

(1964) 12 AHC CK 0011
In the Allahabad High Court
Case No : Second Appeal No. 1497 of 1953

Mst. Peeran

APPELLANT

Vs

Hafiz Mohammad Ishaq and Others

RESPONDENT

Date of Decision : 03-12-1964

Acts Referred:

Mussalman Wakf Validating Act, 1913 — Section 2(1), 3

Citation : AIR 1966 All 201

Hon'ble Judges : R.S. Pathak, J

Bench : Single Bench

Advocate : S.A. Banerjee and K.C. Agarwal, for the Appellant; C.B. Misra, for the Respondent

Final Decision : Allowed

Judgement

R.S. Pathak, J.—This appeal raised two important questions of law concerning the validity of a wakf under the Mohammedan Law.

2. One Qudaratullah owned a house, No. 474, Mohalla Colonelganj, Allahabad, Upon his death it devolved upon his widow Subban, his daughter Peeran and his brother Iddu, their shares being 2 annas, 8 annas and 6 annas respectively. Subban died leaving a daughter Rahiman from her first husband, and her two annas share in the house devolved on Rahiman. On September, 8, 1936, Iddu executed a deed or wakf dedicating his six annas share in the house for the upkeep and maintenance of the Bara Imambara mosque. Similarly, on September 7, 1938, Rahiman executed a deed of wakf dedicating her two annas share in the house to the same purpose. Under the two deeds of wakf Hafiz Mohammad Ishaq was appointed Mutwalli, Thus a share of eight annas in the house became the subject of a wakf devoted to the purpose mentioned above, while the remaining share of eight annas continued to belong to Peeran. The house was let out to tenants on rent, and it appears that the entire rent was realised by Peeran.

3. Accordingly, the suit out of which the instant appeal arises, was instituted by Hafiz Mohammad Ishaq against Peeran for a declaration that a half share in the house was wakf property, that he was the Mutwalli thereof and was entitled to realise half of the rent payable by the tenant, and for an injunction restraining Peeran from interfering with his right to realise the rent in respect of the wakf property. He also claimed a decree for damages,

4. One of the principal grounds upon which the suit was resisted was that no valid wakf had been created by either of the wakf deeds because an undivided share in property could not be made the subject of a wakf and because there could be no wakf of a house standing on a site belonging to the State and leased by it for a fixed term of years.

5. The trial Court decreed the suit and the decree was confirmed by the learned Civil Judge. Allahabad.

6. It is contended for the defendant-appellant that the wakf was invalid because it was a wakf of Mushaa for a mosque.

7. Now, a wakf of Mushaa is a wakf of an undivided share in property. The property may be capable of division or not. According to Abu Yusuf, the wakf of an undivided share of a property which is capable of partition is valid. This view was not accepted by Mohammed. It has, however, been adopted by modern thinkers, and, as the Fatawai Alamgiri notes, "the moderns decide according to the opinion of Abu Yusuf, who held that (the wakf of Mushaa) was lawful, and this is approved." As to the dedication of a share in property which is incapable of partition, Abu Yusuf and Mohammed agree that it is lawful.

8. There is an exception to the rule that a wakf of Mushaa is valid. That exception arises where a piece of land is dedicated for electing a mosque or building a tomb thereon, such a wakf being valid only where the piece of land dedicated is divided off. (Syed Ameer Ali's Mohammedan Law, Tagore Law Lectures, 1884) (1). To the same effect are the comments of Baillie in his Digest of Mohommedan Law (2), And Wilson in his Digest of Anglo-Mohammadan Law (3) states the rules thus:--

"..... the balance of authority seems to be in favour of allowing wakf of an undivided share, even in property capable of division; but it is agreed that the dedication of undivided property, whether naturally divisible or not, for use as a mosque or burying ground is invalid."

The reasons for excepting a wakf of Mushaa for use as a mosque or burying ground are two-fold. As extracted by Wilson (Supra) from the Hedaya, objection is taken.

"because the continuance of a participation in anything is repugnant to its becoming the exclusive right of God", and "because the present discussion supposes the place in question to be incapable of division as being narrow and confined, whence it cannot be divided but by an alternate application of it to

different purposes such as its being applied one year to the interment of the dead and the next year to village, or at one time to prayer and at another time to the keeping of houses which would be singularly abominable."

9. There can, therefore, be little doubt that under the Hanafi law relating to wakfs the accepted view is that a wakf of Mushaa for use as a mosque or burying ground is invalid.

10. There is, however, a distinction between dedicating property for use as a mosque and dedicating it for the maintenance and upkeep of a mosque. In the latter case, the income from the wakf property is to be employed for the purpose of main tainting a mosque. The objections upon which exception has been taken to a wakf of Mushaa for use as a mosque cannot apply. Neither reason which forms the basis or the exception can be logically invoked where the dedicated property is employed not for erecting a mosque but merely for providing for its maintenance. I am supported in the view that a wakf of Mushaa for the maintenance of a mosque is not invalid by the opinion expressed by Mukherjea, J. in *Md. Ayub Ali and Another Vs. Amir Khan and Others*, . It seems to me that the ground that the wakf is invalid because it is a wakf of Mushaa must fail.

11. It is then contended for the defendant-appellant that since the house is situated on a site leased by the Government for a fixed period there cannot be a wakf of a share in it because there is no dedication of a permanent character. The argument is that the property in respect of which the wakf was intended to be created is of a temporary character since it could exist only so long as the term or the lease did not expire.

12. Under the Mohammedan Law, every kind of property is capable of being dedicated. What is necessary is that it must admit of yielding permanent benefit. The validity of a wakf, points out Syed Ameer Ali, "does not depend upon the nature of the property dedicated, but on the probability or presumption of permanent benefit being derived from it by any mode of dealing of which it is capable, or by converting it into something else. It is only where the object is absolutely unfit for being turned into profitable use that its dedication falls to the ground". (Ibid p. 246). It is generally accepted now by jurists under the Mohammedan law that a wakf can be made of movable property as well as of immovable property. There is no dispute also that a wakf of land which has been leased out or mortgaged is valid. The doctrine now accepted extends to upholding the validity of a wakf of a building without the land on which it is situated. But if the building which is the subject of a wakf is situated on land belonging to another, is the wakf valid? The Durr-ul-Mukhtar declares that "the wakf of a building on land held in aariat (bailment) or ijara (lease) is not valid" (quoted in Syed Ameer Ali's Mohammedan Law (Ibid p. 266). This dictum was followed with approval by a Full Bench of the Oudh Chief Court in *Mt. Rahman v. Mt. Baqridan* AIR 1936 Oudh 213 , where, negating the contention that a valid wakf could be made or the rights of a usufructuary mortgagee in immovable property, one of the grounds relied upon was that the wakif was not

the owner of the mortgaged property and had no permanent control over that property. A question arose before this Court in *Haji Amir Ahmad and Another Vs. Mohammad Ejaz Husain and Another*, , whether a wakf could be created of the rights of a grove-holder, and while upholding the validity of such wakf Sulaiman, C. J. relied upon the fact that what had been dedicated were "permanent rights which amount to a permanent occupation of the land and full proprietary rights over the trees that stand on the land and also, the right to maintain the grove as such on the land". He pointed out that the wakf had full dominion over the grove-holder's rights, that these rights had been recognised by the Tenancy Act and were not rights of a temporary character, that the grove-holder was not liable to ejectment arbitrarily so long as he and his heirs and transferees maintained the grove and the land did not lose its character as a grove (the old trees when they fell down being replaced by new ones and in that way the land could retain its character as a grove for ever), that the wakif and his heirs had a right to maintain the grove on the land for all time and were not liable to ejectment at the will of the zamindar. Upon these considerations he held that even though the ownership of the site did not vest in the wakif and could not be transferred by him the wakf of his rights as a grove-holder was valid. He emphasised these considerations because, as he observed, "the essence of a wakf if its permanent character" and that any property which was temporarily or for a limited period in the possession of the wakif could not be validly dedicated because such a dedication will never be of a permanent character. The view expressed by him is not inconsistent with the rule stated in the *Durr-ul-Mukhtan*. On the contrary, the learned Chief Justice is supported by the opinion expressed by Syed Ameer Ali that "where the lease is of a permanent character and the lessee cannot be ejected from the land without process of law, the lessee is entitled to dedicate any building on such land." (Ibid p. 287.) ;

13. In the instant case the site upon which the house stands having been leased for a fixed term, it is difficult to say that the dedication is of property of a permanent character since upon the expiry of the term and the resumption of the site the house as such cannot continue. It is not possible to conceive of a permanent benefit being derived from it.

14. Reference was made on behalf of the plaintiffs-respondents to *Ehsan Beg v. Rahmat Ali* 152 Ind Cas 798: AIR 1935 Oudh 47 , where Zia-ul-Hasan, J. of the Oudh Chief Court observed that when a wakf was created in respect of a house it could be said that the materials of the house constituted a wakf and could be made use of for the purposes of the wakf. The decision in that case cannot be applied upon the facts of the instant case where the purpose for which the wakfs were created was the maintenance of the mosque from the rental income of the house after deducting an amount on account of building repairs, taxes and other liabilities relating to the house. Reference was also made to AIR 1927 113 (Oudh) but in that case the property had been endowed by the Kings of Delhi for the purpose of a wakf and subsequently the British Government granted a Sanad maintaining the endowment and attaching certain conditions which if not

complied with would result in resumption of the grant, and it was held that the mere imposition of the condition subsequent to the creation of the wakf could not destroy its character as a wakf.

15. The learned Civil Judge, in arriving at his finding that the wakfs were valid as a permanent dedication of the property relied upon the definition of "wakf" in Section 2 (1) of the Mussalman Wakf Validating Act, 1913, where a wakf has been defined as "the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable." But this definition is for the purposes of that Act, as was pointed out by the AIR 1927 22 (Privy Council) and there is nothing to show that it has been enacted so as to derogate from the generally accepted concept of a wakf under the Mohammedan law. The object of the aforesaid Act was to remove doubts as to the validity of private wakfs, and indeed Section 3 which provides for the validity of such wakfs expressly states that it applies to a wakf which

"in all other respects is in accordance with the principles of the Mussalman Law".

That provision, it seems to me, clearly implies that the existing principles of Mohammedan law applicable to the creation of wakfs have been maintained. The mere fact that the definition of "Wakf" refers to "any property" cannot, I think, extend to the repeal of any of those principles which lay down which property can and which cannot form the subject of a wakf. If the intention of the legislature was to derogate or modify those principles it would have sought to effectuate its object not by enacting a definition limited to the purpose of the Act but by enacting a substantive provision of general application. It is true that in *Haji Amir Ahmad and Another Vs. Mohammad Ejaz Husain and Another*, Sulaiman, C. J. has referred to the very wide definition of "wakf" in Section 2 (1) of the aforesaid Act, and again to the definition in Section 3 of the Mussalman Wakf Act, 1923, but the observations made by him are obiter and were not necessary when he felt that the rights which were the subject of the wakf were rights of a permanent character. The Madras High Court in *Abdul Sattar Ismail Vs. Abdul Humid Sait*, , also referred to the definition of "wakf" in the Mussalman Wakf Validating Act, 1913, as including moveable property in order to sustain *Us* view that there can be a valid dedication to wakf of movable property. But while relying on the definition for this purpose, it will be noted that the Court was considering a case of a private wakf which fell squarely within the scope of the Act of 1913 and was, therefore, covered by the definition of "wakf" contained in that Act. With respect, I am unable to agree with that observation in the judgment of Leach, C. J. where he opines that the definition of "Wakf" contained in that Act is applicable to all wakfs of property whether they are covered by the Act or fall outside it. In any event, so far as this Court is concerned it has been generally accepted that wakf of movable property is valid, and that view has been taken without necessary reference to the definition of "wakf" in the Act of 1913 or the Act of 1923.

16. I am, therefore, of the view that upon the terms of the wakf deeds and upon the consideration that the house of which a half share was dedicated as wakf property stood on a site leased for a fixed term, the wakfs by Iddu and Rahiman were invalid.

17. Accordingly the suit of the plaintiffs- respondents must fail. The appeal is allowed, the decree of the Court below is set aside and the suit is dismissed. There shall be no order as to costs.