
(2013) 07 DEL CK 0508

In the Delhi High Court

Case No : Regular First Appeal 434 of 1999

Sheikh Mumtaz Ahmed

APPELLANT

Vs

Rana Khursheed and Others

RESPONDENT

Date of Decision : 19-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5
Waqf Act, 1995 — Section 57, 87

Citation : (2013) 07 DEL CK 0508

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Javed Ahmad, for the Appellant;

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—This appeal impugns the judgment and decree dated 12th March, 1991 of the learned Additional District Judge (ADJ) decreeing the suit filed by the respondent No. 1 against the appellant and the respondents No. 2 to 7, for rendition of accounts and for recovery of her share of rent/benefit/income from property XIV/1105-1134 (old) and 908-923, 1327-1345 (new), known as Star Building, Kutab Road, Delhi. The appeal was admitted for hearing and vide order dated 13th July, 1999 which was made absolute during the pendency of the appeal on 24th July, 2001, passing of the final decree was stayed.

2. None of the respondents have appeared. After hearing the counsel for the appellant on 17th July, 2013, the appeal was posted for today with notation in the cause list of "notice of default to counsel for the respondents", In spite thereof none has appeared for the respondents. The counsel for the appellant has been heard further and has also handed over written submissions with copies of the judgments/provisions relied upon.

3. The respondent No. 1 filed the suit from which this appeal arises pleading, (a)

that her grandfather late Sheikh Abdul Ahad created a Wakf-ul-Aulad with respect to the aforesaid property by means of a registered Wakf Deed dated 18th June, 1921; (b) that as per the terms of the Wakf Deed, the author of the Wakf i.e. Sheikh Abdul Ahad was to remain Mutawalli of the Wakf during his lifetime and after his death, if his sons were minor, his wife was to become the Mutawalli and after attaining majority, his sons were to act jointly as Mutawallies and to realise rent of the Wakf property and to manage the same and divide the rents/benefits to the beneficiaries/co-sharers/co-owners as per the shares fixed according to Shairiat; (c) that out of the five sons of late Sheikh Abdul Ahad, three migrated to Pakistan in the year 1947 and thus the remaining two sons namely Sheikh Abdul Karim and Sheikh Mohd. Abid, (father of the respondent No. 1/plaintiff) became Mutawallies; (d) that on demise of Sheikh Abdul Karim, his son Sheikh Mohd. Nasim started acting as a Mutawalli in place of his father; (e) that Sheikh Mohd. Abid, father of the respondent No. 1/plaintiff died on 12th January, 1983 leaving five sons and two daughters including the respondent No. 1/plaintiff as his legal heirs and who thus became entitled to benefits/profits/rent/income of the said Wakf property; (f) that though as per the Wakf Deed, only the sons were entitled to act as Mutawallies but the respondent No. 1/plaintiff and her sister were also entitled to share in rent/benefits/income of the Wakf property and which had been denied to them.

4. Different written statements were filed by different defendants taking various defences in law and on merits pleading that the Wakf was for the benefit only of the male members of the family and not for the daughters of the family.

5. On the pleadings of the parties, the following issues were framed in the suit on 10th February, 1992, 22nd September, 1997 and in the impugned judgment:

1. Whether the Plaintiff is entitled to the decree of rendition of account as prayed? OPP

2. Relief.

1. Whether the suit of the Plaintiff is barred u/S. 55-E read with Section 87 of Wakf Act, 1995? OPD-4

2. Whether the suit has not been property valued for the purpose of Court Fee and jurisdiction? OPD-4

And

1. Whether the suit is bad for non serving of notice u/s 57 of the Wakf Act of Delhi Wakf Board? OPD

2. Whether the suit is bad for nonjoinder of necessary parties? OPD

6. The learned ADJ, in the impugned judgment has decided all the legal/technical issues in favour of the respondent No. 1/plaintiff and held the suit to be maintainable and not barred or bad for the reason of the various technical pleas taken by the defendants including the appellant herein. As far as the Issue No. 1

aforesaid is concerned, i.e. of the entitlement of the respondent No. 1/plaintiff to a decree for rendition of accounts, the learned ADJ in the impugned judgment has set out the material and relevant clauses of the Wakf Deed as under:

1. So long as I am alive, I shall be managing the property (property stated in the Deed) and I shall be the Mutawalli. I shall receive the income from the property and shall spent it on minors.

2. I shall get the property repaired out of the income of the property. I shall be absolutely entitled to collect the rent, to get the tenants evicted and to relit the property. I shall spent the income from the property on the minors wherever I shall consider it necessary and the minors or anyone else shall have no right to ask for rendition of accounts either from me or from my wife.

3. If I expire before minors becoming major, then on my death my wife Rabia Bi, daughter of Mohd. Khan shall become Mutawalli and whatever rights I was having regarding collecting income, getting the property repaired, evicting the tenants, relating it and collecting rents all these rights would be available to my said wife. Smt. Rabia Bi shall take care of minors and their needs, education, etc. from the income of the property and shall also get the property repaired from the same income and whatever is left after this shall be kept by her with herself for needs from time to time.

4. When my sons become major then the property and the income should be handed over to them. From that time, all my sons shall jointly become Mutawallies of the property and they would be entitled to the income, rent from the property and they would have all the rights which I was having of receiving rent, change the rent, evicting the tenants, relating the property, etc.

5. If God forbids, my any of the sons dies then out of his offspring's the eldest sons would be the Mutawalli in his place and he would be managing the property along with his uncles in place of his father. Whoever of my sons would expire, his son would take his place as Mutawalli. If unfortunately my any of the sons dies without leaving behind any son or if he left behind a son but who is a minor then my surviving sons only shall be Mutawallies and they shall receive the income from the tenants and distribute it to the sharers. No Mutawalli shall be entitled to reduce the share of any other beneficiary.

6. After every Mutawalli, out of his offspring's any person who is wise (LIAK), would be Mutawalli and managing the property in his place.

7. If from my successors and from their successors no one remains alive and all men and women come to an end then this property shall go for Madrassa Islamia" and the income of the property shall be spent for pious purposes like giving scholarships to students and purchasing books and other pious works, etc., etc.

8. If such situation arises that I myself and my wife no longer remain in this world leaves minors or my sons die leaving behind no offspring's and if they

leave behind offspring's but were minors, under such circumstances any brother who is having close relationship, shall be Mutawalli and shall manage the property in accordance with the Wakf Deed and in case there was any dispute then the same shall be resolved through the Court.

and on an interpretation thereof held:

(i) That the Wakif never wanted this property to be sold out of the family and wanted that his descendants should only enjoy the fruits of the property and when none of his descendants remain alive then only property would go to "Madarsa Islamia";

(ii) That the clause of the Wakf Deed which prescribes the situation when the property has to go to "Madarsa Islamia" makes it absolutely clear that the female descendants have not been excluded and even if female descendants were alive the property would not go to "Madrassa Islamia";

(iii) That though many of the clauses of the Wakf Deed only refer to the sons or sons of sons for making Mutawallies but this seems to have been done because of the peculiar Muslim culture that ladies in most of the cases are "Pardanashin" and it is only in an exceptional case that he has provided for his own wife to become Mutawalli i.e. when he dies and his sons are minors;

(iv) That the Wakif late Sheikh Abdul Ahad had no intention to deprive his daughters from the benefits of the Wakf property inasmuch as when he made provisions for spending the income from the Wakf property on minors, he did not specify that the income would be spent only on minor sons but provision was made for spending the income on all the minors whether they were sons or daughters;

(v) That although only male descendants were made Mutawallies but spending of income of the Wakf property was to be on all minors irrespective of the fact whether the minor was a son or a daughter;

(vi) That Wakf-ul-Aulad means a trust deed created for the benefit of offspring's- both sons and daughters;

(vii) That "Aulad" does not mean son alone but both son and daughter;

(viii) That the Wakf Deed did not exclude the female offspring's from its purview and benefits and the females were very much beneficiaries of the Wakf and the respondent No. 1/plaintiff who is a daughter of late Sheikh Mohd. Abid cannot be deprived of the benefits of the Wakf on the ground that she was a female descendant;

(ix) That under Muslim Law, a daughter receives 1/2 share of the son. Thus, the respondent No. 1/plaintiff was entitled to 1/12th share while each son was to be entitled to 2/12th equal to 1/6th share out of the benefits of the Wakf.

7. The counsel for the appellant has controverted the interpretation aforesaid of

the Wakf Deed by the learned ADJ and has contended that it is for the male lineal descendants only. Relying on Rahmanul Hasan Vs. Zahurul Hasan and another , Birjis Mahal Begum Vs. Humayun Reza Chaudhury and Another, and AIR 1938 453 (Lahore) it is contended that the executant i.e. Wakif of a Wakf-ul-Aulad is at complete liberty to choose the person of the family to confer the benefit on and it is not mandatory that all sons and daughters must get benefit in respect of the property which is subject matter of Wakf-ul-Aulad.

8. On enquiry, whether Wakf-ul-Aulad is a valid Wakf, attention is invited to the Mussalman Wakf Validating Act, 1913 enacting that it shall be lawful for any person professing the Muslim faith to create a Wakf which in all respect is in accordance with the provisions of the Muslim Law, for the maintenance and support wholly or partially of his family, children or descendants, provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

9. Be that as it may, the said question was not raised in the suit or in the appeal and does not arise for consideration.

10. Though the respondent No. 1/plaintiff and the appellant who was defendant No. 4 in the suit examined themselves as witnesses (no other witnesses were examined) but the question being of interpretation of the Wakf Deed, need is not felt to refer to their depositions.

11. The Wakf Deed is in Urdu language. I have not found any English translation thereof on the Trial Court record, though a Hindi translation was filed. The English translation of some of the clauses of the Wakf Deed set out in the impugned judgment appears to have been done either by the learned ADJ himself or must have been handed over across the bar. The appellant, as Annexure A-1 to this appeal, has of-course filed an English translation of the Wakf Deed. The respondent No. 1 who was earlier appearing in this appeal, had filed a reply to the application under Order 41 Rule 5 of the CPC pleading that the English translation of the Wakf Deed filed by the appellant omitted some important words. The appellant thereafter filed a Hindi translation also of the Wakf Deed together with a true transliteration in English language. On comparison of the english translation of the Deed filed with the memorandum of appeal with the Hindi translation on the Trial Court record and filed before this Court, I do not find the English translation to be accurate.

12. The learned ADJ as aforesaid has in the judgment only set out some of the clauses of the Wakf Deed. In my opinion, for interpretation of the Wakf Deed, some of the other clauses thereof are also relevant and which I am reproducing herein below from the English translation filed by the appellant along with the appeal but with corrections carried out by me on comparison thereof with the Hindi translations aforesaid of the Wakf Deed:

I, Sheikh Abdul Ahad son of Sheikh Abdullah, cast Sheikh, occupation business R/

o. Gali Qasim Jan, Delhi do hereby, willingly and voluntarily declare as under:

That I am landlord and also have children by the grace of God. Out of the entire properties, a house with rooms on lower and upper storeys known as Punjabi School built with pukka masonry situated at Qutab Road, Delhi on Government land is permanently owned and possessed and reconstructed by me without anyone's partnership. My sons Abdul Hameed, Abdul Karim, Fazal Illahi, Mohd. Abid and Mohd. Shafi are still minors.

Life is uncertain is a known fact and need not to be explained and it has been seen and observed that after the death of a person his heirs in young age ruin and destroy what is left behind and even become a tramp, devoid of all necessities and life becomes a burden to them. It is therefore, incumbent on everyone that he should make such an arrangement during his lifetime for the livelihood of his heirs and successors, that his ancestral estate may not be destroyed and his heirs and successors may continue to reap benefits therefrom.

Therefore, I, the executant with this idea in mind do hereby, devise my above mentioned properties, bounded as under, owned, possessed, reconstructed by me along with its internal and external right and permanent possession of the land along with structure over the same valued at Rs. 35,000/- which is free from all sorts of encumbrances, transfers etc. and to which I have the right as owner to transfer, with the enjoyment of my said rights and with sound senses intellect and without any compulsion or pressure or at anyone's instance. I hereby give ownership right of the said property and dedicate and declare the same as Wakf-ul-Aulad and terminate my own rights of ownership in the said property.

13. In fact what has been reproduced hereinabove is the recitals and habendum component of the Wakf Deed and what the learned ADJ has reproduced in the impugned judgment is the part of the Wakf Deed dealing with the management of the Wakf created.

14. The counsel for the appellant has not challenged the finding in the impugned judgment of the word "Aulad", including both sons and daughters. The Mussalman Wakf Validating Act, 1913 also declares that it is lawful for a person professing the Mussalman faith to create a Wakf for the maintenance and support wholly or partially of his family, children or descendants. It is thus not as if a Wakf-ul-Aulad is necessarily for the benefit of the sons only. It has been held in *Imdad Ali Vs. Ashiq Ali* (1929) 4 Luck. 101; 113 I.C. 494 that such a Wakf is not confined to persons who are dependant for their maintenance on the Wakif and even persons not dependant on the Wakif for their maintenance and residing separately from him can be the beneficiaries of such a Wakf. At the same time, as held in *Mt. Mubarak Jan supra* a valid Wakf can be created in favour only of some members of the family or of some of the children or descendants, whether males or females and to the exclusion of others. Reference may also be made to *Beli Ram Vs. Mohammad Afzal* (1949) Lah. 1 laying down that it is not illegal to

make a Wakf deliberately to deprive an heir of the share of his inheritance (see Principles of Mahomedan Law by Sir Dinshaw Fardunji Mulla, 20th Edition, para 197 at page 231). Ameer Ali in his commentaries on "Mahommedan Law", 5th Edition has also in Chapter XI at page 381 opined, that if a Wakf is made in favour of children specifically named, the others not named will be excluded; a Wakf in favour of "A" and after him for his children will include all the children, both male and females; similarly, if a person makes a Wakf for his own children (awlad), both males and females will be included.

15. A reading of the translation of the Wakf Deed shows that though the Wakif in the recitals thereof has recited having five minor sons but while mentioning the objective of the Wakf, he does not use the word "sons" but uses the words "heirs and successors". The habendum/operative part of the Wakf Deed dedicates and declares the property as Wakf-ul-Aulad which again as aforesaid would include all the children and not the sons only.

16. The counsel for the appellant has drawn attention to various clauses of the Wakf Deed containing reference to sons. However, those clauses are pertaining to the appointment of Mutawalli of the Wakf. A Mutawalli of the Wakf is like a Manager, entitled only to manage and is distinct from the beneficiaries of the Wakf. All that can thus be said is that the right of management of the Wakf has been given under the Wakf Deed only to the male descendants and not to the female descendants. Similarly, the residuary clause of the Wakf Deed, providing for the ultimate beneficiary of the Wakf when no descendants are left, also uses the word "Aulad" and men/women and does not use the word "sons" alone and which would have been the case, had only the sons been the beneficiaries of the Wakf.

17. During the hearing, on enquiry, it has been informed that at the time when the Wakf Deed was executed, the Wakif besides having the minor sons also had daughters. It is thus not as if the Wakif while using the words "heirs" or "Aulad" can be said to have referred to his sons alone. There is nothing at all in the Wakf Deed to show any intent to exclude the daughters or the female progeny of his sons or sons of sons from the benefit of the Wakf.

18. Thus, even though the respondent No. 1/plaintiff has chosen not to appear or to oppose the appeal but I am unable to take a different view from that taken by the learned ADJ and hold the Wakf to be for the benefit of all heirs of the deceased Wakif and reject the contention of the appellant of the female heirs being excluded from the benefit of the Wakf. The appeal is accordingly dismissed; however, the respondent No. 1 having not appeared, no costs.

Decree sheet be drawn up.