

(2010) 06 OHC CK 0023

In the Orissa High Court

Case No : Second Appeal No. 271 of 1997

Juma Masjid Bije Mirzapur and Another

APPELLANT

Vs

Sk. Mohammad Alli and Others

RESPONDENT

Date of Decision : 24-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Evidence Act, 1872 — Section 90

Waqf Act, 1995 — Section 55, 56

Citation : (2010) 110 CLT 829

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.S. Naidu, J.—The Appellants, as Plaintiffs, filed O.S. No 77 of 1987 in the Court of the then Addl. Munsif, Bhadrak, inter alia, praying for a declaration that being the sons & legal heirs of Late Mutuwalli Rasul Bux are the sole Mutuwalli of the Wakf properties more fully described under suit schedule "A" & for a further declaration that the order of Wakf Board recognizing Defendant Nos. 4 & 5 to be the sons & legal heirs of Late Mutuwalli Sk. Wahabulla & granting sanction to the alienation made by them on 18.8.1985 in favour of Defendant Nos. 1 to 3 are illegal & void & for further declaration that Defendant Nos. 4 & 5 or Defendant Nos. 8 & 9 are not the sons of Sk. Wahabulla & for permanent injunction against Defendant Nos. 1 to 7 restraining them from entering upon the suit properties or creating any sort of disturbances thereon as well as for other ancillary reliefs.

2. The Trial Court by judgment & decree dated 30.1.1993 & 31.1.1993 respectively decreed the suit against Defendant Nos. 1, 2, 3, 8 & 9 & in part against Defendant No. 7 as well as Defendant Nos. 4, 5, & 6. The Plaintiffs were declared to be the sole Mutuwallis of the Wakf properties more fully described in Schedule "A" of the plaint. It was further declared that the order of the Wakf Board recognizing the Defendant Nos. 4 & 5 as sons & legal heirs of Late

Mutuwalli Sk. Wahabulla & giving sanction to the sale made by them on 18.8.1986 in favour of Defendant Nos. 1 to 3 are illegal & void. It was also declared that the Defendant Nos. 4 & 5 or Defendant Nos. 7 & 8 are not the sons of Sk. Wahabulla. The Trial Court further permanently restrained Defendant Nos. 1 to 6 from entering upon the suit property or from creating any sort of disturbances thereof and/or in the management of Juma Masjid & Wakf properties. The suit decreed was assailed by the Plaintiffs in Title Appeal No. 25 of 1993 & was heard by Learned Addl. District Judge Bhadrak By judgment dated 2.8.1997, appeal was allowed & the judgment & decree passed by the Trial Court was set aside. The said reversing judgment is assailed in this Second Appeal by the Plaintiffs.

3. The facts of the case have been discussed in extenso by both the Trial Court as well as lower Appellate Court. Therefore to avoid repetition, they are not reiterated again, but then only those facts, which are necessary for effectual adjudication are stated herein-below in brief.

According to the Plaintiffs, Sk. Wahabulla, the grand father was the Mutuwallis in respect of Schedule "A" properties recorded in the name of Juma Masjid Sk. Rasul Bux being his only son became the sole Mutuwalli after the death of Sk. Wahabulla. The lands being part of Bahel estate vested with the State Government in the year 1974, On the basis of an application filed by Sk. Rasul Bux, the lands were settled in his favour in R.F. Case No. 14/76. Defendants 1 to 3, who had no semblance of right, title & interest claiming to be the sons of Sk. Wahabulla through his 2nd wife Sahejadi Bibi filed a petition for settlement of the land in their favour. Defendant Nos. 8 & 9 also supported their case The said petition was registered as R.F. Case No. 306 of 1977. The Tahasildar, it is alleged, without serving any notice on the Plaintiffs settled a portion of the suit property in favour of Defendant Nos. 4 & 5 by Order Dated 30.12.1977. Thereafter, Defendant No. 4 filed an application before the Tahasildar to review the said order The order of settlement, it appears from the pleadings, was assailed before different authorities & even before this Court In OJC No. 90 of 1983. This Court held that the Tahasildar had no power to review his own order. While the matter stood thus, Defendant Nos. 4 & 5 executed a sale deed on 22.2.1978 & alienated some of the properties in favour of Defendant Nos. 1 to 3. The said sale deed was executed without obtaining prior permission from the Wakf Board It appears the Wakf Board while granting permission also held that Defendant Nos. 4 & 5 were the legal heirs of the last Mufuwalli The said order, it is alleged, was assailed before this Court in OJC No. 971 of 1979 This Court disposed of the writ application on the ground that the order passed in the review having been set aside, it is not necessary to determine the validity of post facto sanction granted by the Wakf Board. In short, according to the Plaintiff, Defendant Nos. 8 & 9 are strangers to the family, they were not the Mutuwallis of Juma Masjid, but taking advantage of the illegal order of the Tahasildar passed in R.F. Case No. 306 of 1977 & subsequent review Order Dated 20.2.1978, they had illegally alienated the property in favour of Defendant Nos. 1 to 3. On the basis of such pleadings,

the Plaintiffs filed the suit.

4. After receiving notice, Defendant Nos. 1 to 3 & Defendant Nos. 7, 8 & 9 filed three sets of written statements. Defendant Nos. 8 & 9 mainly contested the suit. They admitted that Sk. Wahabulla was the Mutuwalli of Juma Masjid. During his life time, he had married twice. Maina Bibi was the first wife & through her Sk. Rasul Bux was born. After the death of Maina Bibi, he married to Sahejadi Bibi & through her Defendant Nos. 8, 9 & 6 were born. After the death of Sk. Wahabulla, Defendant Nos. 8 & 9 along with the Plaintiffs (sons of Sk. Rasul Bux) became the Mutuwallis. On 20.8.1961, Defendant Nos. 8 & 9 along with Sk. Rasul Bux applied recognize them as Mutuwallis & the Board of Wakf, Defendant No. 7 resisted them as such. The Plaintiffs at a later stage disputed the status of Defendant Nos. 8 & 9 before the Wakf Board & claimed that they are not the Mutuwallis. Defendant No. 7 caused an enquiry, took evidence & came to the conclusion that Defendant Nos. 8 & 9 were the legal heirs of Sk. Wahabulla through his 2nd wife. On 22.5.1980 after obtaining due permission Defendant Nos. 8 & 9 sold Ac. 0.31 dec of land to Defendant Nos. 1 to 3. Again on 18.8.1986 they executed a registered sale deed in favour of Defendant Nos. 1 to 3 & delivered possession of the lands to them. In short, according to the contesting Defendant Nos. 8 & 9, they being the Mutuwallis had right to alienate the properties after obtaining due permission from the Wakf Board & the suit filed by the Plaintiffs is thus a misconception one. Defendant Nos. 1 to 3 in their written statement disputed the averments made in the plaint & supported the case of Defendant Nos. 8 & 9.

5. Defendant No. 7, the Wakf Board in its written statement averred that the sub-committee constituted after taking evidence came to the conclusion that Defendant Nos. 8 & 9 were legitimate sons of Sk. Wahabulla through his 2nd wife. The right of Defendant Nos. 8 & 9 over the suit properties was recognized by Defendant No. 7.

6. On the basis of the aforesaid pleadings, the Trial Court framed as many as thirteen issues & held that the Defendants 8 & 9 were the sons Sahejadi Bibi through her husband Fakir Khan. They are not the sons of Sk. Wahabulla & can never be appointed as mutawallis.

7. Defendants 1 to 3 neither got valid title under Ext. E-1, & the same was executed without any consideration, nor Defendants 1 to 3 & Defendants 8 & 9 acquired any right, title & interest over the suit land.

8. The Plaintiffs are the only mutawallis of Juma Masjid & they are the Marfadars of the Mosque & the order for fixation of rent in favour of Juma Masjid in R.P. Case No. 14/1976 is valid. The suit is neither hit by the principles of resjudicata or estoppels nor it is hit by Sections 55 & 56 of the Wakf Act

9. On the basis of such conclusions, the suit was decreed on contest & it was held that the Plaintiffs are entitled to get the reliefs claimed except the relief of permanent injunction claimed against Defendant No. 7.

10. The judgment & decree passed by the Trial Court was assailed in T.A. No. 25 of 1992. The lower Appellate Court discussed the evidence both oral & documentary in extenso & arrived at the following conclusions:

(a) The findings of the Court that the register indicating the marriage of Sk. Wahabulla with Sahejadi Bibi was fabricated one for the purpose of the suit, cannot be sustained.

(b) Sufficient evidence is not available to establish that Defendant Nos. 8 & 9 were the sons of Fakir Khan & not the sons of Sk. Wahabulla.

(c) Defendant Nos. 8 & 9 by cogent evidence could establish that they are the sons of Sk. Wahabulla through Sahejadi Bibi & not the son of Fakir.

(d) This Court in OJC No. 971 of 1979 (Ext. 12) held that the sale deed dated 18.8.1986 vide Ext. F is a valid one & had conferred title upon Defendant Nos. 1,2 & 3 & as such, the dispute cannot be agitated once again. Defendant Nos. 8 & 9 are the Mutuwallis of Juma Masjid being the sons of Sk. Wahabulla. They have got a valid right, title & interest over the suit properties & they have rightly executed the registered sale deed dated 18.8.1986 in favour of Defendant Nos. 1 to 3 after obtaining permission from the Wakf Board.

11. On the basis of such conclusions, the appeal was allowed.

12. While admitting the appeal, in consonance with Section 100 of the Code of Civil Procedure, the following substantial question of law was framed.

As to whether there was misconstruction of documents marked Exts. A, P & E.

13. Though it was further observed that the Appellants are allowed to urge any other substantial question of law at the time of hearing of the appeal, notice of any other substantial question of law has not been served on Learned Counsel for the Respondents

14. Mr. S.P. Mishra, Learned Senior Advocate appearing for the Appellant, strenuously took this Court through the evidence & contended that while deciding a Second Appeal, this Court can also interfere with the findings of fact in certain circumstances. In support of such contention, Mr. Mishra, relied upon the decision of the Supreme Court in the cases of Mst. Sugani Vs. Rameshwar Das and Another, , Hero Vinoth (minor) Vs. Seshammal, , Narayan Chandra Ghosh and Others Vs. Kanailal Ghosh and Others, & Ramlal and Another Vs. Phagua and Others, .

15. Before entering into the arena of controversy, it would be just & proper to once again recapitulate the law with regard to the restrictions imposed u/s 100 of the CPC (for short, the "Code") Section 100 of the Code reads as follows:

Section 100. (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High

Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this Section from an Appellate decree passed ex parte.

(3) In an appeal under this Section, the memorandum of appeal shall precisely state the Substantial question of law involved in the appeal,

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question,

(5) The appeal shall be heard on the question so formulated & the Respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question,

16. Perusal of the said Section gives an impression that jurisdiction of this Court in a Second Appeal is confined to substantial question of law only & it is not open to this Court to re-appreciate or reassess the evidence, however gross the error may seem to be. In other words, the finding of fact is not open to be challenged even if appreciation of the evidence by the Courts below is apparently wrong. The paramount duty to consider the sufficiency or adequacy of evidence to support a finding of fact is a matter of decision of the Courts below & it cannot be assailed in a Second Appeal. But then, there is some exception to the aforesaid settled principles of law inasmuch as finding of, fact may be interfered with in a Second Appeal if the following contingencies arise;

- (i) where there is no evidence at all upon which the finding of fact can-be based;
- (ii) where the findings of fact have been recorded by ignoring important & relevant evidence having considerable bearing
- (iii) on the issue or by taking into consideration extraneous facts; where point of determination is one of mixed questions of fact & law;
- (iv) where construction of document of title or document which is the foundation of the rights of the parties is ignored; &
- (v) where ultimate finding of fact by the First Appellate Court is a result of wrong placement of onus.

However, in the case where two views are possible to be taken from the available evidence, it is not open to the Second Appellate Court to set aside the findings because a contrary view appears to be more appealing (see: *Gopabandhu Das and Others Vs. Maheswar Mundian and Others*,).

17. In the case of *Panchugopal Barua and others Vs. Umesh Chandra Goswami and others*, , the Supreme Court observed that while entertaining a Second Appeal, the Court should not over look the change brought about by the Amendment Act of 1976 restricting the scope of second appeal drastically & confining the same only to appeals involving substantial question of law,

specifically set out in the memorandum of appeals & formulated by the High Court. Of course the High Court has the jurisdiction to entertain a Second Appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question, but then before that a fresh notice has to be issued to the Opp. Part.

18. In the case of Ram Prasad Rajak Vs. Nand Kumar and BOrs. and Another, , it was observed that existence of substantial question of law is a sine-qua-non for the exercise of jurisdiction u/s 100 of the Code Similar view has also been taken in catena of decisions of Supreme Court, this Court as well as other High Courts. The proper test for determination whether a question of law arises in the case is substantial or not was considered by the Supreme Court in the case of Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., . In the said case it was observed as follows:.

The proper test for determining whether a question of law arises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly & substantially affects the rights of the parties & if so, whether it is either an open question in the sense that it is not finally settled by this Court or by Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled & there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

19. In the case of Gian Dass Vs. The Gram Panchayat, Village Sunner Kalan and Others, & also in the case of C.A. Sulaiman and Others Vs. State Bank of Travancore, Alwayee and Others, , the Supreme Court held that Clause-5 of Section 100 applies only when substantial question of law has already been framed & if the Court forms the opinion that some other substantial question of law exists, the Court may frame the said issue after recording the reasons for the same & after issuing notice to the Respondents.

20. In the case at hand, as stated earlier the only substantial question which has been framed by the Court while admitting the Second Appeal is "as to whether there was mis-construction of documents marked as Exts. A, P & E". Of course this Court further observed that the Appellants are allowed to urge any other substantial question of law at the time of hearing of this appeal, but then no petition was filed for framing any other substantial question of law nor notice thereof was issued to the Respondents.

21. Before proceeding further it would be prudent to take note of the fact that a compromise petition was filed by the Appellants & L. Rs. of Respondent No. 5 & the said petition was registered as Misc. Case No. 334/2007. Respondents 1 to 4 however raised objections to the said petition for compromise on the ground that such a compromise is not maintainable After hearing parties, this Court observed

that as all the parties to the appeal are not parties to the compromise petition, no order can be passed on the petition.

22. Learned Counsel for the Respondents, supported the judgment passed by the lower Appellate Court & submitted that as none of the ingredients necessary for interfering with the order passed by the lower Appellate Court, which is based on factual finding & as no substantial question of law is involved, it is a fit case where the appeal should be dismissed.

23. To appreciate the submissions made, this Court once again went through the judgment & the relevant annexures. Ext. A is the registered sale deed dated 11.6.1976 executed by Fakir Khan wherein Defendant Nos. 8 & 9 have been described as his sons. Ext. P is the certified copy of the birth register dated 30.10.1939 which indicates that a male child was born to Sk. Wahabulia in the year 1939 & a female child was born to him in the year 1945. Ext. E is the order of the Wakf Board granting post-facto sanction. The lower Appellate Court has vividly discussed the evidentiary value of the aforesaid documents & has come to the conclusion that Ext. P being the birth register prepared in due course of business 30 years back & being a public document in consonance with Section 90 of the Evidence Act was admissible in evidence. That apart, Ext. P was a document prepared by Government agency & prepared in due course of business. Ext. E happens to be the marriage register of Sk. Wahabulia, which is of the year 1937. The Appellate Court has taken pains to go through Ext. A which is a binding book & used as a marriage register. Every page of the said book is numbered & is maintained in due course of business. The said document also reveals that Sahejadi Bibi was aged about 27 years, in the year 1937 when her marriage took place with Sk. Wahabulia. Relying upon the said documents coupled with the birth register Ext. P series, the oral evidence of D.W. 6 & the voters list (Ext. 3) the Appellate Court came to the conclusion that the Defendants 8 & 9 were the sons of Sk. Wahabulia. The said conclusion also fortified by the report of the committee constituted by the Wakf Board, vide Exts. C & D as well as the evidence of D.W. 2. After going through the conclusions arrived at by the lower Appellate Court, this Court finds that the said Court has not committed any error in appreciation of Exts. A, P & E. He has taken pains to go through the documents, discussed the same & considering the evidentiary value thereof vis-a-vis other evidence on record & has rightly come to the conclusion that Defendants 8 & 9 were the sons of Sk. Wahabulia, the ex-marfatdar. Ext. 12 is the judgment passed by this Court in OJC No. 971 of 1979. In the said application, the validity of the post facto sanction accorded by the Wakf Board to the registered sale deed executed by the Defendants 8 & 9 in favour of Defendant Nos. 1, 2 & 3 was assailed. This Court by Order Dated 1.10.1986 held that the sale deed executed on 18.8.1986 was valid & so also the permission accorded by the Wakf Board. This Court further held that as the sale deed dated 18.8.1986 is in pursuance of the sanction of the Board, the same confers valid title upon Defendant Nos. 1, 2 & 3. The finding vide Ext. 12 arrived at by this Court is also binding upon the Courts below & cannot be bypassed or

set at rest in a suit. After going through the documents Exts. A, P & E as well as the judgment of the lower Appellate Court, this Court is satisfied that the same have been interpreted correctly & there was no apparent error in such interpretation. The question framed is accordingly answered in favour of the Respondents.

24. In view of the discussions made above, this Court finds no reason to interfere with the finding of facts arrived at by the lower Appellate Court & refuse to interfere with the same. The Second Appeal is accordingly dismissed.

Parties to bear their own cost through out.