintainable in view of Section 14 of the Inams Act. We having found that the property was a service inam granted to individuals burdened with service, which answered the description of all the ingredients of wakf, the Tahsildar under Section 3 of the Inams Act, was not required to adjudicate as to whether it is a wakf property or not. His decision holding that the property is not a Wakf property was not within his domain and the decision could not be said to have been passed under the Inams Act. Decision or order contemplated under Section 14 of the Inams Act presupposes an order passed within jurisdiction. Since order passed by the Tahsildar has been found to be without jurisdiction, Section 14 of the Act which bars the jurisdiction of the Civil Court would not be attracted in the subsequent suit. In the present case, since it was not within the domain of the Tahsildar to embark upon an enquiry in respect Wakf property, Section 14 of the Inams Act cannot affect the maintainability of the suit filed by the Wakf Board. Learned counsel for the appellant relied upon a decision of this Court in Vatticherukuru Village Panchayat & Ors V. Nori Venkatarama Deekshithulu & Ors, [1991] S.C.R. p. 531, in support of his argument that by virtue of Section 14 of the Inams Act, the decisions of the Tahsildar cannot be challenged in a subsequent suit. No doubt, in this case, it was held that the Inams Act gives finality to the orders and decision given by the authorities, but it is not the case here. We have already held that the Tahsildar under Section 3 of the Inams Act was not competent to enquire into or give decision in respect of the character of the Wakf property, therefore the said decision is of no assistance to the argument of the learned counsel.

15. Lastly, it was contended by learned counsel for the appellant that once patta, under the Inams Act, having been granted in favour of Mokhasadar, it was not open to the High Court to hold that the property was Wakf property. In other words, the argument seems to proceed on the basis that once patta has been granted under the Inams Act to Mokhasadwar, the land has ceased to be a wakf property. It may be stated that a wakf is a permanent dedication of property for purposes recognized by Muslim law as pious religious or charitable and the property having been found as Wakf would always retain its character as a Wakf. In other words, once a Wakf always a Wakf and the grant of patta in favour of Mokhasadar under the Inams Act does not, in any

manner, nullify the earlier dedication made of the property constituting the same as Wakf. After a Wakf had been created, it continues to be so for all time to come and further continues to be governed by the provisions of the Wakf Act and a grant of patta in favour of Mokhasadar does not affect the original character of the Wakf property. We accordingly find no substance in last argument of learned counsel for the appellant.

16. For the foregoing reasons, we do not find any merit in this appeal and the same is accordingly dismissed. There shall be no order as to costs.