

(1965) 08 OHC CK 0005

In the Orissa High Court

Case No : Civil Revision No. 313 of 1964

Mayadhar Subudhi Tana and Another

APPELLANT

Vs

Orissa Board of Wakfs and Another

RESPONDENT

Date of Decision : 24-08-1965

Acts Referred:

Waqf Act, 1954 — Section 15(2)

Citation : AIR 1966 Ori 208

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : Ranjit Mohanty and R.K. Kar, for the Appellant; Y.A. Rahim, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, J.—The Orissa Board of Wakfs is the plaintiff The suit is for eviction of defendants 1 to 4 from the disputed land and for recovery of possession Admittedly that the disputed property is the Wakf property of defendant 5 (Pir Saheb) Late Rafique Md. leased out the disputed land by a registered permanent lease dated 19-12 1949 in favour of defendant 1. Defendants 2 In 4 are the brothers of defendant 1 Plaintiff admits that defendants 1 to 4 are in possession ever since the date of lease. The validity of the lease is, however, challenged on the ground that it was effected on false recitals regarding the necessities of defendant 5 and that permanent lease could not have been effected in law beyond three years in respect of the suit property which is an agricultural land Defendants 1 to 4 contested the suit challenging the averments in the plaint. It is unnecessary to give details of the defence as they are not relevant for the disposal of the Civil Revision.

After evidence was closed and arguments heard, the suit had been posted to 8-9-1964 for judgment On 3-9-1964 defendants filed an application alleging that the alienation had been made for the benefit of Pir Saheb and that Rs 1,000 had been paid in cash to Rafique Mohammad. the then sole Mutwali and praying that

the Court should give retrospective sanction to the alienation This application was opposed on the ground that the lease was not for the benefit of defendant 5 and that the premium mentioned in the document was not utilised for repairing the kitchen and the compound wall of the Pir Saheb; but the money was appropriated towards the personal expenditure of Rafique Mohammad and that the Court had no jurisdiction to give retrospective sanction after the passing of the Wakf Act, 1964 (Act XXIX of 1964), hereinafter referred to as the Act.

The learned Court below did not record any finding as to whether the permanent lease was for the benefit of defendant 5 It held that it had no power to accord sanction and that the jurisdiction for the same vested only in the District Judge It accordingly dismissed the application on 23-9-1964 Against this order the civil revision has been filed by defendants 1 to 4. It may be noted that the order under challenge also deals with the question of amendment of the plaint which is not the subject-matter of the Civil Revision.

2. The following points arise for consideration.

(i) Has the Court power to accord retrospective sanction to the permanent lease granted in 1949 ?

(ii) If so, have the ordinary civil courts the power to accord sanction, or is the power confined to the District Judge alone ?

(iii) Does any of the Courts retain the power to accord sanction after passing of the Act ?

3. Para. 208 of the Principles of Mohamadan Law by Mulla (15th Edition) deals with the power of a Mutwali to grant leases. A Mutwali has no power to grant lease of Wakf property, if it be agricultural, for a term exceeding three years, and if non-agricultural, for a term exceeding one year--(a) unless he is authorised by the deed of Wakf to do so; and (b) or where he has no such authority, unless he had obtained leave of the Court to do so, such a lease may be granted even if the founder has expressly prohibited a lease for a longer term

The permanent lease, in this case, is of agricultural land The defence case is not that it has been expressly authorised by the deed of wakf. By this application leave of the Court was asked for. The consensus of authorities is that the Court can grant retrospective sanction if it is supported by legal necessity or for the benefit of the trust. (1910) TLR 37 Cal 179, Nemaichand v. Golam Hossein, is the leading decision on the point. In P.S. Abdul Kadir Vs. The Mahlarathul Kadiria Sabha Kayalpatnam, the entire legal position was examined and their Lordships held that if the alienation was for the benefit of the trust, subsequent approval to the transaction would be as effective as prior approval and the Courts have full powers to accord such sanction. This was accepted as laying down good law by a Bench of this Court in Saleb Khan and Another Vs. Madar Saheb Pir and Others, The position of law is therefore clear that prior to the passing of the Act Courts had full power to accord retrospective sanction, provided other necessary

conditions--that the alienation was for legal necessity or for the benefit of the trust--were established

4. In the aforesaid two cases, sanction was accorded by the High Court in appeal against the judgments of the Ordinary Civil Courts. It was not canvassed before their Lordships whether such power vested in ordinary Civil Courts or exclusively in the District Judge. There are some authorities taking the view that the power vests exclusively in the District Judge (See AIR 1920 Cal 129 : 40 C WN 585). These decisions did not take notice of the Division Bench decision in ILR (1910) 37 Cal 179 (to which Sir Ashutosh Mukherjee was a party) wherein it was observed as follows :

" We can see no reason why an approval by a Subordinate Judge of a transaction by which Wakf property is mortgaged, provided he had jurisdiction over the Wakf property, should not be as effectual as a sanction by a District Judge."

In *Burhan Mirdha Vs. Mt. Khodeja Bibi*, , consisting of five Judges, the dissolution of a Mahomadan marriage was under examination. Their Lordships came to the conclusion that ordinary Civil Courts had power over the matter. There are some observations that cases of wakfs stand apart from their Lordships. However, they pointed out that the place of Karji in the British Indian System had been taken by the Civil Courts and reliance was placed for the purpose on AIR 1934 53 (Privy Council) . The position was examined fully in AIR 1942 Bom 21. Where his Lordship held that ordinary Civil Courts, within their respective jurisdiction, have full power to accord retrospective sanction. I am inclined to follow ILR (1910) Cal 179 : AIR 1942 Bom 21 in preference to other authorities taking a contrary view. The Civil Courts within their respective jurisdiction have the power of accord retrospective sanction and that power is not confined exclusively to the District Judge. The learned Munsif was wrong in his views that prior to the passing of the Act the Civil Courts had no power to grant retrospective sanction.

5. The next question for consideration is whether the Courts have still power to grant permission to a lease of Wakf property for a term exceeding three years after the passing of the Act. The Act came into force in Orissa on 1-6-1958. Section 2 of the Act enacts :

Save as otherwise provided under this Act, this Act shall apply to all Wakfs whether created before or after the commencement of this Act.

Section 16 of the Act prescribes the functions of the Board. Sub-section (1) lays down :

Subject to any rules that may be made under this Act, the general superintendence of all wakf in a State shall vest in the Board established for the State; and it shall be the duty of the Board so as to exercise its powers under this Act as to ensure that the wakf under the superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such Wakfs were created or

intended;

Provided that in exercising its powers under this Act in respect of any wakf, the Board shall act in conformity with the directions of the wakf. the purposes of the wakf and any usage or custom of the wakf sanctioned by the Muslim Law Sub-Section (2) lays down --

Without prejudice to the generality of the foregoing power, the functions of the Board shall be :

xxxx (j) to sanction leases of property for more than three years or mortgage or exchange properties according to the provisions of Muslim law.

Provided that no such sanction shall be given unless at least three-fourth of the members of the Board vote in favour of such transaction

Section 69 of the Act makes provisions for repeal and savings. A number of enactments were repealed By Sub-section (2) certain savings were made

It would thus be clear that after the passing of the Act. the Board has been given specific powers for grant of lease for a term exceeding three years Such a provision in Section 15 (2) bars the jurisdiction of the Civil Courts to take cognizance of an application asking for sanction of such leases After the passing of the Act, the application is misconceived It was open to defendants 1 to 4 to make such application to the Board itself which alone was competent to accord sanction

6. In the ultimate result the judgment of the learned Munsif must be upheld though for different reasons The Civil Revision fails and is dismissed. In the circumstances, parties to bear their own costs throughout.