

## Himachal Pradesh Wakf Board Vs Shri Rajiv Dutta, Shri Sanjeev Dutta

**Court:** High Court of Himachal Pradesh

**Date of Decision:** Jan. 5, 2012

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 21 Rule 101, Order 21 Rule 103, Order 21 Rule 35, Order 21 Rule 36, Order 21 Rule 97

Waqf Act, 1995 – Section 14, 27, 3, 6(1), 6(4)

**Citation:** (2013) 2 ShimLC 622

**Hon'ble Judges:** V.K. Ahuja, J; Deepak Gupta, J

**Bench:** Division Bench

### Judgement

Deepak Gupta, J.

Keeping in view the importance of the issue involved in these cases at the time of admission of these petitions, the same

were referred for decision to a Division Bench.

2. The following important question arises in these cases:-

Whether the Objections filed by the petitioner H.P. Wakf Board should have been transferred for decision of the Tribunal constituted under the

Wakf Act, 1995, or whether the Rent Controller has jurisdiction to hear and decide the objections?

3. The brief facts relevant for decision are that one Smt. Kailash Dutta (since deceased) and now represented by her legal heirs S/Sh. Rajiv Dutta

and Sanjeev Dutta filed three separate eviction petitions against her tenants in respect of portion of the building defined as property Nos. 149 and

150, Nomani Building, Lower Bazar, Shimla. These eviction petitions were filed in the year 1984 and in all these petitions eviction orders were

passed against the tenants in the year 1989. It would be pertinent to mention that in all these petitions, the tenants had raised an objection that no

relationship of landlord and tenant existed between them and Smt. Kailash Dutta, the alleged landlady. The stand of the landlady was that the

original owner of the building late Sh. Kamaru Din by written Will had bequeathed his entire property in her favour. The learned Rent Controller

held that the petitioner was a landlady and entitled to receive the rent. It would be pertinent to mention that the learned Rent Controller could not

have decided the question of title. Even if the title of the petitioner was defective, she could still be treated to be a landlady. Thereafter, three

execution petitions 29-10 of 99/95, 30/10 of 99/95 and 31/10 of 99/95 were filed by the landlady Smt. Kailash Dutta for execution of the eviction

orders, which remained pending for a long time.

4. The Punjab Wakf Board, the predecessor-in-interest of H.P. Wakf Board filed objection petitions in these execution petitions. The case set up

by the Wakf Board was that initially one Abdulla, a Sunni Muslim was the owner in possession of the property. He was succeeded by one

Kamaru Din, who also died sometime in the year 1973-74. The case set up by the objector was that the property vested in the Wakf Board,

Shimla which later became part of the Punjab Wakf Board, Ambala and now is the part of the H.P. Wakf Board. Sh. S.J. Dutta, the predecessor-

in-interest of Smt. Kailash Dutta used to reside in a portion of the property known as 149 and 150 Lower Bazar, Shimla and was managing the

property as an attorney/agent of Sh. Kamaru Din till his death. It was alleged that the Will, whereby Kamaru Din was alleged to have bequeathed

his estate in favour of Smt. Kailash Dutta was not a valid Will. The execution of any such Will was denied. It was claimed that Kailash Dutta and

her successors had no right, title or interest in the property. The landlady and her successors in reply alleged that the objections were not

maintainable and had been filed in collusion with the tenants and that the Wakf Board had no right to approach the Court under Order 21 Rule 97

CPC. On merits, it was alleged that Sh. Kamaru Din had executed a legal and valid Will in favour of Smt. Kailash Dutta. The execution petitions

filed by the Punjab Wakf Board were dismissed by the Executing Court on the ground that the Board had no locus standi to file such objections.

5. Aggrieved by the said order, the Board filed Civil Appeal Nos. 74-S/13, 75-S/13 and 76-S/13 of 2001 in the Court of learned District Judge,

Shimla, who allowed the appeals and directed the Executing Court to consider and dispose of the objections after settling the issues. The

successors of Smt. Kailash Dutta filed FAO Nos. 22, 23, 24 of 2002 against the common judgment passed by the learned District Judge. These

appeals were dismissed by a Division Bench of this Court, vide judgment, dated November 28, 2002.

6. Thereafter, the matter went back to the Executing Court and at that stage an application was filed on behalf of the Wakf Board that in view of

the property having been included in the list of Wakf properties and in view of the fact that a Tribunal had been constituted under the Wakf Act,

the Tribunal alone had jurisdiction to hear the matter and the Wakf Board prayed that the execution petition and the objections may be sent for trial

to the Wakf Tribunal at Shimla for adjudication.

7. Vide order dated 10.8.2005, the Civil Judge held that he had no jurisdiction and referred the matter to the learned District Judge, Shimla, who

was the designated Wakf Tribunal at Shimla for necessary directions. The learned District Judge, Shimla vide his order dated 25.2.2006 held that

the execution proceedings arising under the H.P. Rent Control Act and this was not a matter falling within the Wakf Act and therefore, the Tribunal

did not have jurisdiction to decide the execution petitions. Aggrieved by this common order, the petitioner filed the present petitions.

8. We have heard Sh. B.S. Attri, learned counsel appearing on behalf of the Wakf Board.

9. To appreciate the contentions raised by Sh. B.S. Attri, it would be pertinent to mention that the Wakf Act, 1995 (hereinafter referred to as the

Act) was enacted and applies to all Wakfs in the country. By this Act, the Wakf Act, 1994 and Wakf Amendment Act, 1984 were repealed. A

Wakf has been defined in Section 3(r) of the Act, as follows:-

“Wakf” means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognized by

the Muslim law as pious, religious or charitable and includes-

(i) a wakf by user but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser;

(ii) grants, including mashrut-ul-khidmat for any purpose recognized by the Muslim law as pious, religious or charitable; and

(iii) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable

and “wakf” means any person making such dedication.

10. u/s 83 of the Act, the State Governments have been empowered to constitute as many Tribunals as they think fit for determination of any

dispute, question or other matter relating to Wakf or Wakf property. Section 85 of the Act which bars the jurisdiction of the Civil Court, reads as

follows:-

85. Bar of jurisdiction of Civil Court-No suit or other legal proceeding shall lie in any Civil Court in respect of any dispute, question or other matter

relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal.

11. It is thus clear that no suit or other legal proceedings shall lie in any Civil Court in respect of any dispute, question or other matter relating to

any Wakf property, which under the Act is required to be determined by the Tribunal. Chapter-II of the Act deals with the survey of Wakfs and as

per this Chapter the property of the Wakf have to be notified and if any question arises, whether the property notified as a Wakf property in the list

of Wakfs, is actually a Wakf property or not, the matter has to be decided by the Tribunal, alone and no Court has jurisdiction in this behalf.

12. We are concerned only with Section 6(1) of the Act,

which reads as follows:-

6. Disputes regarding wakfs- (1) if any question arises whether a particular property specified as wakf property in the list of wakfs is wakf

property or not or whether a wakf specified in such list is a Shia wakf or Sunni Wakf, the Board or the mutawalli of the wakf or any person

interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be

final.

13. Section 6(4) of the Act provides that the list of Wakfs, unless modified in pursuance to a decision of a Tribunal, shall be final and conclusive.

Section 6(5) further provides that after the commencement of the Act in the State, no suit or other legal proceedings shall be instituted or

commenced in a Court in that State in relation to any question referred to in sub section (1). Section 7(5) of the Act deals with the power of the

Tribunal to determine dispute regarding Wakfs and reads as follows:-

7. Power of Tribunal to determine disputes regarding wakfs- (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 proceeding or appeal, as the case may be.

14. A bare reading of Section 7(5) clearly shows that the Tribunal does not have any jurisdiction to decide a dispute which is the subject matter of

any suit or proceeding instituted or commenced in a Civil Court before the commencement of this Act, or 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 or

appeal, as the case may be. It is thus clear that if a dispute, whether a property was a Wakf property or not, had been raised in a Civil Court prior

to the enforcement of the Act, then the Tribunal would have no jurisdiction to decide the matter. At this stage, it would be pertinent to notice that

the Act came into force in the State of Himachal Pradesh much after the rent proceedings had commenced.

15. It is contended by Sh. B.S. Attri, learned counsel for the Board that in this case the dispute is, whether the property i.e. 149 and 150, Lower

Bazar, Shimla is a Wakf property or not and the dispute in question cannot be decided by the Rent Controller in execution proceedings and must

be referred to the Tribunal constituted under the Act. He also contends that assuming for the sake of arguments that this dispute has been raised

before the Rent Controller prior to the date of commencement of the Act, then also the Rent Controller not being a Civil Court and not having

jurisdiction to decide the question of title, could not have decided such issue and the same had to be referred to the Tribunal.

16. It would be pertinent to mention that in the State of Himachal Pradesh, two Wakf Tribunals were constituted in exercise of the powers

conferred u/s 83 of the Act, vide Notification dated 1st December, 2001 and these Tribunals are at Shimla and Kangra at Dharamshala. The

Shimla Tribunal has jurisdiction over the Districts Shimla, Solan, Sirmour, Mandi, Bilaspur and Kinnaur. On 9th March, 2002 a Notification was

issued in terms of Section 27 of the Wakf Act and as per this Notification, the property i.e. three storied building with shops known as Noman

Building, 149 & 150, Lower Bazar, Shimla were declared to be Wakf properties under the management of the Punjab Wakf Board, Ambala in

terms of the dedication dated 27.9.1971 by Sh. Kamaru Din.

17. The question that arises is whether the dispute in relation to the title of property No. 149 and 150 is to be referred to the Tribunal or the Rent

Controller can decide the same in execution proceedings. At this stage, it would be pertinent to mention that the Will executed by Sh. Kamaru Din

was also subject matter of Civil Revision No. 175 of 1994. In that case the tenant, at the stage of attornment, denied the title of Smt. Kailash Dutta

on the ground that Kamaru Din has not executed any Will in her favour. The question which arose before this Court was, whether this question has

to be decided by the Civil Court or by the Rent Controller. Hon'ble the Chief Justice has held as follows:-

In such circumstances, the petitioner has to establish the relationship of landlord and tenant for the purposes of filing an application u/s 14 of the

Act. The basic requirement of the Act is that there should be a relationship of landlord and tenant. The Rent Controller under the provisions of the

Act is not expected or entitled to decide the question of title to immovable property when it is in dispute. In this case, the title to the property was

denied at the earliest point of time when the petitioner wanted the respondent to make an attornment to him.

18. It is well settled law and as held by Hon'ble the Chief Justice that the learned Rent Controller cannot decide the question of title, but may at

best decide, whether the relationship of landlord or tenant exists between the parties or not. Since the learned Rent Controller decided this issue in

favour of Smt. Kailash Dutta and that decision has attained finality, she may be considered to be the landlord of the premises. However, in the

present case the matter does not end here. As pointed out above, this Court in the earlier cases i.e. FAOs No. 22 of 2002, 23 of 2002 and 24 of

2002, specifically held that the Executing Court was bound to hold a detailed enquiry to decide the question of title. After quoting various

judgments, the Division Bench of this Court held as follows:-

13. In *Silverline & Anr's case* (Supra) relied upon by the learned counsel for the appellants, Hon'ble the Supreme Court held as under:-

14. It is clear that the executing Court can decide whether the resister or obstructor is a person bound by the decree and he refuses to vacate the

property. That question also squarely falls within the adjudicatory process contemplated in Order 21 Rule 97 (2) of the Code. The adjudication

mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. The Court can make the adjudication on admitted facts

or even on the averments made by the resister. Of course the Court can direct the parties to adduce evidence for such determination if the Court

deems it necessary.

14. It is evident from the above that a detailed inquiry and collection of evidence will not be necessary and the Court can adjudicate the dispute on

admitted facts and averments by the resister. However, if necessary Court has to direct the parties to lead evidence to prove their rival claims. It is

thus not the ratio of the case that a question or right, title or interest should be disposed of without holding inquiry. The detailed inquiry will not be

required when the facts alleged by one party are not disputed by the other. However, in a case where contentious questions of facts and law are

raised, it will be necessary to inquire into such questions by affording opportunity to the parties to prove their rival contentions.

15. In a latter judgment in *Shreenath and Another Vs. Rajesh and Others*, the Hon'ble Supreme Court while dealing with a similar question held

as under:-

11. So, under Order 21 Rule 101 all disputes between the decree holder and any such person is to be adjudicated by the Executing Court. A

party is not thrown out to relegate itself to the long drawn out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the

decree-holder and other person claiming title on their own right to get it adjudicated in the very execution proceedings. We find that Order 21 Rule

35 deals with cases of delivery of possession of an immovable property to the decree-holder by delivery of actual physical possession and by

removing any person in possession who is bound by a decree, while under Order 21 Rule 36 only symbolic possession is given where tenant is in

actual possession. Order 21 Rule 97, as aforesaid, conceives of cases where delivery of possession to decree-holder or purchaser is resisted by

any person. Any person, as aforesaid, is wide enough to include even a person not bound by a decree or claiming right in the property on his own

including that of a tenant including stranger.

13. So far sub clause (1) of Rule 97 the provision is same but after 1976 amendment all disputes relating to the property made under Rules 97 and

99 is to be adjudicated under Rule 101, while under unamended provision under sub-clause (2) of Rule 97, the Executing Court issue summons to

any such person obstructing possession over the decretal property. After investigation under Rule 98 the Court puts back a decree-holder in

possession where the Court finds obstruction was occasioned without any just cause, while under Rule 99 where obstruction was by a person

claiming in good faith to be in possession of the property on his own right, the Court has to dismiss the decree-holder application. Thus even prior

to 1976 right of any person claiming right on his own or as a tenant, not party to the suit such person's right has to be adjudicated under Rule 99

and he need not fall back to file a separate suit. By this, he is saved from a long litigation. So a tenant or any person claiming a right in the property,

on his own, if resists delivery of possession to the decree-holder the dispute and his claim has to be decided after 1976 Amendment. Under Rule

97 read with Rule 101 and prior to the amendment under Rule 97 read with Rule 99. However, under the old law, in case order is passed against

the person resisting possession under Rule 97 read with Rule 99 then by virtue of Rule 103, as it then was, he has to file a suit to establish his right.

But now after the amendment one need not file suit even in such cases as all disputes are to be settled by the Executing Court itself finally under

Rule 101.

16. It is evident from the above that the provisions of Rule 101 are mandatory and provides for inquiry into the question of right, title and interest

raised therein and ambit and scope of such inquiry will depend on the facts and circumstances of each case i.e. in a case where the question (s)

raised can be decided on the basis of admitted and undisputed facts a comprehensive inquiry may not be necessary but in a case where

contentious pleas of facts are raised, the Executing Court is bound to hold a detailed inquiry and permit the parties to lead evidence to prove their

rival pleas based on the facts.

17. In the case in hand, question of title is involved. According to the appellants, they are owners of the property in question by virtue of a Will

executed by a Mohammadan in favour of a Hindu woman which Will was not even produced before the Executing Court, whereas respondent

No. 1 claims to have become owner of such property by virtue of the provision of Muslim law and that the Will set up by the appellants is a forged

document. In these circumstances, the Executing Court could not and should not have proceeded to dismiss the objection petitions without

affording any opportunity to the parties to prove their rival averments and that too in the absence of production of proof of the Will set up by the

appellants. The learned District Judge has thus rightly held that the Executing Court did not hold the requisite inquiry into the question of title raised

by respondent No. 1. 18. In view of the above conclusions, the impugned order remanding the cases to the Executing Court for inquiry in

accordance with law being lawful, call for no interference.

19. This judgment has attained finality and, therefore, the Executing Court will have to hold an inquiry, as to whether the objector, H.P. Wakf

Board is the owner of the property or not. This is an objection raised by the third party i.e. Wakf Board, which has questioned the title of the

landlady. This objection, in view of the earlier judgment of this Court which has attained finality will have to be decided by the Executing Court.

20. In view of the above discussion, the petitions are answered by holding that in the facts and circumstances of the present case, the Executing

Court will decide the question, whether the petitioner (s), i.e. objector before the Executing Court have title to the property or not. In case it is held

that they are owners of the property, then obviously Smt. Kailash Dutt will not be entitled to execute the earlier order passed in the rent petitions.

21. Keeping in view the fact that the proceedings are pending for a long time, the Executing Court is directed to dispose of the objections at the

earliest and in any event not later than 31st August, 2012. The petitions stand disposed of accordingly. No costs.