
(2009) 03 PAT CK 0091

In the Patna High Court

Case No : Appeal from Appellate Decree No. 139 of 1996

Abdus Shakoor @ Shakur Mian and Others

APPELLANT

Vs

Md. Raja Mian

RESPONDENT

Date of Decision : 25-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (2009) 4 PLJR 302

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Advocate : Akhileshwar Kumar Shrivastava, for the Appellant; Md. Anis Akhtar, Md. Rashid Alam, Arif Siddique for Respondents Nos. 1 to 13 and Mr. Farooque Moazzam for Respondent No. 14, for the Respondent

Final Decision : Allowed

Judgement

S.N. Hussain, J.—This second appeal has been filed by the plaintiffs-respondents-appellants against the judgment and decree of the learned court of appeal below. The matter arises out of Title Suit No. 50 of 1986 which was filed by the plaintiffs for the following reliefs:-

- (a) Declaration that plaintiff No. 1 is sole owner of the suit properties and confirmation of possession or recovery of possession thereof.
- (b) Setting aside order dated 25.10.1985 based on 145 Cr.P.C.
- (c) Declaration that waqf deed dated 23.2.1929 by Most. Sukhwaria, wife of late Teg Ali in regard to suit property was illegal, never acted upon and never affected plaintiffs' title.
- (d) Cost of suit.
- (e) Any other reliefs.
- (f) Decree of permanent injunction restraining the defendants from interfering

with the possession of the plaintiffs.

2. The claim of the plaintiffs was that the original owner of the entire suit property was Teg Ali who had two sons and a daughter out of whom, two sons predeceased him issueless and hence Teg Ali left behind a widow Sukhwaria and Hafijan. It was also claimed that Hafijan was married to Ali Sher and they had two sons and a daughter, out of whom Rasool Mian and Kariman predeceased them issueless and they left behind only one son Abdus Shakoor alias Shakur Mian (plaintiff No. 1) who had a son Md. Ibrahim (plaintiff No. 2) and a daughter Kaima who was married to Abdul Hamid who left behind a son Razdin (plaintiff No. 3). It is further claimed that admittedly the suit property belonged to Teg Ali and hence his widow Sukhwaria inherited only 1/8th share (two annas) and as such she had no right to execute waqf deed dated 23.2.1929 with respect to the entire property of Teg Ali and as such the plaintiffs being the heirs of Teg Ali had absolute title over the suit property and are in exclusive possession thereof. It is also stated that some of the co-villagers had an evil eye on the said property and hence they wanted to dispossess the plaintiffs on the ground that the suit property was a waqf property on the basis of the deed of gift dated 23.2.1929 executed by Most. Sukhwaria.

3. On the other hand, the defendants 1st party claimed to be the managing committee of Sukhwaria Waqf Estate formed on the basis of the aforesaid waqf deed dated 23.2.1929, whereas defendant 2nd party claimed to be the President of the District Awqaf Committee and defendant 3rd Party was the Bihar State Sunni Waqf Board. Their claim was similar that the deed of waqf dated 23.2.1929 (Ext.-E) was executed by Most. Sukhwaria with respect to the entire suit land for the maintenance of mosque in which Rasool Mian the grandson of Most. Sukhwaria was made Mutawalli, but after the death of Sukhwaria, Rasool Mian also died in the year 1934, whereafter his father Ali Sher became the Mutawalli of the waqf estate who also died sometimes in the year 1977, whereafter plaintiff No. 1 Abdus Shakoor became the mutawalli, but since he started mismanagement and misappropriation of waqf property, the villagers resented and a committee consisting of defendant 1st party was formed in the year 1980 which was sent by defendant 2nd Party to the Waqf Board {defendant 3rd party} which approved the same. Hence, it is claimed on behalf of the defendants that the said deed of waqf was throughout acted upon and no one ever objected and hence after such a long period, the plaintiffs are not entitled to raise such a plea as their claim was absolutely frivolous and baseless and was also barred by the law of limitation.

4. Considering the respective claims of the parties as per their pleadings, the learned trial court framed the following issues for deciding the title suit:-

- (i) Whether the plaintiffs suit is maintainable?
- (ii) Whether the plaintiffs have cause of action for the suit?
- (iii) Whether the suit is barred by any law?

- (iv) Whether the plaintiff has any title over the suit land?
- (v) Whether the waqf deed dated 23.2.1929 is illegal?
- (vi) Whether the order of S.D.M, dated 25.10.1985 u/s 145 Cr.P.C. is fit to be set aside?
- (vii) Whether the plaintiff is the full owner of the suit land and his possession can be confirmed?
- (viii) Whether the plaintiffs are entitled to any relief?

5. On the basis of the aforesaid issues evidence were led and arguments were made by the parties, considering which the learned Additional Munsif-III, Bettiah decreed the suit in part on contest against private defendants and ex parte against the Waqf Board vide judgment and decree dated 4.6.1990 after arriving at the following findings:-

- (a) The suit would be governed by Article 112 of Limitation Act and not by Article 59 of the Act, hence this suit is well within thirty years from the date of knowledge.
- (b) The plaintiffs have proved that the property of Teg Ali which remained after his death was plot No. 1567 (11 kathas, 18 dhurs), plot No. 2011 (6 kathas 1 dhur) and plot No. 2062 (17 kathas 14 dhur), totally measuring 1 bighas 15 kathas and 13 dhurs in which his widow Sukhwaria inherited 2/16th share only.
- (c) Plaintiff No. 1 has got title over the remaining suit land.
- (d) Waqf deed dated 23.2.1929 executed by Sukhwaria is maintainable only with respect to her 2/16th share and the waqf deed regarding the remaining 14/16 share is illegal, null and void.
- (e) Order of Sub-Divisional Magistrate dated 25.10.1985 u/s 145 Cr.P.C. was wrong and is set aside.
- (f) Plaintiffs had knowledge on 11.11.1985 when defendants threatened to dispossess plaintiffs' father after order u/s 145 Cr.P.C.
- (g) Plaintiffs have right and title over 14/16 share in the suit property and their possession is confirmed.
- (h) Plaintiffs have cause of action for the suit which is, thus, maintainable.
- (i) Waqf deed is legal only to the extent of 1/8th share in the suit property and the remaining 7/8th share thereof belongs to the plaintiffs.

6. Against the aforesaid judgment and decree of the trial court, the defendants filed Title Appeal No. 47 of 1990 (20/ 1995) and the learned court of appeal below after considering the pleadings of the parties formulated the following point for deciding the title appeal:-

"Whether Ext.-E, the deed of Waqf executed by Most. Sukhwaria on 23.2.1929 is valid and operative instrument, if, so, to what extent?"

7. On the basis of the pleadings and evidence of the parties, learned Additional District Judge-I, West Champaran, allowed the Title Appeal on contest with cost, set aside the judgment and decree of the trial court and rejected the suit and claim of the plaintiffs vide his judgment and decree dated 12.2.1996 after arriving at the following findings:-

(a) Oral evidence of the parties are not reliable and in this suit only the documents and proposition of law will play vital role and I am not inclined to discuss the merit of all the 48 witnesses separately.

(b) The plaintiffs had not pleaded or proved that they had no knowledge of the waqf deed.

(c) The plaintiffs have not filed either original or certified copy of waqf deed of 1929 which was basis of suit, hence it must have been fatal for him.

(d) No witness has said that Rasool Mian was not Mutawalli although pleaded in paragraph 12(d) of the plaint.

(e) Hafizan never challenged the waqf deed. Her silence shows that it was with her consent, hence there is no law to hold Ext.-E invalid.

(f) In Ext.-E Rasool Mian son of Hafizan was made Mutawalli and after his death natural consequence would be that his father Alisher would act as Mutawalli.

(g) Ext.-D, registration of Sukhwaria Waqf Estate on 21.1.1964 as Waqf No. 1200 proves waqf, in Column Nos. 9 and 10 of which Alisher was shown as Mutawalli.

(h) Waqf was acted upon and no one including Hafizan, her husband or her son ever challenged it.

(i) It is admitted that Alisher died little before the death of his wife Hafizan in 1977, hence after his death, plaintiff No. 1 would become Mutawalli and in that capacity when he started misappropriating waqf property, villagers reacted and a committee was formed in 1980 and the litigation started.

(j) Plaintiffs' claim of sale to Rizwan of the suit land by Ext.-19 is falsified by Rizwan himself who deposed as D.W. 14 denying any purchase.

(k) Heirs of mutawalli cannot take advantage of their own misdeeds by not maintaining the mosque.

(l) Ext.-E is not void or illegal, rather it is fatal only at the instance of Bibi Hafizan, but she never objected within the period of limitation, i.e. three years.

(m) Plaintiffs argument that there is no contest by Waqf Board and the suit was decided ex parte against Board. I am not inclined to discuss this issue elaborately as plaintiffs have to prove their own case.

8. Against the aforesaid judgment and decree of the learned court of appeal below, the plaintiffs have filed the instant second appeal and by order dated 21.5.1998 a Bench of this court held that this second appeal be decided on the following substantial questions of law:-

(i) Whether the findings of the appellate court on the question of Musha is based on wrong interpretation of law and unnatural assumptions and evidence on record?

(ii) Whether the provisions of Hindu Law can be imported to decide the title of muslim and share of muslim widow such as whether a muslim widow can be held to have acquired entire property of her husband in excess of 1/8 share fixed by the Mohammedan Law for widow having issue from her husband?

(iii) Whether the judgment of lower appellate court is vitiated in view of the fact that Waqf Board had not contested the suit then decree can be passed in favour of stranger such as alleged waqf committee?

9. So far substantial question of law No. (ii) is concerned, learned counsel for the appellants submits that admittedly the suit lands belonged to Teg Ali who left behind a widow and a daughter and according to the principle of Mohammedan Law, his widow Sukhwaria got only 1/8 share which was never partitioned and hence she was not entitled to create any waqf of the entire property as the remaining 7/8 share was inherited by the plaintiffs according to the genealogy given by the plaintiffs. The said genealogy given by the plaintiffs-appellants was not disputed by the defendants-respondents and their only claim is that Sukhwaria, widow of Teg AC had executed waqf deed dated 23.2.1929 (Ext.-E) with regard to the entire property which had been throughout acted upon.

10. Under the provisions of the Mohammedan Law, a widow is entitled to 1/8 share in the property of her deceased-husband which can never change. Section 66 of Mulla's Mahomedan Law read with the Exception included therein provides that even on return the widow's share cannot increase when there is any other heir or even distant kindred alive. Here in the instant case, admittedly, several heirs including Hafizan (mother of plaintiff No. 1). the daughter of Sukhwaria, were alive at the time of death of Teg Ali. In the said circumstances, Sukhwaria acquired only 1/8 share in the property left by her husband Teg Ali and it cannot be legally held that she had acquired any property in excess of her 1/8 share. Thus, it is quite apparent that she had no right or title to execute the deed of gift dated 23.2.1929 (Ext.-E) with respect to 7/8 share in her husband's property which belonged to the other sharers.

11. So far substantial question of law No. (i) with regard to rule of "Mushaa" is concerned, Section 158 of Mulla's Mahomedan Law specifically defines that it is an undivided share in property either movable or immovable, whereas Section 177 of Mulla's Mahomedan Law provides that "Mushaa" or an undivided share in property may form the subject of waqf whether the property is capable of division or not. Reference in this regard has been made to cases reported in

(1939)43 CWN 118 and also in 181 Indian Cases 76. In Chapter-II of Book-IX of Baillie's Digest of Mohammedan Law containing the doctrines of Hanifeea Code of Jurisprudence specifically provides that waqf of an undivided property is lawful as it was approved by Imam Aboo Yoosuf. The great jurist Sir Abdur Rahim at page 308 of his book Muhammadan Jurisprudence had also held that waqf of "Mushaa" is permissible. Furthermore, Section 57 of Outlines of Muhammadan Law written by Asaf A.A. Fyzee provided that a "Mushaa" may be validly dedicated as a waqf. Furthermore, F.B. Tyabji in his book Muslim Law has provided in Section 497 that the property dedicated may consist of "Mushaa" notwithstanding that it is divisible.

12. In the said circumstances, it is settled proposition of Mohammedan Law that a "Mushaa" or an undivided or part share in the property may be validly dedicated as a waqf, but alter if the property is to be used for a mosque or a burial ground. Hence, the waqf of a "Mushaa" for a mosque or a burial ground is not legal and valid whether the property is capable of division or not. Here, in the instant case, according to the waqf deed in question dated 23.2.1929, the waqf was created not for construction of any mosque or burial ground, rather it was created for using its income for maintenance of an already existent mosque, which is permissible in law. Hence, the dedication by Sukhwaria vide waqf deed dated 23.2.1929 (Ext.-E) is held to be legal and valid with respect to her undivided 1/8 share in the property. This view finds support from decisions of two Hon'ble High Courts in case of Mohammad Badrul Haq Rashidi vs. Shah Hasan Ahmad and Others, reported in A.I.R.1935 Allahabad 278(2) and also in case of Md. Ayub Ali and Another vs. Amir Khan & Others, reported in 1939 Cal. 268.

13. In this matter, another point arises for consideration as to whether Sukhwaria was entitled to execute a deed of waqf dated 23.2.1929 (Ext.-E) with respect to the property of the other heirs of Teg Ali, who were co-sharers of Sukhwaria. The Law is well settled in this regard that if the other co-sharers are major, the mother cannot transfer their shares unless she is duly and legally authorised to do so and if the co-sharers are minors, their mother cannot legally be a guardian of their property and cannot execute any deed with respect thereto unless by an order of court. Reference in this regard may be made to Section 359 of Mulla's Mahomedan Law as well as decisions of three Hon'ble High Courts; in case of Mst. Peeran Vs. Hafiz Mohammad Ishaq and Others, ; in case of Fathima Bivi and Others Vs. Sadhakatalla and Others, ; and in case of Gurubax Singh Gorowara vs. Smt. Begum Rafiya Khurshid and Others, reported in AIR 1979 Madhya Pradesh 66. Here in the instant case neither there is any such order of court, nor there is any authorisation by the co-sharers, nor even there is any pleading or evidence in that regard. Thus, it is held that Sukhwaria had no authority to dedicate the share of her children and other co-sharers by the deed of waqf dated 23.2.1929 (Ext.-E) and hence the said waqf deed was not legal and proper to the extent of their share, i.e. 7/8 share in the suit property.

14. So far substantial question of law No. (iii) is concerned, the defendants-respondents have admitted that Bihar State Sunni Waqf Board, respondent No. 14, did not contest the claim of the plaintiffs in the suit, nor produced any evidence in support of the claim of the remaining defendants-respondents, but it is claimed by the defendants-respondents that Ext.-E is a valid document admittedly executed by Sukhwaria and hence in any view of the matter, once a waqf is created the property vests in God and the said waqf was throughout acted upon as Rasool Mian, appointed Mutawalli by the Waqf deed, acted as Mutawalli till the end of his life in the year 1934, whereafter his father Ali Sher became Mutawalli of the entire waqf estate and after his death in the year 1977 his son plaintiff No. 1 Abdus Shakoor became Mutawalli and when plaintiff No. 1 started misappropriating and mismanaging the waqf property a committee (defendants No. 1 to 12) was formed by the people in 1980 which was sent by the President, District Awqaf Committee (defendant No. 13) to the Waqf Board (defendant No. 14) which approved the same.

15. The said claim of the defendants is falsified by their own pleadings and non-production of any valid material to support the same. Although the defendants raised the aforesaid claim, but there is no material at all, except Ext.-E, the impugned waqf deed dated 23.2.1929 in which Rasool Mian was sought to be made mutawalli and Ext.-D which is a register of waqf kept in the Board in which Ali Sher was shown as a mutawalli. There is no other material to show that the said waqf functioned for all those long years or Rasool Mian and after his death Ali Sher was ever approved by the Board for the post of mutawalli of the alleged waqf or they functioned as such. Furthermore, the claim of the defendants was that although plaintiff No. 1 was never appointed or approved as mutawalli of the waqf estate by the Board, but after the death of his father, he started functioning as mutawalli and misappropriated the waqf property, but these facts are also not substantiated by any reliable material whatsoever, whereas specific claim of the plaintiffs proved by valid materials was that waqf deed was never acted upon and the suit property throughout remained exclusive property of the plaintiffs. So far the deed of waqf, Ext.-E is concerned, its validity has already been discussed above while deciding substantial questions of law Nos. (i) and (ii) and only on the basis of Ext.-D, which is a self-styled document of the defendants, the specific right, title and interest of the legal heirs cannot be legally jeopardized.

16. Learned counsel for the respondents tried to place reliance on some extraneous materials which were never brought on record of the suit, but such documents cannot be legally relied upon in a second appeal as the defendants had never taken any step for producing them as additional evidence in the appeals. Furthermore, the defendants have also failed to plead as to whether the post of the mutawalliship as provided in the deed of waqf was hereditary or not. If it was hereditary, no reason has been given as to why the Board or its authorities did not take any step for appointment of a mutawalli as per the said provision of the deed as there were several persons in the family fit to be appointed as mutawalli. However, if according to the waqf deed, the post of the

mutawalliship was not hereditary, the defendants failed to give any reason as to why the Board did not take any step for appointment of the mutawalli/committee after the death of Rasool Mian in the year 1934 or even after the death of Ali Sher in the year 1977. Furthermore, the claim that the Managing Committee of Respondents No. 1 to 12 was constituted by the people of the locality and was sent to the Board by respondent No. 13 after plaintiff No. 1, who was the mutawalli, started mismanaging and misappropriating the waqf property, whereafter the Board, respondent No. 14, approved the same is clearly falsified in absence of any material whatsoever to show that plaintiff No. 1 ever acted as mutawalli of the alleged waqf or ever mismanaged or misappropriated the same or even that the people of the area ever selected such a Managing Committee of respondents No. 1 to 12 for the alleged waqf. Hence, it is quite apparent that the entire matter is the handiwork of respondents No. 1 to 12 in collusion with respondent No. 13 as before 1980 there is nothing to show, except Ext.-E and Ext.-D discussed above, that the suit property was ever treated as a waqf property by anyone and the dispute had arisen only after the initiation of a proceeding u/s 145 of the Code of Criminal Procedure and the plaintiffs learnt about the same from the pleadings of the defendants in the said proceeding.

17. Learned trial court had decreed the claim of the plaintiffs after arriving at several findings, including the finding that the suit was not barred by limitation as limitation would be counted from the date of the order (Ext.-20) passed u/s 145 of the Code of Criminal Procedure in the year 1985 and not from the date of the waqf deed of 1929 which was held to be ab initio void with respect to the legal share of the plaintiffs. Although the said judgment and decree of the trial court was challenged by the defendants in the title appeal, but the only point formulated by the learned court of appeal below for deciding the title appeal was "whether Ext.-E, the deed of waqf executed by Most. Sukhwaria on 23.2.1929 is valid and operative instrument, if so, to what extent?" and on that question, the learned court of appeal below went on to allow the title appeal without reversing the finding of the that court with regard to limitation. Hence, this court upholds the finding of the trial court with regard to limitation to be legal, valid and proper.

18. It may be interesting to note that respondent No. 13 claimed in the suit and the appeals that he was the President of the District Awqaf Committee formed by the Waqf Board in the year 1980. The term of appointment of a District Awqaf Committee or its authority is hardly for one or two years and if defendant No. 13 was the President of the District Awqaf Committee in the year 1980 he cannot be presumed to continue on that post for all these long years and furthermore, no material has been produced on behalf of the defendants to show that the Waqf Board has thereafter appointed any District Awqaf Committee of which respondent No. 13 was a President. In this court also learned counsel for the respondents have submitted that they have no instruction as to whether respondent No. 13 is still the President of District Awqaf Committee, but at the time of filing of the title suit he was President of the District Awqaf Committee, but no document even with respect thereto has been produced. So far the

Managing Committee of respondents No. 1 to 12 is concerned, its claim that it was elected on 19.12.1980 and the same was approved by the Board on 23.12.1980, but no order of approval of the Board has been produced, nor any material has been produced to show that after the expiry of the said period, extension was granted although the claim of respondents is that the said Managing Committee was given extension after extension and finally in the year 2003 an extension for three years was granted which ended in the year 2006 and thereafter no step was taken. But these claims are not supported by any material whatsoever. Hence the said respondents are not functioning even according to the claim of the respondents, including the Board. In the said circumstances, it is quite apparent that the Managing Committee of respondents No. 1 to 12 was a frivolous committee which had never managed the alleged waqf properties.

19. In view of the aforesaid findings of this court with respect to the three substantial questions of law, it is quite apparent that the judgment and decree of the trial court were based upon the respective pleadings of the parties and evidence on record as well as specific provisions of law which were completely ignored by the learned court of appeal below. The learned court of appeal below not only misconstrued the documents and evidence on record which could not legally support the claim of the defendants, but also misinterpreted the specific provisions of law in arriving at the findings with regard to validity or otherwise of the waqf deed, Ext.-E. The learned court of appeal below also failed to appreciate that once it was found that Sukhwaria had only 1/8 share in the suit property and her deed of waqf with respect to 7/8 share was ab initio void, the onus was squarely upon the defendants to show that the said deed of waqf was throughout acted upon, but they miserably failed to prove the same by any cogent material as discussed above. The learned lower appellate court also failed to appreciate that the plaintiffs had specific share in the suit property and Sukhwaria had no right, title or authority under the provisions of law to transfer their said share and the plaintiffs sufficiently proved that they had throughout been in possession of the suit land as specific owner thereof. In the aforesaid facts and circumstances, this second appeal is allowed, the impugned judgment and decree of the learned court of appeal are hereby set aside and the judgment and decree of the learned trial court are hereby affirmed and the claim of the plaintiffs to that extent is upheld. However, in the facts and circumstances of the case, there will be no order as to cost.