

(1979) 05 CAL CK 0003
In the Calcutta High Court
Case No : F.A. No. 203 of 1963

Ayesha Khatoon and Others

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 02-05-1979

Acts Referred:

Bengal Wakf Act, 1934 — Section 6(10)

Citation : (1979) 1 CALLT 82 : (1979) 1 CHN 426 : 83 CWN 776 : (1980) 126 ITR 489

Hon'ble Judges : Sharma, J;M.M. Dutt, J

Bench : Division Bench

Advocate : Ranjit Kumar Banerjee and Nirmala Chaturvedi, for the Appellant; Ram Chandra Prosad, for the Respondent

Judgement

Dutt, J.—This appeal is at the instance of the defendants and it arises out of a suit for declarations.

2. The case of the plaintiff. Union of India, represented by the Commissioner of Income Tax (Central) Calcutta, Assam, Manipore and Tripura, was that one Md, Safulla, the sole proprietor of M/s. Habibulla Safulla of Tinsukia, was an assessee under the I.T. Act His Income Tax was assessed by the ITO, Dibrugarh, for the sum of Rs. 1,27,926-11-0 which became due and payable by him. A certificate proceeding was started for the recovery of the said sum. The Certificate Officer, Dibrugarh, could realise only Rs. 3,180 on July 12, 1949, by attachment and sale of some movable property of the assessee and the balance sum of Rs. 1,24,746-11-0 remained due and payable by the assessee. A certificate proceeding was also started in the court of the Certificate Officer, Alipore, on November 9, 1949, In the said proceeding, the Commissioner of Wakfs, West Bengal, filed a claim on the allegation that the Calcutta property of the assessee formed part of the wakf estate under the terms of a deed of wakf executed by the assessee on August 14, 1946. The Certificate Officer allowed the claim of the Wakf Commissioner, holding that the certificate dues of the deceased assessee

could not be realised by the sale of the wakf property. Subsequently, there were two further assessments of Income Tax for the assessment years 1945-46 and 1947-48 for Rs. 2,26,843-6-0 and Rs. 16,983-14-0, respectively. It was contended by the plaintiff that the deed of wakf was collusive and fraudulent and was, accordingly, illegal and void. As the creation of the said wakf had put some illegal obstacles to the recovery of the Income Tax dues of the said Md. Safulla, and since the deceased had cast a cloud over the plaintiff's right to realise the said dues out of the assets of the deceased, the plaintiff instituted the suit praying for a declaration that the said deed of wakf dated August 14, 1946, was fraudulent, illegal and void. Further, the plaintiff prayed for a declaration that the order of the Certificate Officer, Alipore, dated March 10, 1953, was not binding on the plaintiff.

3. The defendants Nos. 1 to 5, who are the heirs and legal representatives of the deceased Mr. Safulla, entered appearance in the suit and contested the same by a written statement. The principal defence was that the wakf was validly created and, at the time of its creation, the said Md. Safulla had no Income Tax dues. It was contended by them that the order of the Certificate Officer dated March 10, 1953, was binding on the plaintiff. The further contention of the defendants was that the suit was barred by Section 42 of the Specific Relief Act and also Section 37 of the Bengal Public Demands Recovery Act.

4. The learned subordinate judge, 1st Court, Alipore, came to the findings that the wakf was void for uncertainty and that the same was not acted upon. He held that the wakf was a sham, collusive, fictitious, fraudulent and dishonest transaction. He overruled the contention of the defendants that the suit was barred by Section 42 of the Specific Relief Act or by Section 37 of the Bengal Public Demands Recovery Act. He also held that the said order of the Certificate Officer was illegal and not binding upon the plaintiff. Upon the said findings, the learned subordinate judge decreed the suit. Hence this appeal.

5. The principal question that is involved in this appeal is whether the wakf created by the said Md. Safulla by the deed dated August 14, 1946, is legal and valid. The deed of wakf is Ex. "P". By this deed, the said Md. Safulla created a wakf-alal-aulad for the maintenance and support of his family, children and descendants and ultimately for such religious, pious and charitable purposes as recognised by the Muslim law as such. He constituted himself the first mutwalli during his lifetime confining the succession to the mutawalliship to the eldest male member of his descendants for the time being. He made provision for separate reserve funds for various purposes. He also made provision for making payments to his sons and heirs, reserving Rs. 75 per month as the remuneration of the mutawalli. Provisions were also made for the contribution of Rs. 10 per month to a Madrasa at Tinsukia and Rs. 5 per month to a Jumma Masjid at the same place. He also provided for marriage expenses of his sons and daughters. After making the above provisions, he directed as follows in Clause (6) of the wakfnama :

"On the extinction of all my heirs and descendants and the heirs and descendants of my sons, grandsons, etc., either in the male or female lines the net balance of the income of the wakf estate which is payable to my sons and their descendants according to the terms of this wakfnama shall be spent for such purpose or purposes as are recognised by the Mussalman law as religious, pious and charitable, as the then mutawalli shall think fit and proper, and if there be no such mutawalli, as a competent court will think fit and proper."

6. In Clause (12) he reserved the right to alter the terms of the wakfnama and the beneficiaries of the wakf either by adding to their number or excluding some and to increase or reduce their shares. It was, however, directed that this power should not be exercised by any of the subsequent mutawallis,

7. It has been observed by the learned subordinate judge that the wakif did not divest himself completely of the ownership and possession of the property with which the wakf was created, but he retained the same during his lifetime though, ostensibly, in his capacity as a mutawalli. We may now consider the propriety of this finding. u/s 6(10) of the Bengal Wakf Act, 1934, "wakf" means the permanent dedication by a person professing Islam of movable or immovable property for any purpose recognised by the Islamic law as pious, religious or charitable and includes a wakf by user. u/s 6(11) of the Bengal Wakf Act, wakf-alal-aulad means a wakf under which not less than 75% of the net available income is for the time being payable to the wakif for himself or any member of his family or descendants. In this connection, we may refer to Section 3 of the Mussalman Wakf Validating Act, 1913, which declares that it is lawful for a person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of the Mussalman law, for the following among other purposes :

"(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character."

8. It has been already noticed that by Clause (6) of the wakfnama, the wakif expressly reserved the ultimate benefit for such purpose or purposes as are recognised by the Mussalman law as religious, pious or charitable. The object of the wakf is, therefore, a lawful one. There is no provision in the deed of wakf which shows any intention on the part of the wakif to retain ownership of the property to himself. By the wakfnama, the wakif created a wakf-alal-aulad for lawful objects. In arriving at the conclusion as to the invalidity of the wakf, the learned subordinate judge has been influenced by the wakif reserving to himself

an unqualified power of altering the terms of the wakfnama and the number of beneficiaries as well as the extent of their shares. It has been observed by him that by such reservation the wakif had meant to treat the property even after the creation of the wakf as his personal and absolute property. The learned subordinate judge has, however, completely overlooked that under the Mussalman law the wakif may, at the time of dedication, reserve to himself the power to alter the beneficiaries either by adding to their number or excluding some, and to increase or reduce their shares (see Article 190 of Mulla's Mahommedan Law, 16th Edn. p. 184). The wakif was, therefore, entitled to make such reservation in his favour. The learned subordinate judge, in our view, was not right in holding that by such reservation the wakif had meant to treat the property sought to be dedicated as his personal and absolute property.

9. We may now consider whether the wakf is void for uncertainty as held by the learned subordinate judge. It has been stated already that the ultimate benefit was reserved for such purpose or purposes as are religious, pious or charitable. The learned subordinate judge has taken the view that the use of general words of the proviso to s. 3 of Mussalman Wakf Validating Act, 1913, was not a sufficient specification of the object and so the wakf must be held to be void for uncertainty. In expressing that view, he has placed reliance on two decisions, one of the Full Bench of the Chief Court of Oudh in AIR 1940 324 (Oudh) , and the other of the Bombay High Court in Mariambi Vs. Fatmabai, . In the former case, it has been held that a dedication in general terms for "charitable purposes highly commendable according to the Hanafi school of Mussalman law" is not a valid dedication, and in the latter case, a bequest by a Mohamedan for sharam, kherat, vigere, has been held to be void for uncertainty. These two cases no doubt support the view of the learned subordinate judge. In this connection, we may refer to a decision of the Privy Council in AIR 1948 168 (Privy Council) , where, under the wakfnama, the ultimate benefit was reserved "for such religious and charitable purposes as may be beneficial to all Muslims". The wakfnama was upheld by the Privy Council as valid. This court in Hashim Ali v. Iffat Ara Hamidi Begum [1942] 46 CWN 561, has laid down that the use of the general words of the proviso to Section 3 of the Wakf Act without specification of the object of charity does not invalidate a wakf as it contemplates an ultimate gift effective in law, and that the ultimate benefit in a wakf-alal-aulad can also be impliedly reserved for the poor or for any purpose of a permanent character. In view of the said decisions of the Privy Council and of this court, we do not think that the law in this regard has been correctly laid down in the above decisions of the Chief Court of Oudh and of the Bombay High Court. We are, therefore, of the view that in the wakfnama there is no uncertainty in the ultimate gift to charity according to Muslim law and, accordingly, the wakfnama is not void for uncertainty as held by the learned subordinate judge.

10. The other ground on which the wakf was declared to be void by the learned subordinate judge is that it was never acted upon. In order to prove that the wakf was acted upon, the defendants produced several documents, namely, bank

papers, counterfoils of rent receipts, municipal papers, electric bills and various other letters (Exs. U series, J series, Q series, F series and K). It is an admitted fact that the wakf was enrolled with the Commissioner of Wakfs, West Bengal. These documents, however, did not commend to the learned subordinate judge and it was observed by him that to keep up the show of acting upon, the mutawalli was "required to do all the above in the minimum. We are not at all impressed with the finding of the learned subordinate judge which is based on mere assumptions. There is evidence that mutations were made in respect of the properties and municipal taxes and electric charges were paid in the name of the wakf. Further, rents were collected from the tenants; ejectment suits were instituted against them in the name of the wakf. The learned subordinate judge considered these evidence as insufficient to prove that the wakf was acted upon. He was again greatly influenced by the fact that the wakif reserved to himself the power to vary the number of beneficiaries and their shares which, it has been pointed out earlier, the wakif was lawfully entitled to do. It is the evidence of D.W. 1 that the surplus income of the wakf estate was distributed by the wakif amongst the beneficiaries. This evidence has not been accepted by the learned subordinate judge. We do not, however, find any reason not to accept the same. It is true that although by the wakfnama different reserve funds were directed to be opened, no evidence was adduced by the defendants that such funds were opened. They have, however, produced the bank account opened in the name of the wakf. In our view, as soon as a wakf is found to have been validly created, the failure of the wakif as the first mutawalli to perform the acts in terms of the wakfnama will not render the wakf invalid or void, nor can any inferences be made from such failure to act that he did not intend to divest himself of the ownership of the property dedicated to the wakf. After considering the evidence of the parties, we hold, disagreeing with the learned subordinate judge, that the wakf was acted upon, and that it was not a sham and colourable transaction.

11. The learned advocate for the plaintiff-respondent has placed reliance on a number of decisions, which will be referred to presently, relating to the question as to the validity of the wakf. We are of the view that the learned advocate has completely misconceived the decisions which are quite irrelevant for the consideration of the said question. The said decisions are COMMISSIONER OF Income Tax, BOMBAY Vs. ABUBAKER ABDUL REHMAN AND OTHERS (MUTAVALEES OF WAKF)., , CIT v. Ibrahimji Hakimji [1940] 8 ITR 501 (Sind), COMMISSIONER OF Income Tax, MADRAS Vs. M JAMAL MOHAMAD SAHIB., , COMMISSIONER OF Income Tax, BOMBAY Vs. KARIM BROS., CHARITY FUND., , COMMISSIONER OF Income Tax MADRAS Vs. AGA ABBAS ALI SHIRAZI., and Nawab Bahadur of Murshidabad Vs. Commissioner of Income Tax, West Bengal, Calcutta, . In all these cases, the question was whether, though some properties were validly given to the wakf, the same were held for charitable or religious purposes so as to enable the wakf estate to claim exemption from taxation u/s 4(3)(i) of the Indian I.T. Act, 1922. It was held that where properties were transferred to a wakf and the income was to be distributed to the wife and

children of the settlor and after the total extinction of the beneficiaries, the income was to be applied for charitable, religious or pious purposes, the properties were not held for charitable or religious purposes so as to claim exemption u/s 4(3)(i). As already observed, these cases have no manner of application to the question with which we are concerned in the present case relating to the validity of the deed of wakf. Indeed, there is evidence in this case that the income of the wakf estate is being assessed to Income Tax.

12. It has been already stated that the certificate proceeding was started by the plaintiff before the Certificate Officer, Alipore, 24 Parganas, being Case No. 26 (O.P.) of 1949-50 for the realisation of the Income Tax dues of the said Md. Safulla for the assessment years 1944-45 to 1946-47, by the sale of the wakf property situate at Calcutta. By his order dated March 10, 1953, the Certificate Officer came to the finding that the deed of wakf was executed and registered long before the assessment was made. In that view of the matter, he released the wakf property from attachment. The plaintiff has also challenged the said order and has prayed for a declaration that the said order of the Certificate Officer is not binding on the plaintiff. It is not disputed that no appeal was preferred by the plaintiff against the said order of the Certificate Officer. The question is whether the present suit is maintainable in view of Section 37 of the Bengal Public Demands Recovery Act, 1913. Section 37 provides as follows:

"Except as otherwise expressly provided in this Act, every question arising between the certificate-holder and the certificate-debtor, or their representatives, relating to the making, execution, discharge or satisfaction of a certificate duly filed under this Act, or relating to the confirmation or setting aside by an order under this Act of a sale held in execution of such certificate, shall be determined, not by suit, but by order of the Certificate Officer before whom such question arises, or of such other Certificate Officer as he may determine.

Provided that a suit may be brought in a Civil Court in respect of any such question upon the ground of fraud."

13. It has been held by the learned subordinate judge that in view of Sections 10 and 55 of the Bengal Public Demands Recovery Act, the decision of the Certificate Officer is entirely without jurisdiction and void and is incapable of operating as *res judicata* or ousting the jurisdiction of the Civil Court, notwithstanding the provision of Section 37. The proviso to Section 10 confers a power on the Certificate Officer to refer the petition u/s 9 to the Collector for orders if the Certificate Officer reconsiders that the petition involves a bona fide claim of right to property. The proviso, therefore, requires that the Certificate Officer must come to a finding that the petition involves a bona fide right to property before he can refer the petition to the Collector for his decision. If the Certificate Officer had found that the petition involved a bona fide claim of right and, in spite of that finding, he did not refer the petition to the Collector, in that case, it could be said that the Certificate Officer acted without jurisdiction. In the impugned order of the Certificate Officer, there is no such finding. It does not

also appear from the order that the plaintiff challenged the deed of wakf as a sham and colourable transaction created by Md. Safulla for the purpose of avoiding payment, of his Income Tax dues. In the circumstances, we are unable to hold that the Certificate Officer had acted without jurisdiction and that, accordingly, his order was null and void. Section 55 saves other remedies conferred by any other Act for the recovery of any debt or demand to which the provisions of the Act are applicable. The suit has not been instituted by the plaintiff for the recovery of the Income Tax dues of the said Md. Safulla, for such a suit is not maintainable under any enactment. So Section 55 also has no manner of application. In our opinion, as there was no question of fraud in respect of any question relating to the making, execution, discharge or satisfaction of the certificate filed under the Act, the suit was not maintainable in view of Section 37.

14. The defendants have filed an application under Order 41, Rule 27 of the CPC, praying for admitting in evidence a letter dated December 22, 1964, of the ITO, CC-VI, Calcutta, intimating the defendants that the assessment order of the ITO dated March 28, 1955, for the assessment years 1945-46 had been cancelled by the order dated January 10, 1959, of the AAC of Income Tax, Assam, Tripura and Manipur. In view of the said order of the AAC, the ITO cancelled the demand of Rs. 2,26,843-4-0. In view of our above findings, we do not think that we require any additional evidence.

15. For the reasons aforesaid, we set aside the judgment and decree of the learned subordinate judge and dismiss the suit with costs. The appeal is allowed, but in view of the peculiar facts and circumstances of the case, we make no order for costs.

Sharma, J.

16. I agree.