
(2010) 09 CAL CK 0063
In the Calcutta High Court
Case No : C.O. No. 2066 of 2010

Rizwan Danish Hussain and Another APPELLANT
Vs
Mussamat Naseem Ara Begum and Others RESPONDENT

Date of Decision : 17-09-2010

Acts Referred:

Constitution of India, 1950 — Article 227
Waqf Act, 1995 — Section 3, 85

Citation : (2010) 09 CAL CK 0063

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Haradhan Banerjee, A. Pain and P.P. Mukherjee, for the Appellant; S.P. Ray Chowdhury, S. Basu and S.P. Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Jyotirmay Bhattacharya, J.—This application under Article 227 of the Constitution of India is directed against an order dated 29th May, 2010 passed by the learned Additional District Judge, Eleventh Court at Alipore in Misc. Appeal No. 109 of 2009 modifying the order dated 3rd March, 2010 passed by the learned Civil Judge (Junior Division), Fifth Court at Alipore in Title Suit No. 282 of 2004, at the instance of the plaintiffs/petitioners.

2. Heard Mr. Banerjee, learned Advocate, appearing for the petitioners and Mr. Ray Chowdhury, learned Senior Counsel, appearing for the opposite party No. 1. Considered the materials on record including the order impugned.

3. Let me now consider as to how far the learned Appeal Court was justified in passing the impugned order in the facts of the instant case. The plaintiffs/petitioners filed a suit in the representative capacity claiming themselves as beneficiaries under the wakf deed executed by Shahzadah Kamar Kadar Mirza Md. Abid Ali Bahadur on 14th June, 1917 for enforcement of their beneficial right to perform their religious congregation and worship in the Mosque and Imambara situated at premises No. 123, Circular Garden Reach Road (presently known as

Karl Marx Sanari, Kolkata-73), as members of the Shia Community of Muslims. Since the defendant No. 1 being the Mutwalli of the said wakf estate was taking steps to demolish the Mosque and the Imambara, the plaintiff prayed for a decree for declaration that the defendant No. 1 (Mutwalli) is not entitled to demolish the Mosque and Imambara situated at 123 Karl Marx Salani, Kolkata-23 by disobeying the instruction given by the wakif viz. late Prince Kamar Kadar Mirza Md. Abid Ali Bahadur in the said wakf deed. The plaintiffs have also sought for a decree for permanent injunction for restraining defendant No. 1 from going ahead with any scheme/plan for demolition of development/transfer/alienation of the Maszid/Imambara of the Wakf Estate situated at 123 Karl Marx Sarani, Kolkata-23 or any part thereof on the basis of any purported permission or sanction of the scheme or building plan issued by the defendant Nos. 2 and 3 being the Municipal Authorities. The plaintiffs claimed that the wakif executed the said deed of wakf on 14th June, 1917 with a view to carrying out the directions of his religion and for the maintenance of his children from generation to generation and for perpetually keeping in existence the works of charity. The wakif dedicated his considerable immovable properties mentioned therein for implementation of the objects contained in the said wakf deed.

4. By referring to various provisions of the said wakf deed, the plaintiffs claimed that the members of the Shia Community were given the right of congregation and worship in the said Maszid and Imambara. They further claimed that since the said deed provides for spending of a portion of the income from the wakf property for charitable purpose, the said wakf deed should be regarded as a public wakf deed. The plaintiffs as members of the Shia Community, are thus claiming themselves as beneficiaries under the said deed. The plaintiffs claimed that though the defendant was claiming the said wakf deed as wakf-al-al-aulad but, in fact, the said deed was the public wakf deed as the members of the Shia Community had been given right of congregation and/or worship in the Maszid and the Imambara. Since the defendant No. 1 was taking steps for demolishing the Mosque and the Imambara for raising a commercial complex therein, the instant suit was filed.

5. After filing the said suit, the plaintiffs filed an application for temporary injunction inter alia praying for an order for restraining the defendant No. 1 from going ahead with any scheme/plan for demolition and development/transfer/alienation of the Maszid/Imambara of Wakf Estates at Premises No. 123 Karl Marx Sarani, Kolkata-23 or any part thereof, on the basis of any purported permission or sanction of scheme or building plan given by the defendant Nos. 2 and 3. The pleadings, made out in the said application for injunction, are mere repetition of the facts as stated by the plaintiffs in the plaint.

6. The defendant No. 1 contested the plaintiffs' said application for temporary injunction by filing objection therein. It was contended by the defendant therein that the said wakf deed was created by the wakif in the nature of wakf-al-al-aulad for the benefit of the children of the wakif for generation after generation and the

said Mosque and the Imambara were established by the wakif for offering prayer by the family members of the wakif and his descendants and the members of their families. It was stated therein that neither the Masjid nor the Imambara is the public wakf property. As such the plaintiffs and/or any other members of the public have no right to offer any prayer in the said Mosque and the Imambara. It was further stated therein that whatever steps are being taken by the said defendant either for demolition of the Imambara or for construction of a commercial building therein or for shifting the Imambara from first floor of the said building to the third floor of the newly constructed building, were all taken on the basis of the resolution of the Board of Wakf and also on the basis of the sanctioned plan issued by the Municipal Authorities. Thus the said defendant contended that the said defendant has not committed any illegality in taking such steps for improvement of the Wakf Estate.

7. The plaintiffs' prayer for ad interim injunction was rejected by the learned Trial Judge on 11th October, 2004. Being aggrieved by the said order the plaintiffs preferred an appeal being Misc. Appeal No. 413 of 2004. The said appeal was also dismissed on 11th January, 2005 primarily on the ground that the suit is barred u/s 85 of the Wakf Act. Challenging such order, the plaintiffs filed a revisional application being C.O. No. 1212 of 2005 which was ultimately disposed of by Hon'ble Justice Subhro Kamal Mukherjee on 11th May, 2005 by directing the learned Trial Judge to dispose of the plaintiffs' prayer for temporary injunction as expeditiously as possible, but in any event, before commencement of the long vacation of the Civil Court for the year of 2005. The defendants were permitted to file their written objection to the plaintiffs' application for temporary injunction within two weeks, reply if any, was directed to be filed within one week thereafter. His Lordship also made some interim arrangements in the said order. It was provided therein that "subject to the result of the application for temporary injunction, it will be open to the defendant No. 1 to carry out the construction works with the sanction and approval of Kolkata Municipal Corporation in accordance with law without claiming any equity, but she shall not touch the Mosque and Imambara. Status quo with regard to the possession, nature and character of the Mosque and Imambara shall be maintained by the parties till the disposal of the application for temporary injunction."

8. Pursuant to direction passed by His Lordship as aforesaid, the application for temporary injunction was heard by the learned Trial Judge and ultimately by an order dated 3rd March, 2009 the plaintiffs' application for temporary injunction was disposed of by passing an injunction order in following terms:

Hence, the defendant no 1 is restrained to make any construction, reconstruction or development work and to touch upon the Mosque and Imambara inside the suit premises which will change in any way the nature, character, use and benefits of the said Mosque and Imambara and not to restrain the plaintiffs including those whom are they representing to worship at the said Mosque and Imambara, till the disposal of the suit.

9. Being aggrieved by and dissatisfied with the said order, the defendant No. 1 preferred an appeal being Misc. Appeal No. 109 of 2009 before the learned Additional District Judge, Eleventh Court at Alipore. The learned Appeal Court disposed of the said appeal on 29th May, 2010 by modifying the impugned order. Injunction order which was passed in respect of the Mosque by the learned Trial Judge was maintained in the said appeal. However, the injunction order which was passed in respect of the Imambara by the learned Trial Judge was set aside.

10. The plaintiff is aggrieved by that part of the said order by which the injunction order passed by the learned Trial Judge in respect of the Imambara was set aside by the learned Appeal Court. Hence the plaintiff has filed the instant revisional application before this Court.

11. At the very outset Mr. Ray Chowdhury, learned Senior Counsel, appearing for the opposite parties, submitted that his client has no intention to demolish the Mosque. Mr. Ray Chowdhury thus submitted that the injunction order which was passed by both the Courts below regarding the Mosque, may be maintained, as it is, till the disposal of the suit. Mr. Ray Chowdhury further submitted that in the mean time the Imambara has been demolished and a new building has been reconstructed in terms of the sanction plan and such reconstruction was made on the basis of the order passed by the Board of Wakf. Mr. Ray Chowdhury further submitted that in terms of the resolution adopted by the Board of Wakf, the Imambara has been shifted to the third floor of the newly constructed building. The photographs showing the construction of the new building and relocation of the Imambara to the third floor of the said building have also been produced before this Court. In fact, Mr. Banerjee has also produced a photograph of the new construction. Thus this Court finds that the original suit premises in respect of such injunction was sought for by the plaintiff, has already been demolished and new construction has been made therein and the Imambara has also been relocated in the third floor of the said building. Thus the relief which was claimed by the plaintiff in his application for temporary injunction cannot be granted in the form in which it was prayed for by the plaintiff in his said application for injunction due to subsequent events as aforesaid.

12. Mr. Banerjee however submitted that even though the situation has altered due to the facts as stated above still then, the Court is not powerless to pass appropriate injunction order in such altered situation by moulding the reliefs of the plaintiff so that the nature and character of the suit property as it stands now, is not altered any further and the interim order of injunction which was passed by this Court after entertaining the revisional application prohibiting transfer of the said property during the pendency of the revisional application is maintained till the disposal of the suit.

13. It is no doubt true that Court is not helpless in passing the appropriate order in altered situation by moulding the relief of the plaintiff. But this Court before passing any interim order, in this regard, is required to consider the three basic tests for grant of temporary injunction; viz. (i) prima facie case, (ii) balance of

convenience and inconvenience of the parties and (iii) the irreparable loss and injury which the plaintiff may suffer in case the interim injunction is refused.

14. Let me now examine the aforesaid three tests one after another. In fact, both the parties are claiming their respective rights through a common deed i.e. the deed of wakf dated 14th June, 1917 as mentioned above. The plaintiffs are claiming that the said wakf deed executed by the wakif was in nature of a public wakf as the members of the Shia community were given right of congregation and worship in the Mosque and the Imambara situated in the said premises. The plaintiff further claimed that the right of participation in the management of the Mosque and the Imambara was also given to the members of the Shia community in the event any competent person amongst the descendants of the wakif's family cannot be found out for appointment of the Mutawalli subsequently. The plaintiff further pointed out from the wakf deed that direction was given by the wakif in the said deed to the effect that in the event the property on which the Mosque and Imambara are situated, is ultimately acquired by the State or the Imambara and/or the Mosque is demolished to the ground, then a big magnificent Mosque and Imambara should be established in the Metiabruz Area where considerable members of Shias live by utilizing the compensation money as well as the surplus income from the other Wakf properties. The plaintiff further pointed out from the deed of wakf that provision was also made therein for disbursement of the surplus of income of the Wakf Estate amongst various persons including his heirs with the rider that in the event no descendant is living amongst the children of the wakif then a portion of a surplus money which was allocated to them, will be devoted for some charitable work. The plaintiff thus contended that if the wakf deed is considered as a whole then it will be absolutely clear that the said wakf was created with a definite intention of the wakif for establishing a public wakf. The plaintiff further contended that since the Wakf Estate comprises of several properties and a part of which was exclusively kept for the benefit of the members of the family of the wakif and a part of it was dedicated to the public; such wakf is really a combination of both private wakf and public wakf. Mr. Banerjee thus submitted that since the plaintiffs are beneficiaries under the said wakf deed, their right of congregation and/or worship in the Mosque and the Imambara cannot be denied. Accordingly he invited this Court to interfere with the impugned order so that the plaintiffs' said right is protected.

15. Mr. Ray Chowdhury, learned Senior Counsel, appearing for the opposite party, contended that the Wakf Estate belongs to a private wakf i.e. wakf-al-al-aulad as the said wakf was created by the wakif only for the benefit of the members of his family from generation to generation without creating any interest for the public therein. Mr. Ray Chowdhury further pointed out from the said wakf deed that no right was given to the members of the Shia community to perform any religious function and/or to worship either in the Mosque or in the Imambara. Mr. Ray Chowdhury further submitted that no doubt some provision was made in the said wakf deed for selection of Mutawalli from the Shia

community and/or for constitution of a committee with the members of the Shia community in the event suitable Mutawalli cannot be found out from the members of the wakif's family but that does not mean that the Mosque and the Imambara was dedicated for public use and/or for use of the members of Shia community. Mr. Ray Chowdhury further contended that though it is true that the provision was also made therein for establishment of a Mosque and Imambara of a big magnificent size in the Metiabruz area where the considerable Shias reside, in the event the Mosque and/or the Imambara is acquired by the Government or the Mosque and/or Imambara is demolished to the ground, but, according to him, such provision itself cannot change the nature and character of the wakf from its private character to the public character. Mr. Ray Chowdhury further contended that the defendant No. 1 has not taken any illegal steps in the process of demolition of Imambara or for construction of a new commercial complex therein or by relocating the Imambara from the first floor to third floor of the newly constructed building as all those steps were taken lawfully by the present Mutawalli in terms of the order passed by the Board of wakf and also as per the plan sanctioned by the Municipal Authority. Mr. Ray Chowdhury thus submitted that when such demolition and reconstruction was made by the Mutawalli in terms of the order of the Board of Wakf, the plaintiff cannot maintain the instant suit without impleading the Board of Wakf as party to the suit. Mr. Ray Chowdhury pointed out that in spite of the fact that grant of such permission of the Wakf Board and/or sanction of the building plan by the Municipal Authority were disclosed by the defendant in his affidavit in connection with the injunction proceeding but still then neither step was taken by the plaintiff for impleading the Board of Wakf as party in the instant suit nor any step was taken by the plaintiff for challenging the decision of the Board of Wakf in the suit. Mr. Ray Chowdhury thus contended that if the decision of the Board of Wakf remains unchallenged, it cannot be held that the plaintiff has committed any illegality either in demolishing the Imambara or by reconstructing the new building for commercial purpose or by shifting the Imambara from the first floor of the said building to a portion in the third floor of the said new constructed building. Mr. Ray Chowdhury further contended that no relief can be granted in such a suit in favour of the plaintiff unless the plaintiffs succeed in avoiding the order passed by the Board of Wakf in appropriate forum. He further contended that such challenge even cannot be made before the Civil Court in view the provision contained in Section 85 of the Wakf Act of 1995. He thus contended that the plaintiffs have failed to prove a prima facie case for grant of temporary injunction in this suit.

16. Mr. Ray Chowdhury further submitted that since the building has already been constructed and permission has also been granted by the Wakf Board for letting out a part of the said newly constructed building, the defendant cannot be restrained from letting out part of the said building in terms of the order passed by the Board of Wakf. Thus according to Mr. Ray Chowdhury the balance of convenience and inconvenience is wholly against grant of injunction. Mr. Ray

Chowdhury thus supported the impugned order. Mr. Ray Chowdhury also submitted that since the plaintiffs have failed to prove their right in the wakf property even prima facie, they can suffer any loss, even if, their prayer for temporary injunction is rejected.

17. This Court has considered the submission of the respective Counsel of the parties. As a matter of fact the wakf deed is the sheet anchor of both the parties. As such this Court has carefully examined the said wakf deed. On reading the said wakf deed as a whole, this Court does not find that any right of congregation or worship was given to the members of the Shia community of Muslim either in the Mosque or in the Imambara located at premises No. 123, Circular Garden Reach Road, Kolkata-23. Though it is true that the said wakf deed provides that in case of acquisition of the said property by the Government or in case of demolition of the Mosque and the Imambara to the ground, a big magnificent Mosque and Imambara will be constructed in Metiabruz area where considerable Shias reside by utilizing the compensation money as well as the surplus income of the Wakf Estate, but that provision cannot be construed as conferment of right of worship and congregation upon the members of the Shia community of the Muslim in the said Mosque and/or Imambara. Since the wakif himself was a Shia Muslim he preferred the Metiabruz area for construction of a Mosque and/or Imambara in the event such eventuality arises, as considerable number of Shias reside in the said locality.

18. If the wakf deed is read as a whole, it will appear that the wakif clearly gave direction therein that Mutawalli will be selected from members of the wakif's family and/or their heirs with a rider that in the event no such suitable Mutawalli can be found in the family of the wakif and/or his heir's family, then Mutawalli can be selected from the Shia community of Metiabruz. It was also provided therein that if suitable person is not found out from the wakif's family and/or his heir's family for management of the wakf property, then a committee may also be formed with the Shias for its management. But such provision, made in the deed, does not confer any right upon the members of the Shia community either to congregate or worship in any part of the wakf property including the Mosque and/or the said Imambara. If the provision regarding the disbursement of the surplus income of the Wakf Estate which was made in the said wakf deed is considered then it will be found that no provision was made therein for using any part of surplus income for any charitable purpose. It was further provided therein that if there is nobody living in the family of the wakif and/or his descendants, then only a part of allocation which was given to the members of the wakif's family will be utilized for charitable purpose. That situation has not yet matured. Even assuming that the said situation has matured still then in view of the provision contained in Section 3(iii) of the Wakf Act, the part of the money which was to be spent for charitable purpose as per the direction of the wakif in the said deed, may at best be treated as a public Wakf Estate but neither the property nor the other income of the wakf property can be treated as a part of the public Wakf Estate.

19. Thus on consideration of the wakf deed as a whole this Court is of prima facie view that, in fact, the wakif created the wakf in nature of wakf-al-al-aulad i.e. for the benefit of the wakfi's family and his heirs and other descendants, without creating any right of worship either in the Mosque or in the Imambara in favour of the members of the Shia community. This Court is also of the prima facie view that even if it is found that on happening of certain eventuality, some part of the allocation in the surplus money of the wakif's estate which was allocated for the members of the wakif's family and/or his heirs was directed to be spent for charitable purpose but still then the wakf estate and/or its income as a whole cannot be regarded as a public wakf in view of Section 3(iii) of the Wakf Act, 1995 which provides that only the part of the income which was directed to be utilized for charitable purpose may at best be treated as a part of public wakf.

20. Considering the wakf deed as a whole, this Court is of prima facie view that the wakif created a wakf in the nature of wakf-al-al-aulad i.e. a private wakf in which no right for performance of worship was created in favour the Shia community of Muslim. As such the plaintiffs cannot claim any beneficial right in the wakf estate as beneficiaries under the said deed.

21. Thus this Court is of prima facie view that the plaintiff has failed to make out any prima facie case in the application for injunction.

22. That apart the balance of convenience and inconvenience is also against the grant of injunction as the said defendant has taken all such steps either for demolition of the said building or for construction of a commercial complex therein or for reallocation of Imambara from the first floor to the third floor of the newly constructed building, in terms of the order passed by the Board of Wakf. Furthermore since the defendant was permitted to let out a part of the newly constructed building by the order of Board of Wakf, injunction as prayed for by the plaintiff cannot be granted in the instant case.

23. That apart, when the plaintiffs have failed to prove their prima facie right of congregation and worship either in the Mosque or in the Imambara, the plaintiffs cannot suffer any loss, even if their prayer for temporary injunction is rejected.

24. This Court also expresses its doubt about the maintainability of the said suit in the absence of the Board of Wakf, as in the absence of the Board of Wakf, the order passed by such Board of Wakf, cannot be effectively considered by the Court. Furthermore since the legality of the order passed by the Board of Wakf is not under challenge, the plaintiff cannot get any relief for injunction in the instant suit, inasmuch as the acts of the defendant No. 1 cannot be regarded as illegal and unlawful, so long as the order of the Board of wakf remains valid and operative.

25. Under such circumstances this Court holds that the order passed by learned Appeal Court does not require any interference.

26. The revisional application thus stands rejected.

27. Urgent xerox certified copy of this order, if applied for, be given to the parties as expeditiously as possible.