(1982) 01 DEL CK 0027

In the Delhi High Court

Case No : L.P.A. No. 106 of 1971

Om Parkash (died) represented through Ratish Kumar Aggarwal and others — APPELLANT

Vs

Union of India and others — RESPONDENT

Date of Decision : 04-01-1982

Acts Referred:
- Administration of Evacuee Property Act, 1950 — Section 10, 10(2)(o), 11, 11(2)(a), 4
- Civil Procedure Code, 1908 (CPC) — Section 141
- Constitution of India, 1950 — Article 226

Citation : AIR 1982 Delhi 181

Hon'ble Judges : Leila Seth, J;A.B. Rohtagi, J

Bench : Division Bench

Advocate : S.L. Bhatia, with P.N. Sethi, for the Appellant; Bishambar Dayal for Respondents 1 to 7, for the Respondent

Final Decision : Dismissed

Judgement

Avadh Behari Rohatgi, J.—This is a Letters Patent Appeal from the order of a learned single Judge dated March 30, 1971.

2. The single question that arises for decision in this appeal is whether a property forming the subject-matter of Wakf-ul-Aulad can be sold by the Custodian of Evacuee Property. The property in question in this case is called "Jamaji-ka-pech." It is situated at Aligarh. It is a Dal Mill. This property was purchased in 1908 by one Shri Ram and two other persons Mohammad Ahmad and Savaid Hussain (hereafter referred to as "the Muslim owners". Shri Ram had ? share in the said property. The Muslim owners had the other half. Shri Ram died leaving behind a son Balram. On January 6, 1925, the property was partitioned between Balram and the Muslim owners. After partition, the Muslim owners created a Wakf-ul-Aulad in respect of the portion of the property that fell to their share. A deed of Wakf dated May 6, 1925, was executed. It was registered on May 7, 1925. The founders appointed mutawallis in the Wakfnama. Under the deed

there are a number of beneficiaries who are entitled to receive income from the Wakf property.

3. On the partition of the country in 1947, the mutawallis migrated to Pakistan. They become evacuees. The Wakf property u/s 11 of the Administration of Evacuee Property Act, 1950 (''the Act'') vested in the Custodian. With the consent of the Deputy Custodian General, U.P., Lucknow, this property was sold to the appellants. A sale deed dated Feb., 8, 1960, was executed by the Custodian in their favour for a total consideration of R. 57,004.80 Paise.

4. After the sale, it was brought to the notice of the authorities under the Act that the property had wrongly been sold. The Deputy Custodian General, by order dated, December 6, 1961, set aside the sale. He ordered refund of the purchase price. From his order the appellants, who are the purchasers of the property, brought a writ petition in this Court. The learned single Judge upheld the order of the Deputy Custodian General setting aside the sale. His decision is reported as Om Parkash v. Union of India, ILR (1971) Del 780. From his order the purchasers have brought this appeal under Cl. 10 of Letters Patent.

5. There is a special provision with respect to trust properties in the Act. This is Section 11. This reads:

11. (1) Where any evacuee property which has vested in the Custodian is property in trust for a public purpose of a religious or charitable nature, it shall be lawful for the Central Government, notwithstanding anything contained in the instrument of trust or any law for the time being in force, to appoint, by general or special order, new trustees in place of the evacuee trustees and the property shall remain vested in the Custodian only until such time as the new trustees are so appointed; and pending the appointment of such new trustees the trust property and the income thereof shall be applied by the Custodian for fulfilling, as far as possible, the purpose of the trust,

(2) In respect of any Wakf-alal-aulad.--

(a) Where the mutawalli is an evacuee, the property forming the subject-matter of the wakf shall vest in the Custodian subject to the rights of the beneficiaries under the wakf, if any, who are not evacuees;

(b) Where not all the beneficiaries are evacuees, the rights and interests of such of the beneficiaries as are evacuees shall alone vest in the Custodian.

6. The real question, for decision is whether the Custodian had the power to sell the property which was the subject-matter of Wakf. In the present case the mutawallis and most of the beneficiaries have migrated to Pakistan. Mr. S.L. Bhatia, on behalf of the appellants purchasers, relies heavily on sub-section (2) (a) of Section 11 of the Act. He says that where a Mutawalli is an evacuee, the entire property forming the subject-matter of the Wakf vests in the Custodian. He then says that Section 10 of the Act. confers power of sale on the Custodian, Under clause (o) of sub-section (2) of Section 10, the Custodian is given the

power to "transfer in any manner whatsoever any evacuee property, notwithstanding anything to the contrary contained in any law or agreement relating thereto". Mr. Bhatia submits that the power of the Custodian to transfer an evacuee property which has vested in him by reason of Section 11 (2) (a) of the Act is clearly given by the Act and it was in exercise of this power that the sale was made to the appellants. He relies on Section 4 which says that the provisions of the Act shall override any other law or agreement.

7. Mr. Bhatia says that except three beneficiaries, all others have migrated to Pakistan and these three beneficiaries had given their consent to the sale in favour of the purchasers. The three beneficiaries are Tufail Ahmad, Zahida Begam (respondents 6 and 7) and an institution known as Darul Ulam Madrasa at Deoband. As regards Tufail Ahmad and Zahida Begam there are letters on record written by them asking the Custodian to sell the property to the present purchasers for the agreed sum of Rs. 57,004-80 paise. Counsel says that after this consent these two beneficiaries have no right to object to the sale. As regards Darul Ulam, an opportunity was given to the institution to purchase the property. In fact, they made an offer but subsequently they withdrew it. This, according to counsel, shows that Darul Ulam had no objection to the sale of the property to the purchasers because Darul Ulam itself was unable to purchase it.

8. The decision of this appeal depends upon an interpretation of Section 11 of the Act. Has the Custodian any right to sell a property where mutawallis and some of the beneficiaries have migrated to Pakistan and have been declared evacuees? It appears to us that on an interpretation of Section 11, he has no such power. Where the mutawalli is an evacuee, the property forming the subject-matter of the Wakf vests in the Custodian, no doubt. But it is subject to an important qualification, namely, that the vesting is "subject to the rights of the beneficiaries under the Wakf, if any, who are not evacuees." Cl. (b) of sub-sec. (2) of S. 11 makes it abundantly clear that all that vests in the Custodian will be the rights and interests of such of the beneficiaries as are evacuees. Of such beneficiaries as are non-evacuees their rights and interest do not vest in the Custodian. On a plain reading of Section 11 this appears to us the law.

9. Suppose, the Custodian has the power to transfer the property as given in S. 10 (2) (o). But he can transfer only the interest of the evacuee. Here the interest of the evacuees and non-evacuees in the Wakf property was never separated. The whole of the property, therefore, could not be sold. The question, whether the two beneficiaries, Tufail Ahmad and Zahida Begam, could give their consent where the Wakf Deed itself makes the property inalienable, was debated before us. It was said that these two beneficiaries had no right to give consent to the sale because their descendants get interest after their death. The Wakf is both for the benefit of settlor''s family, children and descendants and for charity. A whole line of settlors descendants benefit from the Wakf.

10. Assuming that the non-evacuee beneficiaries had given their consent, the question remains whether such consent will make that valid which is a nullity in

law. The Custodian is a creature of the statute. He cannot do that which the Act has not authorised him to do, whether with or without consent. The legislature has not empowered him to destroy trusts and wakfs. It is inconceivable that the legislature took the path of extinction.

11. A Wakf extinguishes the right of the Wakif or dedicator and transfers ownership to God. All rights of property vest in the Almighty. The mutawalli is the manager of the wakf. If the mutawalli migrates to Pakistan the right of management vests in the Custodian. The mutawalli is not the owner of the property. Therefore, what vests in the Custodian is not ownership but the right of management and the rights and interest of such beneficiaries as are evacuee. Nothing more. The wakf shall continue till the crack of doom. The object of the settlor was to create a family settlement in perpetuity. The income of the wakf property is to be applied for the benefit of the settlor''s descendants from generation to generation. There is trust in favour of the charity also as Darul Ulam, a religious and charitable institution, is one of the beneficiaries. Now charity never dies. So it can safely be concluded that the legislature never contemplated sale of the wakf property. For such a sale will mean the extinction of primary object of the wakf which is the aggrandizement of the family.

12. Then there is the charity. Darul Ulam is a beneficiary under the wakf. Now it cannot be said that Darul Ulam gave their consent to the sale. It is true that they made an offer to purchase the property and later on withdrew that offer. That does not mean that they consented to the sale. In our opinion, the Deputy Custodian General and the learned Judge were right in taking the view that the Custodian had no power to sell the property.

13. One other point remains to be noticed. During the pendency of this appeal, one of the appellants Shri Om Parkash, died on August 12, 1978. An application to bring his legal representatives was made on August 4, 1980. Mr. Bishambar Dayal, on behalf of respondents 4 to 7, says that the appeal has abated. In our opinion, the appeal does not abate. The reason is that the provisions of O. 22 of the Civil P.C. in terms do not apply, This has been made clear by the recent amendment of S. 141, Civil P.C. which says that the provisions of the Civil P.C. do not strictly apply to the proceedings under Art. 226 of the Constitution of India. Numerous authorities have taken this view that O. 22 and the technical provisions of the Limitation Act do not apply to writ proceedings: See Hemraj Vs. Income Tax Recovery Officer, Jodhpur, , K.L. Bhasali v. The Chief Controller of Imports & Exports, (1967) 69 PLR (D) 19 and Hans Raj Sood Vs. State of Himachal Pradesh and Others, . In our opinion there is sufficient explanation of delay on the record. The affidavits made by the son of the deceased and his brother explain the delay of these two years or so which has taken place in bringing the legal representatives on record. We, therefore, allow the application for bringing the legal representatives on record. We hold that the appeal does not abate.

14. On the merits of the appeal, we are of the opinion that the learned single

Judge was right in the conclusion he arrived at.

15. For these reasons, the appeal is dismissed. But in the circumstances of the case, we make no order as to costs.

