
(2001) 10 GAU CK 0013
In the Gauhati High Court
Case No : Second Appeal No. 172 of 1996

Abdul Haque (MD.)

APPELLANT

Vs

Abdul Mannan and Others

RESPONDENT

Date of Decision : 09-10-2001

Acts Referred:

Citation : (2001) 3 GLT 399

Hon'ble Judges : B. Biswas, J

Bench : Single Bench

Advocate : C.R. De, B.C. Das and R. Kar, for the Appellant; H.R.A. Choudhury and S. Baruah, for the Respondent

Judgement

D. Biswas, J.—This second appeal is directed against the concurrent findings of the Courts below. The learned Munsiff No. 2, Karimganj partly decreed the Title Suit No. 159 of 1980 declaring the Documents No. 3208 and 3209 registered on 28.6.1978 as void. The learned Assistant District Judge affirmed the impugned judgment and decree in Title Appeal No. 8 of 1988. Being aggrieved thereby, the Plaintiff Md. Abdul Haque has preferred this appeal admitted on 6.1.1997 for hearing on the following substantial questions of law.

1. Whether the learned Court below committed error of law in holding that the Defendant No. 1 (a) has become the Mutawalli by right of inheritance contrary to the provisions of Section 206 of the Mohammedan Law ?

2. Whether the learned Court below committed error in holding that the office of Mutawalli is not hereditary in view of Section 206 of the Mohammedan Law ?

3. Whether the learned Courts below were justified in not holding that only the founder of Wakf has power to appoint the 1st Mutawalli and lay down scheme for administration of the trust and for succession to the office of Mutawalli as provided u/s 204 of the Mohammedan Law?

2. I have heard Mr. C.R.-De, learned senior counsel for the Appellant and also Mr.

H.R.A. Choudhury, learned senior counsel for the Respondents.

3. It appears that the appeal is directed against the decision in Issue No. 4 only wherein the learned Courts below held that the Defendant No. 1 i.e. Respondent No. 1(a) and not the Plaintiff is the Mutawalli of Dighirpar Jame Masjid.

4. The Plaintiff claimed himself as the first Mutawalli of the Masjid having been appointed by the villagers 7/8 years prior to the institution of the suit. According to the Defendants, the Masjid in question is a very old Masjid and originally the land on which the Masjid situates belonged to the grandfather of the Defendant No. 1. It was a Wakf property managed by his grand-father as Mutawalli. After death of his grand-father, his father became the Mutawalli of the Masjid and the Wakf property. His father became incapable of discharging the functions of Mutawalli because of paralytic disease and he has been performing the duties of Mutawalli till date. In 1967 when he went to pilgrimage (Hauj), he handed over the accounts of the Masjid to Maulavi Aziruddin to manage the affairs of the Masjid. After his return from Hauj, when he was sick, the Plaintiff had taken away all the books of accounts from Maulavi Aziruddin and asserted him as the Mutawalli.

5. The Plaintiff examined himself and two other witnesses in support of his claim while the Defendant No. 1 examined himself and three other witnesses to vindicate his position. The learned Courts below on appreciation of the evidence and the law in this behalf rendered the above concurrent verdict declaring the Defendant No. 1 as the Mutawalli.

6. Mr. C.R. De, learned senior counsel assailed the aforesaid finding of the Courts below recorded in Issue No. 4 as violative of the provisions of Section 204 of the Mohammedan Law relating to Wakf. This is because, Mr. De pointed out, the Deed of Wakfnama has not been produced to show that the founder of the Wakf has laid down any scheme for the administration of the Trust and for succession to the office of Mutawalli. Besides, the Defendant No. 1 was not nominated to succeed by the last Mutawalli. The father of Defendant No. 1 also did not make any such nomination. According to him, the Defendant No. 1 cannot take over the office of Mutawalli only because he is the eldest son of his father, the last alleged Mutawalli. Mr. De, learned Counsel, however, did not advance argument in support of the claim of the Appellant (Plaintiff) that he is the Mutawalli.

7. Section 203 of the Mohammedan Law provides for eligibility for appointment as Mutawalli. It shows that subject to restrictions contained in Sub-section (2), the founder of a Wakf may appoint himself or his children or descendants or any other person, even a female or a non-Mohammedan to be Mutawalli of Wakf property. Sub-section (2) further provides that a minor or a person of unsound mind cannot be appointed as Mutawalli. Section 204 provides the procedure for appointment of Mutawalli. The section reads as follows:

204. Appointment of Mutawalli - (1) the founder of the wakf has power to appoint the first mutawalli ; and to lay down a scheme for the administration of

the trust and for succession to the office of mutawalli. He may nominate the successors by name, or indicate the class together with their qualifications, from whom the mutawalli may be appointed, and may invest the mutawalli with power to nominate a successor after his death or relinquishment of office.

(2) If any person appointed as mutawalli dies, or refuses to act in the trust, or is removed by the Court, or if the office of mutawalli otherwise becomes vacant, and there is no provision in the deed of Wakf regarding succession to the office, a new mutawalli may be appointed:

(a) by the founder of the wakf;

(b) by his executor (if any);

(c) if there be no executor, the mutawalli for the time being may, subject to the provisions of Section 205 below, appoint a successor on his death-bed ;

(d) if no such appointment is made, the Court may appoint a mutawalli. In making the appointment the Court will have regard to the following rules:

(i) the Court should not disregard the directions of the founder except for the manifest benefit of the endowment;

(ii) the Court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office;

(iii) where there is a contest between a lineal descendant of the founder and one who is not a lineal descendant, the Court is not bound to appoint the lineal descendant, but has a discretion in the matter, and may in exercise of that discretion appoint the other claimant to be mutawalli.

8. Provisions of Clause (d) of sub-section (2) of Section 204 clearly show that when the office of Mutawalli falls vacant and there is no provision in the Deed of Wakf regarding succession and where no appointment is possible under Clauses (a), (b) and (c), the powers to appoint Mutawalli vests with the Court. In the instant case, the Deed of Wakf was not produced to show that any scheme was incorporated for succession to the office of Mutawalli of Dighirpar Jame Masjid. There is also no nomination by the last Mutawalli. Therefore, the Defendant No. 1 cannot be accepted as the successor to the office of the Mutawalli on death of his father. There is no ambiguity in the provisions of law reproduced above and, therefore, the parties will have to approach the Civil Court of competent jurisdiction for appointment of Mutawalli. The concurrent findings tendered by the Courts below is contrary to the provisions incorporated in Section 204. Hence, the decisions given by them that Defendant No. 1 is the Mutawalli cannot be sustained in law.

9. The questions formulated at the time of admission of the second appeal centre-around the provisions of Section 204, The provisions in Section 204 are clear enough and calls for no interpretation. In the given circumstances, neither the Plaintiff nor the Defendant No. 1 can be declared as Mutawalli. The claim of

Defendant cannot be adjudicated in a suit filed by the Appellant. The questions formulated accordingly stand answered:.

10. In the result, this appeal is allowed. The findings of the learned Court below in Issue No. 4 declaring Defendant No. 1 as Mutawalli is hereby set aside. No costs.