
(2012) 12 CAL CK 0040
In the Calcutta High Court
Case No : C.O. No. 3204 of 2007

Asma Khatoon

APPELLANT

Vs

The Board of Wakfs and Others

RESPONDENT

Date of Decision : 21-12-2012

Acts Referred:

Bengal Wakf Act, 1934 — Section 46A
Trusts Act, 1882 — Section 78

Citation : (2013) 1 CALLT 517

Hon'ble Judges : Toufique Uddin, J

Bench : Single Bench

Advocate : Priyabrata Mukherjee, Mr. Mohiuddin and Mr. Nayeemuddin Munshi, for the Appellant; Sahidullah Munshi for the Opposite Party No. 3, for the Respondent

Final Decision : Dismissed

Judgement

Toufique Uddin, J.—This revision arose out of resolution dated 22.3.2005 and 21.3.2006 passed by the Board of Wakf, duly communicated by the Chief Executive Officer to the petitioner by his order dated 5.5.2006 as well as the judgment dated 31.7.2006 passed by Abdul Quader, Presiding Officer, Wakf Tribunal, West Bengal in Appeal No. 17 of 2006. In the background of this case, the fact in a nutshell is as follows:

One Abdul Rashid was the original owner of more or less of 1 bigha 4 cottahs of land with a structure situated therein at the premises No. 32, Ekbalpur Lane, Kolkata-23. He executed a deed of settlement on 27.3.1931 and registered on 28.3.1931 in respect of 7 cottahs 8 chittacks of land and structure. He formed a committee for management of the said property after his death but he revoked the said deed after 66 days thereof by a deed of revocation dated 2.6.1931.

2. Then Abdul Rashid gifted the said 1 bigha 4 cottahs of land with a structure situated at the said premises to his wife Halimon Bibi by a registered deed of Heba dated 7.1.1931. During enjoyment of the said premises, she died in the

year 1939 leaving only son Abdul Latiff who was fathered by one late Osman Gani, (former husband of Halimon Bibi) as the sole heir and legal representative. Abdul Latiff became owner. While in possession, he sold the same in favour of one Kulada Kanta Roy and his brother Kali Charan Roy by a registered deed of Kobala dated 12.6.1951. One Sk. Md. Sahen Shah, father of opposite party No. 3 somehow collected a copy of the said deed of settlement dated 27.3.1931 and applied before the Commissioner of Wakfs, West Bengal to enrol 7 cottahs 8 chittacks of land and structure on 28.7.1965 as wakf properties after expiry of more than 34 years showing the deed of settlement dated 27.3.1931 as wakf deed. On 19.9.1966 the said Sk. Md. Sahen Shah allegedly claiming himself as mutwalli of Abdul Rashid Wakf Estate filed a Title Suit being T.S. No. 391 of 1966 in the 6th Court of the learned Munsif at Alipore for declaration of title and confirmation of possession and permanent injunction and that suit was dismissed for default on 24.4.1969. Sk. Md. Sahen Shah neither filed any application for restoration of the said suit nor preferred any revision or appeal against the said order of dismissal of the said suit.

3. On 26.6.1969 one Abdul Khaleque of premises No. 9, Shah Aman Lane, P.S. Ekbalpur, District 24-Parganas applied before the Commissioner of Wakfs to enrol such 7 cottahs 8 chittacks of land with a structure in the said premises as wakf property on the basis of deed of settlement dated 2.3.1931 executed by said Abdul Rashid which was revoked on 2.6.1931. Thereafter the said Kulada Kanta Roy and others while in possession sold the property to the present petitioner Asma Khatoon by deed dated 26.6.1973. The petitioner got her name recorded in the Kolkata Municipal Corporation as sole owner. Then she sold the part of the property measuring 3 cottahs 10 chittacks and 30 square feet after erection of partition wall as separate unit unto and in favour of one Khairunnessa Bibi by deed dated 28.4.1977 and remaining land was under possession of the petitioner.

4. The opposite party No. 2 suddenly issued a letter No. 1309 dated 29.5.2004 to the existing tenants with a direction to pay rent to the opposite party No. 3 who is presently alleged mutwalli of Abdul Rashid Wakf Estate. The tenant handed over the said letter to the petitioner on 6.6.2004 and thereafter the petitioner filed a petition on 8.6.2004 before the opposite party No. 2 and prayed for revocation of the enrolment of the premises.

5. The Board of Wakfs heard the matter and passed resolution on 22.3.2005 which was confirmed on 13.4.2005 and thereby cancelled the petition of the petitioner dated 8.6.2004 and confirmed that the said property was wakf property.

6. The Board of Wakfs further took resolution on 25.1.2006 in hush manner without any knowledge of the petitioner and enrolled the said property having an area of 7 cottahs 8 chittacks at the said premises as wakf property which was confirmed by the Board in its meeting held on 21.3.2006 and the opposite party No. 2 communicated the said order to the opposite party No. 3 by Memo No. 402 dated 5.5.2006.

7. The opposite party No. 3 lodged a caveat on 1.5.2006 before the Wakf Tribunal, West Bengal and sent notice to the petitioner.

8. On 12.5.2006, the petitioner applied before the opposite party No. 1 for obtaining certified copies of resolution and then preferred the appeal, being Appeal No. 17 of 2006.

9. The Presiding Officer of Wakf Tribunal, West Bengal in his judgment passed in the said appeal stated that one Abdul Rashid created a Wakf by virtue of a registered Deed dated 27.3.1931 in respect of his property measuring 7 cottahs and 8 Chittaks at premises No. 32, Ekbalpur Lane, Kolkata-23. It was subsequently known and enrolled as Abdul Rashid Wakf Estate under E.C. No. 13875 in the year 1965 on the application of Sk. Md. Sahensha, the father of the respondent No. 3 who was appointed as mutawalli for the said Wakf Estate by the Wakf Board for a period of five years. But the respondent No. 3 presently is appointed as the mutawalli of the said Wakf Estate. On 8.6.2004, the appellant filed an application before the Wakf Board praying for cancellation or revocation of the enrolment of the said Wakf Estate. But the Wakf Board after hearing the parties by its resolution dated 22.3.2005 and 21.3.2006 disallowed the said application of the appellant.. Thereafter, the Chief Executive Officer of the Wakf Board in terms of the said resolution passed the impugned order dated 5.5.2006 for information of the parties. The Presiding Officer, Wakf Tribunal after hearing of both sides dismissed the appeal No. 17 of 2006 by the impugned judgment dated 31.7.2007.

10. Being aggrieved by and dissatisfied with the impugned resolutions and order dated 31.7.2007 the present petitioner has come up with this case.

11. Now the point of consideration is if the resolutions mentioned hereinabove, and the judgment passed in Appeal No. 17 of 2006 on 31.7.2007 by the Presiding Officer, Wakf Tribunal, West Bengal are suffering from any infirmities or not.

12. I have heard learned Counsels of both parties and examined the materials on record. One plain copy of alleged settlement deed, executed by Abdul Rashid on 27th March, 1931 and the alleged deed of revocation, executed by same Abdul Rashid on 2nd June, 1931 were placed before me. The learned lawyer of the petitioner contended, inter alia, that whether a deed is a deed of settlement or not or whether settler revokes the deed of settlement by virtue of power reserved by him cannot be adjudicated by a Board of Wakfs but (sic)n be done in a civil court having jurisdiction. In saying so, the learned lawyer of the petitioner wanted to make distinction between "trust" and "wakf" as follows:

13. It was further contended by the learned lawyer of the petitioner that the document dated 27.3.1931 is not at all a deed of wakf but it is actually a deed of settlement and he added that the deed of settlement dated 27.3.1931 was revoked by the settlor on 2.6.1931 by virtue of power reserved by the settlor in terms section 78 of the Indian Trusts Act, 1882. It was contended that it is

manifest in the deed of settlement itself that it was specifically written therein that as long as the settlor is alive the property in question is a property to be utilized and enjoyed by only the settlor. The learned lawyer also contended that the declaration made by the settlor in the original deed was conditional and it could not be nullified by the wakf at his own sweet will and in support of his contention he submitted the decision as reported in *Jonabali Sardar and Others Vs. Sm. Saleha Khatun and Others*, as well as another decision as reported in *Wakf Board Andhra Pradesh represented by its Secretary Vs. Biradavolu Ramana Reddy*, and concluded that the deed is not at all a wakf deed.

14. Learned lawyer of the respondents countered the arguments of learned lawyer of the petitioner. With due respect I am to say that the argument advanced by the learned lawyer of the petitioner is thrilling one no doubt and there is much to learn from it but I opine that his gallant attempt appears to be fruitless in view of the nature and character of the document and discussion made hereinafter.

15. From the definition of the wakf it transpires that "wakf" means the permanent dedication by a person professing Islam, of any moveable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes--

(1) A wakf by user.

(2) Grants recognized by the Muslim law as pious, religious or charitable;

(3) A wakf-al-ulad to the extent to which the property is dedicated for any purpose recognized by muslim law as pious, religious or charitable.

Essentials of a valid wakf are as follows:

(i) Perpetuity

(ii) Irrevocability

(iii) Inalienability.

16. The document dated 27.3.1931 ex-facie, I must say in view of its recitation, made at item No. (1) and (3) shows character of a wakf deed. The sub-clause (1) cannot be construed as an obstruction for treating the document as a wakf deed. It was contended by learned lawyer of the petitioner that the wakif cannot reserve any right for benefit of property except to some extent under Heenafi Law. What was the "except" has not been elaborated by the learned lawyer of the petitioner. That apart the recital shows that so long the wakif was alive he could enjoy usufructs of "kha" schedule property, out of such income, he would give Rs. 5/- per month to the Fakir and beggars and after his death the income derived out of "kha" schedule property will go for religious purposes viz., lightening the grave yard, reading of Fateya, making arrangement for and imparting education to poor children at Madrasa, gifting money to Mosque and distributing food during the month of Ramjan, as well as during the time of Idd

and Bakrid etc., etc. All these items relate to performance of religious and charitable work which is very object of the wakf. Enjoying the usufructs of the property during his lifetime with the condition that Rs. 5/- per month is to be paid to the Fakir and beggars does not destroy the nature of wakf deed.

17. The learned lawyer of the petitioner submitted written argument which is a part of the record. He dealt with various aspects of Wakf Validating Act, 1913, the Mussalman Wakf Validity Act, 1930 etc. but I think that those are not very much essential for proper adjudication here.

18. The learned lawyer also took up the case of the question of limitation by stating that as per Bengal Wakf Act, 1934 application for enrolment might be made within six months from the creation of all alleged wakf but here only on 23.6.1969 application was made. The fact remains the property was enrolled in 1965 as wakf property. So. it is expected that Wakf Board considered the question of limitation before enrolment. None challenged such enrolment as Wakf property. That apart section 46A of Bengal Wakf Act, 1934 shows the decision of the Commissioner is final unless revoked by a Court.

The decisions cited by learned lawyer of the petitioner (supra) are distinguishable in this case.

19. The deed of settlement itself is very clear. Rather from the same it is manifest that the wakif had cherished a bitter experience about his wife and son and dedicated the property in the name of almighty keeping a portion of income of the property for his own sustenance whereas the deed of cancellation appears to be a product of afterthought.

Now let the case be examined otherwise.

20. After dismissal of the suit being Title Suit No. 391 of 1966 filed by Sk. Md. Sahan Shah the said Mutwalli neither took any steps for restoration nor preferred any appeal. But it was contended by learned lawyer of respondents that there was no mutwalli in respect of wakf property for a long time and taking advantage of such vacancy, one Md. Siddique was grabbing the income of the property. The applicant Asma Khatun is the wife of Md. Siddique. Further the dismissal of suit for default or non-restoration of same does not confer title of property to the petitioner.

21. It was further contended by the learned lawyer of the opposite party that wakf becomes complete when a declaration of dedication is made by a person who is the owner of the property and the moment declaration is made the owner of the property is divested from its ownership and the property vests to the Almighty. The wakif in this case has done the execution and registration of the deed dated 27.3.1931 but he has termed the deed as a deed of settlement instead of deed of wakf. The deed of revocation was made by Abdul Raishid by subsequent deed dated 2nd June, 1931 but it is of no importance inasmuch as once a wakf is created the same cannot be revoked because after the creation of

the wakf the wakif does not retain any power to revoke the deed. It was further contended by learned lawyer of the respondent that after execution of the wakf, creation of subsequent deeds are void.

22. It was also argued by the learned lawyer of the respondent that the property was enrolled as wakf property in 1965 under the Bengal Wakf Act, 1934 but such enrolment of the Wakf Estate was not challenged by any body before the competent court or authority within the prescribed time. Therefore, the appellant has no locus standi to challenge the enrolment by filing a petition on 8.4.2004.

23. I have put my anxious thought over the submission made by the learned lawyer of both sides and carefully examined the records and provisions of law as well as the decision cited by both sides.

24. The learned lawyer of the respondent cited before me the decision as reported in Chhedi Lal Misra (Dead) through LRs. Vs. Civil Judge, Lucknow and Others, wherein it was held that wakif stand divested of his title to the property which after the creation of the wakf vests in the Almighty. However, creation of wakf may be questioned if it is shown that the wakif had no intention to create a wakf but had done so to avoid a liability. In the given case nobody filed any suit that the wakf created in 1931 was bad in law and was done so as to avoid a liability by the creator i.e., wakif. The language used in the settlement deed dated 27.3.1931 is of clear and unimpeachable character.

25. In a decision as reported in 1946 Lah 200 at page 208 it was pointed out that a wakf created by a will is as valid under Mohamedan Law as a wakf created during lifetime of the wakif. In this case, deed of settlement to some extent has the touch of a Will.

26. Therefore, considering the entirety of the subject in view of the materials available coupled with the provisions of law I am of opinion that there is nothing to interfere with the impugned findings. The C.O. No. 3204 of 2007 has no legs to stand upon and accordingly, the same stands dismissed.

Urgent Photostat certified copy be supplied to the parties, if applied for, on priority basis.