
(2015) 09 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : LPA No. 334 of 1998 CMP Nos. 171 of 2008 and 69 of 2014

Ghulam-ud-Din Bhat

APPELLANT

Vs

Minister for Auqaf Affairs

RESPONDENT

Date of Decision : 03-09-2015

Acts Referred:

Citation : (2016) 2 JKJ 42 : (2015) 2 SriLJ 696

Hon'ble Judges : N. Paul Vasanthakumar, CJ. and Bansi Lal Bhat, J.

Bench : Division Bench

Advocate : Z.A. Shah, Sr. Advocate with Mr. A. Hanan, Advocate, for the Appellants; Mr. Shiekh Manzoor, Dy. A.G. and P.S. Ahmad, Advocate, for the Respondents

Final Decision : Dismissed

Judgement

N. Paul Vasanthakumar, C.J. - This appeal is filed against the order dated 22.11.1982 made in OWP no. 698/1982 wherein the appellants had

challenged the order passed by the Special officer Auqaf, which was confirmed by the 1st respondent, the appellate authority.

2. The case of the appellants before the learned Single Judge was that they were given tenancy by the lessee of the land measuring 14 kanal and 18

marlas comprising of survey Nos. 325, 328 and 330, which land was owned by one Issa Shah. The said Issa Shah created a lease in favour of one

Samad Ghulam by executing a lease deed on 28th Baisakh 1997 Smvt (roughly in May 1940 AD). Said Samad Ghulam, in whose favour the lease

was created, before going to Haj, created a wakf of the above land in favour of the 3rd respondent-Jamia Masjid. According to the appellants,

they all were in possession of the land through Samad Ghulam from the year 1960. The revenue records were also reflecting the same, stating that

appellants are in possession through Samad Ghulam. It was the contention of the appellants that once entries were recorded by the Consolidation

authorities and the same having not been challenged, their possessory right is recognised and even the same was affirmed in proceedings initiated

under Section 145 Cr.P.C. The challenge made by the Jamia Masjid before the Sessions Court in respect of proceedings under Section 145 were

also dismissed against which the Jamia Masjid preferred Criminal Revision No. 1/1981 before this Court. The grievance of the appellants was that

the property having been in possession of the appellants, the so called Wakf created by the lessee, namely, Samad Ghulam, without even executing

a document is not valid.

3. It is also the contention of the appellants that the said Samad Ghulam being not the owner, has no right to create the Wakf. The Special officer

thus ignored the revenue records while passing the order in favour of the 3rd respondent and the appellants were also non-suited by the appellate

authority, as if they have no right to question the creation of the wakf and if at all any person can object to creation of the wakf it could be by the

legal heirs of the owner of the property, namely, Issa Shah.

4. The said orders were challenged before the learned Single Judge and the learned Single Judge having noted the findings of fact rendered by the

Special Officer and the Appellate Authority, that after creation of the Wakf the trees standing on the land were cut and used for heating the water

in the Hamam and a shop existing on the site has been leased to one Mohamad Labroo by the 3rd respondent and the rent received from him is

being used for charitable purposes, the 3rd respondent is in possession of the land from 1953. The learned Single judge also pointed out the finding

recorded that Samad Ghulam who was in possession of the property created Wakf and his sons came into the witness box before the authorities

and stated that their father had created the Wakf in favour of the Jamia Masjid before proceeding for Haj and the land itself is unfit for cultivation,

i.e. a barren land, therefore, the possession of the appellants will not arise.

5. The learned Single judge, having regard to the limited scope available to go into the factual aspects in the writ petition, dismissed the writ petition

by holding that the persons who could have objected to the creation of the Wakf were the legal heirs of Issa Shah and they have not raised any

objection. The legal heirs of the lessee namely Samad Ghulam having supported the creation of Wakf and positive findings having been recorded

by the authorities constituted under the Wakf Act holding that a Wakf was created by oral gift followed by delivery of possession, the same cannot

be set aside in writ proceedings.

6. The said order is challenged before this Court by the appellants in this appeal. The legal heirs of said Issa Shah also attempted to challenge the

order of the learned Single Judge by seeking leave to file the L.P. appeal. The said leave application filed with application seeking condone delay

was considered by the Division Bench of this Court in COD no. 219/2009, IA no. 139/2009 in LPA no. 138/2009. The said leave was sought for

with condone delay of 11 years and 160 days in filing the L.P. appeal, stating that the said legal heirs came to know about the order of the Special

officer Auqaf dated 07.11.1981 as well as the order of the appellate authority dated 22.11.1982 and the order of the learned Writ Court dated

16.10.1998 and the pendency of the present LPA no. 334/1998, only in the first week of July, 2008. It was also their case that in the said appeal

the legal heirs filed impleading petition, however, they were later on advised to file a separate Letters Patent Appeal and, therefore, they have

chosen to file leave to appeal with application seeking condone delay.

7. The said applications seeking leave and condone delay was opposed and by a detailed order passed by the Division Bench of this Court on

23.07.2012 the said applications were dismissed. In the said order the Division Bench observed that land measuring 14 kanal and 8 marlas

comprising under survey nos. 325 and 330 situated at Rakh Mujgund, Srinagar was transferred by Ahmad Shah, Mohamad Shah, Habib-Ullah

Shah and Abdullah Shah sons of Issa Shah residents of Hajibagh, Mujgund to one Samad Ghulam son of Sidiq Ghulam resident of Chattabal,

Srinagar in the year 1941 and the said Samad Ghulam proceeded to Haj in the year 1953 and donated the aforesaid plot to the local mosque and

the Mutwali Jamia Masjid in the year 1980 approached Special officer Auqaf with an application contending that the appellants encroached the

property of the Masjid and to declare the said area as Waqf property and for directions to the revenue authorities to make entries accordingly in

the revenue records. The Special officer on 03.03.1980 summoned the parties,

recorded the statements of the parties and their witnesses and after going through the materials placed on record concluded that the disputed land measuring 15 kanal and 2 marlas was Waqf property within the meaning of Section 5 of the Jammu and Kashmir Waqf Act, 1978 and notification was also issued on 07.11.1981 declaring the said property as Waqf property. The whole case of the appellants was that they were allegedly in possession and they are entitled to retain the property by adverse possession.

8. The order of the Special officer Auqaf was challenged before the Minister in-charge Auqaf Affairs Department-appellate authority and the appeal was dismissed on 02.11.1982 and the said orders were challenged in the writ petition OWP No. 698/1982 and the same was dismissed on 16.11.1998. The Division bench held that the said Samad Ghulam having made a public announcement when he proceeded for Haj in the year 1953, which was also given wide publicity, it is expected that everyone, including the applicants, namely the legal heirs of the land owner and others have the knowledge that the donated property remained in the possession of the local Mosque and the usufructs are enjoyed by the Mosque, therefore, there is no reason to believe the contention that creation of Wakf made in the year 1953 came to the knowledge of the applicants only in 2008 and dismissed the application for leave to appeal and condone delay petition.

9. The said order of the Division bench dated 23.07.2012 passed at the instance of the legal heirs of actual owners of the disputed property has become final. Learned senior counsel appearing for the appellants was specifically asked as to whether the order of the Division Bench dated 23.07.2012 has been challenged before Hon'ble the Supreme Court. He has stated that no appeal was filed. However, he submitted that the said order will not bind the appellants and they can independently argue this appeal on merits.

10. The contention of the learned counsel for the appellants in this appeal is that the dismissal of the appeal filed by the legal heirs of Issa Shah and others have; no bearing as the appellants are asserting their independent right over the property based on possession. The learned senior counsel also submitted that the appellants were in possession of the said property

through sub tenancy granted by the lessee namely Samad Ghulam and they being in possession, they can challenge the order of the Special officer, Appellate Authority as well as the order of the learned Single Judge.

11. The appellants are allegedly claiming their right through tenancy, namely as sub-tenants. The original tenant who was granted lease, namely, Samad Ghulam, has given the property to Jamia Masjid and a wakf was created in the year 1953 and the Masjid is in possession of the land and enjoying the usufructs from the date of creation of the Wakf. The entry made in the revenue records or the order passed in the proceedings under Section 145 Cr.P.C will not confer title to the appellants in any manner. The appellants claim that the property came into their alleged possession as Sub tenants. They cannot claim that the Wakf created is not valid. The learned Single Judge has rightly held that if at all the creation of the Wakf could be challenged, the same could be by the legal heirs of the original owners i.e. the legal heirs of Issa Shah. The attempt made by the legal heirs of the original owner, by seeking leave to file appeal with condone delay was already negated by the Division Bench of this Court as early as on 23.07.2012. If they have no right to challenge the order of the learned Single Judge, as held by the Division Bench, definitely the present appellants, who are claiming the right of possession through sub-tenancy, cannot have any locus standi to file this appeal. The sub-tenancy right of the appellants will extinguish from the date the original lessee has transferred his right over the property to the Jamia Masjid i.e. in the year 1953 and thereafter the appellants, if were in possession, shall be treated as strangers/tress passers in respect of the property in question.

12. The contention of the appellants that creation of Wakf was not by a registered deed, cannot also be urged by the appellants as it is proved that Samad Ghulam while proceeding to Haj not only declared the property in favour of the 3rd respondent but also has handed over the possession of the property to the Masjid. It is settled proposition of law that oral gift followed with delivery of possession will create a right to the Masjid and registration of the document is required only if possession was not handed over. The gift/Hiba may be made orally. Under the Muslim Law writing is not necessary for the validity of the gift. Section 123 of the Transfer of Property Act, which states that gift of immovable property must be in

writing and registered is not applicable to gifts made by the Muslims, Oral gift if accepted by the donee, the donee becomes its owner only if donor puts the donee in possession of the property.

13. The similar issue was considered by Hon'ble the Supreme Court in the decision reported in (2011) 5 SCC 654, wherein a question arose as to

whether a Muslim can make an oral gift followed by delivery of possession, As there was divergence of opinion among the High Courts on the

above question, namely, the Calcutta High Court, the Madras High Court, the Andhra Pradesh High Court, the Gauhati High Court and the Jammu

and Kashmir High Court, The Calcutta High Court took a view that oral gift by a Muhammadan with delivery of possession is valid and no

registered gift deed needs to be executed. However, the full Bench of the Andhra Pradesh High Court, the Madras High Court and the Jammu &

Kashmir High Court held that oral gift is not valid. The Supreme Court upheld the view taken by the division bench of the Calcutta High Court and

the single bench of the Gauhati, High Court and held that the contra view taken by the full bench of the Andhra Pradesh High Court, the full bench

of the Jammu & Kashmir High Court and the single bench of the Madras High Court were not correct. In paragraph 28 to 30, it has held thus:

28. In considering what is Mohammadan Law on the subject of gifts inter vivos, the Privy Council in Mohd. Abdul Ghani stated that when the old

and authoritative texts of Mohammadan Law were promulgated there were not in contemplation of anyone any Transfer of Property Acts, any

Registration Act, any Revenue Courts to record transfers of possession of land, and that could not have been intended to lay down for all time

what should alone be the evidence that titles to lands had passed.

29. Section 129 of the TP Act preserves the rule of Mohammadan Law and excludes the applicability of Section 123 of the TP Act to a gift of an

immovable property by a Mohammadan. We find ourselves in express agreement with the statement of law reproduced above from Mulla,

Principles of Mahomedan Law (19th Edn.), p. 120. In other words, it is not the requirement that in all cases where the gift deed is

contemporaneous to the making of the gift then such deed must be registered under Section 17 of the Registration Act. Each case would depend

on its own facts.

30. We are unable to concur with the view of the Full Bench of the Andhra Pradesh High Court in Tayyaba Begum. We approve the view of the Calcutta High Court in Nasib Ali that a deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence, such writing is not a document of title but is a piece of evidence. We also approve the view of the Gauhati High Court in Mohd. Hesabuddin. The judgments to the contrary by the Andhra Pradesh High Court, the Jammu and Kashmir High Court and the Madras High Court do not lay down the correct law.

14. In view of the above decision, the contention of learned senior counsel that the Wakf created in favour of 3rd respondent in the year 1953 without a registered document has no substance and the plea made by the 3rd respondent that the Wakf was created in the year 1953 by oral gift followed by delivery of possession found acceptance.

15. Even though the appellants claimed to be in possession for some years, the authorities below and the learned Single judge had given a finding that after creation of the Wakf in the year 1953 the property remained in possession of the Masjid and the usufructs, namely the trees and the rent paid for the shop are being enjoyed by the 3rd respondent. In such circumstances we are unable to find any reason to interfere with the order of the learned Single judge. The appeal is dismissed. No costs.