

(1983) 04 PAT CK 0009
In the Patna High Court
Case No : M.A. No"s. 106 and 107 of 1977

Maulvi Reza Ansari and Others

APPELLANT

Vs

Shyamlal Sah and Others

RESPONDENT

Date of Decision : 19-04-1983

Acts Referred:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 — Section 3
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Waqf Act, 1954 — Section 15(2), 36, 43, 6

Citation : AIR 1983 Patna 299

Hon'ble Judges : Birendra Prasad Sinha, J;B.P. Griyaghey, J

Bench : Division Bench

Advocate : S.S. Asghar Hussain, Abdus Salam and Ahsan Sahabuddin, for the Appellant; Mridula Mishra, S. Masoom Ali Rahmani, Shyam Sunder Sinha "Shyam" and Rajeeva Ro., for the Respondent

Final Decision : Dismissed

Judgement

Birendra Prasad Sinha, J.—Both these appeals have been heard together and are being decided by this common judgment.

2. The Question for consideration is whether a Mutawalli of a Wakf estate can institute and defend suits and proceedings in a court of law relating to wakfs after coming into force of Wakf Act 1954 (hereinafter referred to as the Act).

3. In order to appreciate the question arising in these appeals it will be necessary to give certain facts. One Hazi Tassadduk Hussain created a wakf in June, 1914 in respect of the suit property which is a pucca house consisting of seven rooms situate in Mohalla Nathnagar of Bhagalpur town. According to the wakf deed he was to act as Mutawalli till his death and after him his wife was to act as such. It was further stipulated that after the death of the wife also the Panches of Nathnagar were to appoint a person as Mutawalli whom they consider proper. Both Tassadduk Hussain and his wife died and after their death Maulvi Abdul Hamid was appointed as Mutawalli and manager. Garib Das, Govind Lal and

Shyamlal Sah were in occupation of some of the rooms of the house in question. A suit was filed by Munshi Abdul Hamid, the elected Mutawalli, which was registered and numbered as Title Suit No. 2 of 1955. He sought for a declaration that the suit properties were endowed properties having been made wakf by Hazi Tassadduk Hussain and that Garib Das, Govind Lal and Shyamlal Sah had not acquired any title to the properties under their respective sale deeds dt. 27-12-1949 and that their possession over the suit properties was illegal and wrongful. It was contended that Garib Das, Govind Lal and Shyamlal Sah who were tenants having repudiated their tenancy had forfeited the same and their tenancies had been determined and as such they were trespassers and their possession was wrongful. 31 more persons were also impleaded as defendants in the suit and a declaration was sought against them that they were also trespassers. Munshi Abdul Hamid also claimed a decree for recovery of possession in favour of himself representing the wakf estate and restoration of the suit properties to the wakf estate. A decree for permanent injunction and mesne profits was also sought for. The suit was dismissed by the trial court on 29-1-1957. Munshi Abdul Hamid and others filed First, Appeal No. 557 of 1957 in this Court which was allowed by a judgment dated 7-9-1961* and the suit was decreed. It was held by this Court that Tassadduk Hussain had created the wakf in question in 1914 and continued to be the Mutawalli until his death; that defendants Govind Lal, Garib Das and Shyamlal Sah had not acquired any title in respect of the suit properties and they were trespassers after 27-12-1949 though they were tenants of some portions of the suit Property before that date that defendants 4 to 34 had no title whatsoever to the suit property and that the plaintiffs were entitled to a decree for recovery of possession of the suit properties with mesne profits. Govind Lal, Garib Das and Shyamlal Sah took the matter to the Supreme Court and the Supreme Court by a judgment, dt. 13-11-1969 remanded the appeal to this Court on the ground that reference was made to Sections 11 and 12, Bihar Building (Lease, Kent, and Eviction) Control Act, 1947, under which the decree for eviction could only be passed at the relevant time by the controller appointed under the Act and the High Court's judgment was not explicit on that point. It was directed that that question should be determined by the High Court. Except for the reasons aforementioned, the appeal was dismissed by the Supreme Court. When the appeal was placed for hearing before this Court on 13-1-1970 the parties entered into a compromise and the appeal was disposed of in terms of the said compromise. A decree, accordingly, followed. The decree was put under execution by the present appellant Maulvi Reza Ansari who claims to have been elected as Mutawalli after the death of the original decree-holder Abdul Hamid and two others, namely, Hazi Abdus Salam and Maulvi Iylas who claim to have been elected as Sadar and secretary respectively of the wakf estate in question on 2-1-1975. By that time two judgment-debtors Garib Das and Govind Lal died. Objection under Sections 47 and 151 Civil P. C. was filed by Girja Devi widow of late Garib Das and Sabitri Devi and Dr. Dinesh Prasad Gupta widow and son of late Govind Lal. This gave rise to Miscellaneous Case No. 2 of 1976. Another objection was filed by the third

judgment-debtor Shyamlal Sah giving rise to Miscellaneous Case No. 3 of 1976. Their main objection was that the decree put in execution was null and void and could not be executed. The next objection was that the execution case was not maintainable.

4. On the first question the learned Additional Subordinate Judge who decided both the miscellaneous cases together held that the decree under execution was executable against Shyamlal Sah and the legal representatives of the deceased judgment-debtors Garib Das and Govind Lal. But, on the next question the learned Subordinate Judge held that after coming into force of the Wakf Act the execution case having been filed by the Mutawalli was not maintainable.

5. These two appeals have been filed by Maulvi Reza Ansari, the elected Mutawalli and two others in which the finding of the court being regarding non-maintainability of the execution case has been challenged. Mr. Asghar Hussain learned counsel appearing on behalf of the appellants in both the appeals has seriously contended that even after coming into force of the Wakf Act, 1954 the Mutawalli can institute and defend suits and proceedings in a court of law relating to wakf. It is in this context that we have to consider whether the Mutawalli can do so after coming into force of the Wakf Act, 1954.

6. The Wakf Act, 1954 came into force in the State of Bihar with effect from 12-4-1973. It provides for better administration and supervision of wakfs. Prior to this the Bihar Wakf Act, 1947, was in operation which stood repealed when the Central Act came into force. Chap. III of this Act provides for establishment of Boards and their functions. Section 9 provides that with effect, from such dates as the State Government may by notification appoint in this behalf there shall be established a Board of Wakfs under such name as may be specified in the official notification. Such Board shall be a body corporate having perpetual succession and a common seal with powers to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued. Section 15 lays down the functions of the Board. According to it the general superintendence of all wakfs in a State vests in the Board established for the State and it shall be the duty of the Board so to exercise its powers under the Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the incomes thereof are duly applied to the objects and for the purpose for which such wakfs were created or intended. While exercising its powers under this Act in respect of any wakfs the Board is required to act in conformity with the direction of the wakf, the purpose of the wakf and any usage or custom of the wakf sanctioned by the Muslim law. Sub-section (2) of Section 15 provides that without prejudice to the generality of the foregoing power of functions of the Board shall be "to institute and defend suits and proceedings in a court-law relating to wakfs".

7. The word "Mutawalli" has been defined in Section 3 of the Act and reads as under:--

"Mutawalli means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a competent authority to be the mutawalli of a wakf and includes any naib-mutawalli, khadim, mujawar sajjadanishin amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act, any person or committee for the time being managing or administering " any wakf property as such".

Section 36 of the Act lays down the duties of a Mutawalli which reads thus:

"36. It shall be the duty of every mutawalli--

(a) to carry out the directions of the Board:

(b) to furnish such returns and supply such information or particulars as may from time to time be required by the Board:

(c) to allow inspection of wakf properties, accounts or records or deeds and documents relating thereto:

(d) to discharge all public dues: and

(e) to do any other act which he is lawfully required to do by or under this Act."

A mutawalli may be removed by the Board from his office notwithstanding anything contained in any other law or the deed of wakf in the circumstances mentioned in Section 43 of the Act. Section 42 provides that when there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf or where the right of any person to act as mutawalli is disputed the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit.

8. This shows that a mutawalli is merely a manager of the wakf and is directly under the control and superintendence of the Board and may even be removed from his office in accordance with Section 43. As shown above he has to carry out the directions of the Board and to perform other duties as specified in Section 36. There is nothing in the Act which empowers a mutawalli to institute and defend suit and proceedings in a court of law relating to wakfs on his own. This power is vested in the Board which is a corporate body which must sue and be sued in its own name. The only exception which seems to have been provided was for an interim period u/s 6 of the Act. According to it if any Question arose whether a particular property specified as wakfs property in the list of wakfs published under Sub-section (2) of Section 5 is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf the Board or the mutawalli of the wakf or any person interested therein could institute the suit in a civil court of competent jurisdiction for the decision of the question but this was only for a period of one year from the date of publication of the list of wakfs under Sub-section (2) of Section 5 of the Act.

9. In the present case the execution was levied in 1976 by the mutawalli.

Apparently he had no power to levy execution in his own name. The execution case could have been filed only in the name of the Board and by the Board. It was submitted that Maulvi Reza An-sari was elected as a Mutawalli of the wakf estate in question on 23-6-1972 and was recognised as such by the Wakf Board and in such situation could institute the execution proceeding in his Own name. It may be that Maulvi Reza An-sari was elected as mutawalli and was recognised as such by the Board but that would not empower him to institute any suit or proceeding in his own name in view of the specific provisions in the Act giving this power only to the Board, The admitted position is that the property in question is a wakf property and is now governed by the Wakf Act which came into force in the State of Bihar on 12-4-1973. In view of the specific provisions in the Wakf Act in this regard it has to be held that the Board alone could institute the execution proceeding in the present case. The court below is right in holding that the execution proceedings instituted by the mutawalli is not maintainable.

10. Mr. Asghar Husain relied upon a single Judge decision of the Rajasthan High Court in *Shahi Jama Masjid, Merta Vs. Kanhaiya Lal Bhagat and Others*, in support of his submission that mutawalli can bring a suit even after coming into operation of the Wakf Act, 1954. That was a suit by the Managing Committee of a mosque seeking a relief of injunction against certain alleged trespassers on the open piece of land when according to the plaintiff belonged to the mosque. There is nothing to indicate in the Rajasthan case that the property in suit was a wakf property. In my opinion, Rajasthan decision does not help the appellants at all.

11. Mr. Asghar Hussain further submitted that the power which was enjoyed by a mutawalli prior to the coming into operation of the Wakf Act. 1954 has not been taken away by the Act. According to him the mutawalli had the power to institute a suit or a proceeding in his own name and that power cannot be taken away. On a plain reading of the various provisions of the Act it is not possible to agree with this contention of the learned counsel. The wakf property is not the personal property of the mutawalli and he is required only to perform those functions and duties which are enjoined upon him by the provisions of the Act.

12. Learned counsel lastly, submitted the Section 15 (2) (i) which vests the power to institute and defend suits and proceedings in a court of law relating to wakf in the Board is an unreasonable restriction on the right of a mutawalli if it purports to take away his rights under the Mohammedan Law. It must be clearly understood that a mutawalli has no personal right in the wakf property except to manage and administer the wakf property. He is merely a manager. There is no question of taking away any of the rights of a mutawalli under the Mohammedan Law by vesting the right of instituting and defending any suit or proceeding in the Board. In any case by doing so it is only intended to administer and manage the trust properties in a better manner.

13. Having considered the facts and circumstances of this case and the various submissions advanced by the learned counsel I am of the opinion that it is the Board alone which can institute and defend suits and proceedings in a court of

law relating to wakfs after Wakf Act. 1954, came into force and not the mutawalli. The execution proceeding instituted by the mutawalli has been rightly held to be not maintainable.

14. Mr. S. Masoom Ali Rahmani appearing on behalf of the Wakf Board surprisingly adopted the arguments of Mr. Asghar Hussain and submitted that the execution proceeding was maintainable, apparently conceding the right of a mutawalli to institute a suit or a proceeding in respect of the wakf properties. Such a concession, which is directly in conflict with the provisions of the Act, cannot vest the Dower of the mutawalli and has to be ignored.

15. Mrs. Mridula Mishra appearing on behalf of the judgment-debtors-respondents challenged the findings of the court below holding that the decree under execution was executable against Shyamlal Sah one of the original Judgment-debtors as also against the legal representatives of the deceased judgment-debtors Garib Das and Govind Lal. According to her the decree could not be executed if the same was passed on a compromise and not on any of the grounds mentioned in the Bihar Buildings (Lease. Rent and Eviction) Control Act, 1947, part of the decree was already executed and enforced. The Plain-tiff-decree-holders withdrew certain amounts as stipulated in the compromise decree and the judgment-debtors continued in possession of the suit premises from December 1970 according to the compromise decree. It did not He in the mouth of the judgment-debtors to say that the decree was void and not executable now. Moreover the suit was by the owner of a property against trespassers and not by a landlord against tenants. The defendant-judgment -debtors had repudiated the title of the plaintiffs and a decree had been passed against the trespasser and not tenants. It cannot now be said that the judgment-debtors became statutory tenants after their tenancies were determined. In my view the decree is executable but in accordance with law and the court below is right in holding the same.

16. In the result both the appeals filed by the Mutawalli must fail on the same ground as held by the court below and they are, accordingly, dismissed. There shall, however, be no order as to costs.

B.P. Griyaghey, J.

I agree.