

(1943) 02 CAL CK 0017
In the Calcutta High Court

Muzafar Ahmed

APPELLANT

Vs

Indra Kumar Das and Others

RESPONDENT

Date of Decision : 19-02-1943

Acts Referred:

Bengal Wakf Act, 1934 — Section 70, 70(1)

Citation : AIR 1944 Cal 40

Judgement

1. The plaintiffs in the suit out of which this appeal arises prayed for a declaration of their raiyati right in certain lands and for khas possession of the same after demolishing certain huts, which were situated thereon. The suit was contested by defendant 5 only. This defendant asserted that some of the lands formed part of a wakf property which had been dedicated by his ancestor, Md. Sami, by a deed dated Agrahayan 17, 1272 B.S., and the substantial question in issue between the parties in the suit was whether the lands in question were wakf property or not. In the Court of first instance notice was served upon the Commissioner of Wakfs after written statement of defendant 5 has been filed. After a number of adjournments the Commissioner of Wakfs appeared on 26th November 1938, by a vakalatnamah and applied for time for filing a written statement. Time was allowed for this purpose and the learned Munsif reserved his decision on the question whether the Commissioner of Wakfs was a necessary party or not. Subsequently, the Commissioner of Wakfs filed a written statement. He did not apply formally to be added as a party to the suit. His name was not entered in the plaint as a party and certainly so far as the form of the suit was concerned he was not made a party. "I"he learned Munsif came to the conclusion that the property was wakf property, and ho ordered that the suit be dismissed on contest with costs against defendant 5 and ex parte against the rest. Against that decision the plaintiffs appealed. The Commissioner of Wakfs was not made a party to the appeal, and no notice of the appeal was served upon him. The learned Subordinate Judge who heard the appeal came to the conclusion that the property was not wakf property, and he ordered that the appeal be allowed with costs throughout, and that the judgment and decree of the lower Court be set

aside and the suit decreed in full. The contesting defendant, that is defendant 5, preferred a second appeal to this Court. At the time of the hearing of the appeal under Order 41, Rule 11, that is on 22nd November 1940, the learned advocate for the appellant was permitted to add two grounds of appeal. Those two grounds are as follows:

13. For that the appeal to the lower Appellate Court was incompetent inasmuch as the Commissioner of wakfs was not made a party to the appeal and no notice of the appeal was served on him.

14. For that the decree of the Munsif could not have been reversed in the absence of the Wakfs Commissioner or without serving any notice of the appeal on him.

2. The record shows that notice of this second appeal was issued to the Commissioner of Wakfs and was served upon him in March 1941. The Commissioner of Wakfs appeared in this Court on 13th January 1943. Mr. Nausher Ali for the appellant has contended that the learned Subordinate Judge was not competent to hear the appeal and to dispose of it without the Commissioner of Wakfs being made a party to the appeal. It is obvious from what I have said above that the Commissioner of Wakfs was not made formally a party to the suit. Therefore unless section 70, Bengal Wakf Act of 1934 was applicable to the appeal it was not essential for the Commissioner of Wakfs to be made a party to the appeal. Even if the Commissioner of Wakfs ought to have been given notice of the appeal, it appears that section 70 (4), Wakf Act, provides the remedy in such a case. Section 70 (4) reads: In the absence of a notice under Sub-section (1) any decree or Order passed in the suit or proceeding shall be declared void, if the Commissioner, within one month of his coming to know of such suit or proceeding applies to the Court in this behalf.

3. It is obvious from this that the decree or Order passed in the suit or proceeding is not void but voidable, and the Commissioner must apply within one month of his coming to know of the suit or proceeding. It is apparent from what I have stated above that the Commissioner of Wakfs came to know of the proceedings of the Appellate Court certainly as early as March 1941, and apparently no steps have yet been taken u/s 70 (4), Bengal Wakf Act. In my opinion the provisions of section 70 do not mean that the appeal was not competent without the Commissioner of Wakfs being made a party, and the decree in the appeal is certainly not void. Mr. Gupta for the respondents has drawn my attention to the ruling in Commissioner of Wakfs Vs. Mahmuda Bibi and Others, . in which it was held that the words "suit or proceeding" in section 70 (1), Bengal Wakf Act, do not include an appeal. That decision is binding on me being a decision of a Division Bench and, therefore, if it were necessary, I should hold that section 70 does not apply to the appeal before the lower Appellate Court. In the result, therefore, I hold that the two added grounds, to which I have referred above, are not good grounds for allowing this appeal.

4. Ground no. 6 of the grounds of appeal to this Court reads as follows:

For that in the total absence of evidence that the value of the raiyati in dispute in 1272 B.S., was one hundred rupees or more, the learned lower Appellate Court erred in law in holding that Ex. B required registration under the Indian Registration Act.

5. Exhibit B was the document by which the wakf was said to have been created. The question whether it was admissible in evidence was the vital question in the suit. Mr. Nausher Ali for the appellant after referring to the document has conceded that he cannot now support the argument set out in ground no. 6, and that under the Registration Act the deed was compulsorily registrable. No other ground of appeal has been argued before me. In the result the appeal fails and must be dismissed with costs to respondents on record.