
(1948) 05 AHC CK 0007
In the Allahabad High Court
Case No : First Appeal No. 17 of 1946

Sm. Kamla Devi

APPELLANT

Vs

Sunni Central Board of Waqfs, U.P., Lucknow and another

RESPONDENT

Date of Decision : 10-05-1948

Acts Referred:

Citation : (1948) 05 AHC CK 0007

Final Decision : Dismissed

Judgement

Harish Chandra, J.—This is an appeal from an order of the learned Civil Judge of Bareilly requiring the plaintiff-appellant to pay court-fee on her suit in accordance with cl. (1) of sub-s. (iv-A) of S. 7, Court-fees Act, 1870, as applicable to the United Provinces. The property in dispute belonged to one Qazi Muhammad Khalil and the appellant has purchased a share in that property from an heir of Qazi Muhamad Khalil. The Sunni Central Board under sub-s. (1) of S. 5, U.P. Muslim Waqfs Act, 1936 (Act XIII [13] of 1936) notified the property of Qazi Muhammad Khalil as a waqf to which the provisions of that Act applied. The appellant has accordingly filed a suit under sub-s. (2) of that section for a declaration that the property is not subject to a waqf and that the appellant is the owner of the share which she has purchased from an heir of Qazi Muhammad Khalil, God Almighty through the Anjuman Islamis has also been impleaded as a defendant. The property in dispute has been valued by the appellant at a sum of Rs. 7000.

2. Sub-section (iv-A) of S. 7, Court-fees Act, runs as follows :

In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market-value, or an instrument securing money or other property having such value,

(1) where the plaintiff or his predecessor-in-title was a party to the decree or instrument, according to the value of the subject matter.

A perusal of the plaint shows that the so-called waqfnama said to have been executed by Qazi Muhammad Khalil has been specifically mentioned in it and that

it has been stated therein that this document had not been properly executed by Qazi Muhammad Khalil and that it was invalid and without effect. No doubt, in the relief as framed by the appellant there is no specific prayer that this waqfnama be cancelled or adjudged void and the appellant merely prays for a declaration that the property in suit is not waqf property. But she also prays for any other relief that the Court might consider necessary in the circumstances of the case. A plaint has to be read as a whole and the Court is not to be guided entirely by the actual language used by the plaintiff and must look at the substance of the relief claimed. See the case of Kamta Nath Vs. Chiranji Lal and Another, There can be no doubt that the plaint also seeks to have the so-called waqfnama to be cancelled or adjudged void. But even if this is not the intention of the appellant, there can be no doubt that a declaration that the property is not subject to a waqf does in fact involve the cancellation of or adjudging void the so-called deed of waqf by Qazi Muhammad Khalil.

3. It is, however, argued on behalf of the appellant that the execution of a written waqfnama is not at all necessary for the creation of a waqf and that a waqf can only be created by an oral dedication of property by the waqif and reference is made to the case of Fakhruddin Shah v. Kifayat Ullah, 7 A.L.J. 1095: (8 I.C. 578).

4. The question, however, that was raised in that case was not whether a waqf could or could not be created by a written instrument only and the question that was before the High Court was whether from the existence of certain circumstances in that case the existence of an oral dedication of property could be inferred. As a matter of fact counsel for the respondents admitted the necessity of an oral dedication as essential for the creation of a waqf and his argument was that the waqf in question being an old one, an oral dedication by the waqif creating a waqf was to be inferred from the circumstances of the case. However, it seems unnecessary for me to consider the merits of the decision in Fakhruddin Shah's case, 7 A.L.J. 1095 : (8 I.C. 576) although it seems to go against the view taken by other High Courts in India in regard to this question. For, even if an oral dedication is essential for the creation of a waqf, a waqfnama executed thereafter must be regarded as an instrument securing property.. When an instrument is in fact executed and falls within the purview of sub-s. (iv-A) of S. 7, Court-fees Act, it is, in my opinion, immaterial whether the execution of such instrument was or was not necessary. If an oral dedication is essential for the creation of a waqf and no such oral dedication exists in the present case, that may be a good ground for cancelling the waqfnama or adjudging it void. But when the cancellation of such an instrument is in fact involved in a suit, court-fee must, in my view, be paid in accordance with the provisions of sub-s. (iv-A) of S. 7. The words "securing money or other property having such value" are no doubt not very clear. These words also occur in the Act as applied to the province of Madras and in the Madras case of Chella Sodemma v. Pullate Krishnamurthy, AIR 1938 Mad. 824 : (181 I.C. 431), it was held that the words should not be construed in a wide sense as that would work hardship on a litigant and the view

was expressed that

the document which is sought to be set aside must of itself have secured the property, that is, there must have been a conveyance of the said property or a release of rights thereunder which would operate as an extinguishment of the right of the person conveying or releasing.

There is no warrant for putting such a narrow interpretation upon the words used in the sub-section. For, if it was the intention of the Legislature to use the words in this narrow sense it is not understood why the intention was not expressed in clearer terms, as it was quite easy to provide that the sub-section was applicable only to instruments transferring or releasing property. It was recognised in the Madras case that the ordinary dictionary meaning of the word "secure" is to make safe or to confirm or make certain the possession and enjoyment of rights and privileges" and I do not see why an instrument, such as one declaring any right, title or interest in immovable property, which apparently secures property in the sense indicated above should not come within the purview of this sub-section. However, a waqfnama is obviously a document which purports to operate as an extinguishment of the rights of the executant in a property and to convey it to the donee and the sub-section is clearly applicable in the present case. But even if it be regarded as a document merely declaring a waqf which may have been executed by an oral declaration my view is that it is covered by this Sub-section.

5. In regard to cl. (1) of sub-section (iv-A) Mr. Seth on behalf of the appellant contends that inasmuch as the waqfnama had not been executed by the immediate predecessor-in-title of the appellant she cannot be required to pay court-fee according to cl. (1) and that the proper clause to apply to the present case would be cl. (2). I cannot read the word "predecessor-in-title" in that clause as referring to the immediate predecessor-in-title of the plaintiff. Qazi Muhammad Khalil was as much a predecessor-in-title of the appellant as his heir from whom the appellant has purchased a 6/16ths share in the property and the contention has no force.

6. Lastly, it is argued on behalf of the appellant that the learned Civil Judge has not correctly fixed the market value of the property. According to him the correct market-value of the property, having regard to the income yielded by it, is us. 64,800. The sale deed purports to have been executed for a sum Rs. 7000 only and the learned Civil Judge is of opinion that the full price was not paid by the appellant in view of the fact that the title of the vendor was not free from dispute and that the appellant could not get the property without some litigation relating to the waqf. It is argued that if in view of these considerations the appellant in fact paid a price of Rs. 7000 for the property that would be its market-value. The contention does not appear to be sound. The market-value of a property is the value which the property would fetch in the open market irrespective of any limitations to which it may be subject. This contention of the appellant also seems to be without force.

7. I would accordingly dismiss the appeal with costs.

Sapru J.

8. The plaintiff is the appellant in this case. She has been directed by an order of the learned Civil Judge of Bareilly to pay court-fee in Suit NO. 19 of 1945, which she instituted for a declaration that a certain property which has been declared by the Sunni Central Board of Waqf, U.P., to be waqf property is not waqf property and that she is the owner of it, in accordance with cl. (1) of sub-s. (iv-A) of S. 7, Court-fees Act, as applicable to the United Provinces.

9. It would appear that one Qazi Mohammad Khalil was the original owner of the property in dispute. The plaintiff appellant is a purchaser of a 6/16ths share of the entire property which Qazi Mohammad Khalil had from an heir of Qazi Mohammad Khalil. It appears that under the powers given to it the Sunni Central Board of Waqf, U.P., have under the Muslim Waqfs Act, 1936 (Act XIII [13] of 1936), taken over charge of the entire property left by Qazi Mohammad Khalil on the ground that he had created a waqf of that property. According to the provisions of that Act, on a declaration made by either the Sunni or the Shia Central Board of a property as waqf, it is open to a person who claims to be the heir of that property to challenge its waqf character by bringing a suit for a declaration that the property is not waqf property. The plaintiff filed the suit and paid a court-fee on the assumption that her suit was a declaratory one. On an objection taken both by Government and the defendant, the learned Civil Judge before whom the suit was pending came to the conclusion that the court-fee paid was insufficient. His view was that the court-fee should have been calculated in accordance with the provisions of cl. (1) of sub-s. (iv-A) of S. 7, Court-fees Act.

10. The plaintiff's case is that the suit she had brought was for a declaration that the property which the Sunni Central Board had declared under S. 5, U.P. Muslim Waqfs Act, as waqf property was not in fact waqf property and that it is property of which she is the owner, it having been purchased by her from a person who is the heir of Qazi Mohammad Khalil. It may be mentioned that a party to this suit is God Almighty through the Anjuman Islamia.

11. The answer to the question of the amount of court fee for which the plaintiff is liable depends upon an interpretation cl. (1) of sub-s. (iv-A) of S. 7, Court-fees Act, to which I have referred above. In order to make the position intelligible, I quote the sub-section :

In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market-value, or an instrument securing money or other property having such value,

(1) where the plaintiff or his predecessor-in title was a party to the decree or instrument, according to the value of the subject-matter.

The point which has to be decided is whether the suit which the plaintiff-appellant has brought involves a cancellation of an instrument securing money. I

have gone through the plaint carefully and find that the relief claimed by the plaintiff is for a declaration that the notification of the Sunni Central Board that the property in suit is waqf property is not correct and that, in point of fact, the property is not waqf property at all. It may be mentioned that there is a reference in the plaint to a waqfnama which is alleged to have been executed by Qazi Mohammad Khalil and this waqfnama is described as null and void.

12. The question which arises, therefore, for consideration is whether the suit, which the plaintiff has brought, is merely one for a declaration under S. 5, Muslim Waqfs Act, or whether it also involves either a cancellation or the adjudication as void of a waqfnama which, in the circumstances of this case, can be held to be an instrument securing money or other property within the meaning of sub-s. (IV-A) of S. 7, Court-fees Act.

13. As I understand the position, the plaintiff's suit would involve an adjudication of the voidability or otherwise of the waqfnama only if, without its cancellation, the declaration that the property is not subject to waqf cannot be given. Necessarily, this leads me to a consideration of the questions whether, (a) cancellation of the waqfnama is implied in the reliefs which the plaintiff seeks and (b) the waqfnama can, in the circumstances of this case, be said to be a document which secures property.

14. I shall deal with the second question first. The question what the words "securing property" mean came up for consideration before a learned Judge of the Madras High Court in the case of Chella Sodemma v. Pullate Krishnamurthy, AIR 1938 Mad 824 : (181 I.C. 431), in which S. 7, cl. (IV-A), Court-fees Act as applicable in Madras was involved. I may point out that the sub-section of the Madras Act which Venkataramana Rao J. had to consider is worded in the same terms as the sub-section of the U.P. version of the Court-fees Act. Venkataramana Rao J. rightly pointed out that there was something defective with the drafting of the sub-section inasmuch as it was not worded in dear language. There being some ambiguity about the words "securing property," the correct principle to be followed in interpreting those words, particularly in a statute of a fiscal nature, is not to construe them in a wide sense for by doing so hardship may be caused to a litigant or subject. I quote with approval certain remarks of Venkataramana Rao J.:

The ordinary dictionary meaning of the word "secure" is to make safe or to confirm or make certain the possession and enjoyment of rights or privileges. An acknowledgment of a right or a liability may in a sense be said to make certain or safe the right or liability acknowledged; but it seems to me to construe the word in that wide sense would work hardship on a litigant and having regard to the scope and object of the enactment it has to be construed strictly. The prayer of cancellation under the law is obligatory only in cases where a person is a party to a document or where, even though not a party, the law would make him liable as if he were a party. Again, a document must be one which, if allowed to be outstanding without challenge, would operate as a bar to the enforcement of a

right or remedy that one may have in regard to a property. A document wherein a person admits the right of another or acknowledges his liability will not come under this category because it may be open to a party to show that the admission or acknowledgment was made under a mistake, that is documents which are of evidentiary value and might even estop a party from stating facts contrary to those alleged by him in the document, are documents which do not require to be cancelled or set aside. Therefore the documents which require to be set aside are documents whereby rights are transferred or released, such as sales, gifts, leases, mortgages or releases.

15. I may say that I find myself in complete agreement with the interpretation of the word "secure" which Venkataramana Rao J. has given. I may point out that the question what the words "securing money or other property" mean in court-fee matters was considered by Venkatasubba Rao J, in the case of Doraiswami Reddiar and Others Vs. Thangavelu Mudaliar and Others, and at p. 669 that learned Judge observed that the words "securing money or other property" were not happy words and that a release deed is a document securing property having money value. This decision was referred to in the case reported in AIR 1938 Mad 824 : (181 I.C. 431) to which I have invited attention. Venkataramana Rao J. explained that the decision in that case was correct

because the tenure of property was rendered secure by the deed of release and until that deed was set aside, the person who executed it was completely bound by it.

The essential point which must not be forgotten is that "the document which is sought to be set aside must," as Venkataramana Rao J, points out

of itself have secured the property, that is, there must have been a conveyance of the said property or release of rights thereunder which would operate as an extinguishment of the right of the person conveying or releasing.

16. How did the waqf in this case come to be created ? Did it come into existence by an oral dedication or was it created by a waqfnama independently of any oral dedication ? It is on a determination of these points that an answer to the question of the correct court fee to be paid in this case depends. The question, therefore, which we cannot avoid considering is whether the waqf was created by an oral dedication of the property by the waqif. If it is an oral dedication which created the waqf, then the position is that the waqfnama merely evidenced the waqf and did not create it. A waqfnama which has been brought into existence to act merely as evidence of a waqf would stand in the same position as, say, an adoption deed. The cancellation of the document which stands in no higher a position than an adoption deed will not in that case be a necessary part of the general relief invariably claimed by plaintiffs in their suit. It is perfectly true that the plaint has got to be read as a whole; but it must be remembered that attention has to be focused on the relief claimed. The real point, therefore, in the case is whether the relief which the plaintiff claims can be given without a

cancellation of the waqfnama. The answer to this question, as I have indicated before, depends upon whether the waqf was created by a merely verbal declaration which was followed by a waqfnama to confirm that verbal declaration or whether it was created by the waqfnama itself.

17. Learned counsel for the appellant has strenuously argued on the basis of certain observations of Karamat Husain J. in the case of Fakhruddin Shah v. Kifayat Ullah, 7 A.L.J. 1095 : (8 I.C. 578) that to create a valid waqf inter vivos there should be an oral dedication by the waqif of the property over which he creates the waqf. The opinion of Karamat Husain J. is entitled to very great weight; but it may be pointed out that the Bench which decided the appeal from his judgment under the Letters Patent made it clear that they were not passing their decision on any express approval of the opinion of Karamat Husain J. in regard to the necessity of an oral declaration. I may also point out that the opinion of Karamat Hussain J. is not in accordance with the statement of the law relating to the creation of a waqf by, Mr. Ameer Ali and Sir Dinshah Mulla in their well-known works on Muhammadan Law. I quote below from the learned authors:

There is no essential formality or the use of any express phrase or term requisite for the constitution of a wakf. The law looks to the intention of the donor alone. Where a dedication is intended the law will give effect to it, in whatever language it may be expressed or in whatever terms the wish may be formulated. And a wakf may be made either verbally or in writing": (Amir Ali's Mahommadan Law, Vol I p. 148, Third Edition).

A wakf may be made either verbally or in writing. It is not necessary, in order to constitute a wakf, that the term "wakf" should be used in the grant if from the general nature of the grant itself such a dedication can be inferred. Where it is not clear whether a grant constitutes a wakf, the statements and conduct of the grantee and his successors, and the method in which the property has been treated, are circumstances which, though not conclusive, are worthy of consideration. (Principles of Mohammadan Law by Sir Dinshah Mulla, 12th Edition, p. 158).

18. I would also refer to a case, Badrul Islam Ali Khan v. Ali Begum, reported in 16 Lah. 782 : (A.I.R. 1935 Lah. 251) in which, in a suit relating to the removal of a mutawalli and rendition of wakf accounts, it was held by Jai Lal J. in a Bench case that a wakf can be made by means of a will. He repelled the contention of the respondents' counsel that in addition to the bequest of such a nature in the will, there should be an oral declaration by the testator that he had created a wakf in respect of the property or that after his death the property was to become wakf property. Reference was made by them to support this view to certain other cases, Banubi v. Narsingrao, 31 Bom. 250 and Fakhruddin Shah v. Kifayat Ullah, 8 I.C. 678 : (7 A.L.J. 1095).

19. It is thus clear that a wakf can be created by wakfnama. The point, therefore, for consideration is whether in this particular case the wakf which the

plaintiff alleges was invalid was created by a wakfnama or by an oral declaration followed by a wakfnama to confirm it. A perusal of paras. 2 and 4 of the plaint leaves no room for doubt that the wakf which the plaintiff seeks to be declared as invalid was, according to the case set up by her, created by a deed of wakf. There is no reference anywhere to an oral declaration and it certainly does not seem to me the case of the plaintiff that the wakf was created by an oral dedication and later evidenced by a wakfnama. Had the latter been the position taken up by the plaintiff, I should have little difficulty in holding that the wakfnama was not an instrument securing money or property having such value. The wakf in this case is the creature of a wakfnama and for the relief which the plaintiff claims it will be necessary to set aside the wakfnama. In the circumstances of this case, I hold that the wakfnama, having regard to the case set up by the plaintiff in her plaint, is a document which secures property and that the court-fee payable will be in accordance with cl. (1) of sub-s. (iv-A) of S. 7, Court-fees Act, 1870, as applicable to the United Provinces.

20. I may say that I am in agreement with my brother Harish Chandra, in regard to his interpretation of the word "predecessor-in-title" in cl. (1) of sub-s. (iv-A) of S. 7, Court-fees Act. The word "predecessor-in-title" cannot be limited, as he rightly says, to mean the immediate predecessor.

21. I am also in agreement with my brother, Harish Chandra, in regard to the question of the market-value of the property in this case. I would interpret the word "market-value" to mean value for which it would be possible for a property to be sold in the open market, regardless of any consideration such as litigation relating to it.

22. The result is that I agree with my brother, Harish Chandra, though for somewhat different reason. In the view that I take, this appeal should be dismissed with costs.

23. By the Court.- The appeal is dismissed with costs. This order will govern P.A.F.C. No. 18 of 1946 also.