
(2008) 12 AHC CK 0433
In the Allahabad High Court
Case No : Second Appeal No. 911 of 2008

Smt. Faiqa Khatoon

APPELLANT

Vs

Riyazur Rehman Khan Sherwani and Another

RESPONDENT

Date of Decision : 15-12-2008

Acts Referred:

Waqf Act, 1995 — Section 3A

Citation : (2008) 12 AHC CK 0433

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Advocate : Suresh Chandra Verma and Satyendra Kumar Singh, for the Appellant; M.K. Gupta and Diwakar Rai Sharma, for the Respondent

Final Decision : Allowed

Judgement

Pankaj Mithal, J.—The dispute in this second appeal is between the Plaintiff-brother and the Defendant-sister.

2. According to the admitted facts, Dr. Maulvi Hazi Habib-ur-Rehman Khan Nawab Sarvar Yar Jang Bahadur created a wakf-alal-aulad vide wakf deed dated 24.5.45. The Plaintiff-Respondent No. 1 Riyazur-Rehman Khan Sherwani is the grandson of wakif and is presently mutwalli of the wakf. The Defendant Appellant Smt. Faiqa Khatoon who is his real sister is occupying and living in the part of the wakf property with the permission of the earlier mutwalli who happened to be their father, late Haji Ubed-ur-Rehman Khan Sherwani.

3. The Plaintiff/Respondent No. 1 instituted Original Suit No. 1463/94 for the ejectment of Defendant/ Appellant and for possession over the disputed portion of the wakf property on the allegation that she is living therein as a licensee of the wakf which has been revoked. The suit was resisted by the Defendant/ Appellant on the ground that she is one of the beneficiary under the wakf and, as such, cannot be evicted by treating her to be a licensee. The suit was dismissed by the Court of first instance. However, on appeal it has been decreed holding

that the Defendant/Appellant is not a beneficiary entitled to right of residence. Thus, the Defendant/ Appellant has come up in this second appeal.

4. In short, according to the Plaintiff, the Defendant is not a beneficiary under the aforesaid wakf and is not entitled to live in any part of the property of the wakf. On the other hand, the Defendant claims herself to be a beneficiary having right of residence in the wakf property from which she cannot be evicted by treating her to be a licensee.

5. Learned Counsel for the parties agreed that the only question of legal substance which is involved in this appeal is whether the Defendant/Appellant Smt. Faiqa Khatoon who is grand daughter of the wakif is a beneficiary under the wakf deed dated 24.5.45 and, as such, is entitled to right of residence in the wakf property.

6. I have heard Sri S. C. Verma, learned Counsel for the Defendant/ Appellant and Sri M. K. Gupta alongwith Sri Diwakar Rai Sharma for the Plaintiff/ Respondent No. 1 on the above substantial question of law to which they were put to notice by the Court by an order dated 6.11.2008 and they have agreed for final decision of the appeal at the stage of admission itself on the aforesaid question.

7. Basically, a wakf under the Mohammedan Law owes its origin to a rule laid down by Prophet of Islam which provides tying up a property in the ownership of the God and devotion of the profit for the benefit of human beings. In a wakf the ownership of dedicated property is taken away from the person making wakf and is transferred and detailed by the God. The real purpose of creating a wakf is to acquire the merit in the eyes of God and any other purposes are of a secondary nature. Making of a wakf signifies offering a gift with the object of obtaining a favour of Almighty which would be helpful in the next world.

8. According to well recognised principles of the Muslim Law, wakf is a permanent dedication of a property by the wakif in the Almighty God and to utilise the profits thereof for religious, pious or charitable purpose. At one time, a private wakf was in no case valid. In other words, a wakf for the purposes of benefit of the family was not recognised. However, this extreme view is no longer tenable and now a settlement of property by way of wakf in favour of the family, children and descendants is recognised provided it is also of a charitable nature.

9. The Supreme Court in Radhakanta Deb v. Commissioner, (1981) 2 SCR 826 has observed as under:

...the Mohammedan law recognises the existence of a private trust which is also of a charitable nature and which is generally called wakf-alal-aulad, where the ultimate benefit is reserved to God but the property vests in the beneficiaries and the income from the property is used for the maintenance and support of the family of the founder and his descendants. In case the family becomes extinct then the wakf becomes a public wakf, the property vests in God. A public wakf

under the Mohammedan law is called wakf-fi-sabi-lil-lah.

10. Thus, two kinds of the wakfs are now recognised under Moahmmedan Law: (1) Public wakf which is created for the religious or charitable purposes and is called wakf-fi-sabi-lil-lah ; and (2) Private wakf which is created by the wakif for his own family and descendants. It is a family settlement by way of a wakf and is called wakf-alal-aulad. Under the wakf-alal-aulad the ultimate benefit is reserved to the God and the property vests in beneficiary but the income earned from the property is used for the maintenance and support of the family of the wakif and his descendants and where the family of the wakif gets extinct then the wakf becomes a public wakf and the property would vest in God.

11. Mohammedan Law does not prescribe any form for creating a wakf. It may either be verbal or in writing. An oral or a written declaration amounts to a permanent and irrevocable dedication to God, constituting a valid wakf vide Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, A Muslim who is not a minor and is of sound mind may create wakf of any property owned by him or her of his/her own free will.

12. The manager of the wakf is called mutwalli but he is not the owner of the wakf property. He is only entitled to a reasonable remuneration from the income of the wakf as manager. As soon as a wakf is created, all rights of property pass out of wakif and vest in God. Mutwalli has no right in the wakf property.

13. It is in the above background of the principles of Mohammedan law, it is required to be seen as to whether the Defendant/Appellant is one of the beneficiary of the wakf-alal-aulad and entitled to have a place of residence in the wakf property. The answer to this depends upon the interpretation of the wakf deed and by gathering the intention of the wakif in creating the wakf.

14. The wakf deed dated 24.5.1945 is in writing and is not disputed to the parties. The said wakf deed is in three parts. The first part deals with the creation of wakf-alal-aulad. The second part is in respect of appointment of first and subsequent mutwallis while the third part is with regard to the objects of the wakf, its beneficiaries and the manner of utilization of its income.

15. A careful reading of the wakf deed after ironing out the unnecessary creases brings out the following salient features of the aforesaid wakf:

1. Dr. Maulvi Hazi Habib-ur-Rehman Khan Nawab Sarvar Yar Jang Bahadur is the wakif.
2. The wakf is a private wakf with a charitable purpose, i.e., wakf-alal-aulad.
3. It consists of the properties mentioned in Schedule-A and Schedule-B all of which have been dedicated to the Almighty God with which the wakif severed all his rights except as mutwalli.
4. The wakif appointed himself to be the first mutwalli of the wakf and transferred his personal possession over the wakf property to himself as mutwalli

of the wakf.

5. The eldest son of the wakif, namely, Maulvi Hazi Mohd. Ubaid-ur-Rehman Khan was named the second mutwalli and after him the second son of the wakif, namely, Moulvi Mohd. Musud-ur-Rehman Khan and it was provided that after him the eldest son of his eldest son, Maulvi Haji Mohd. Ubaid-ur-Rehman Khan would be the mutwalli and the process would continue as per rule of Primogeniture where the first born or the eldest child succeeds, from the male line of the descendants of the wakif. In the event there remains no male descendant, the mutwalli would be the eldest son from his female descendants. Finally, if no male descendant is available either from the male or the female line of descendants, the Aligarh Muslim University would step into the picture.

6. The first mutwalli, i.e., the wakif was entitled to utilise the income of the wakf for himself and for his wife and children, i.e., for the family and was not liable for any accounting in respect thereof.

7. The other mutwallis are supposed to utilize the income of the wakf first for the payment of land revenue and other Government dues and thereafter for meeting the necessary expenses for the maintenance of the wakf property. So long as the sons of the wakif would be mutwalli, they would be entitled to Rs. 20 out of Rs. 100 as remuneration as mutwalli and thereafter subsequent mutwallis would get only Rs. 10 out of Rs. 100. From the remaining income, a separate fund by depositing Rs. 12 out of Rs. 100 was to be created for the repairs and maintenance of the Masjid and Idgah, for payment of salary to the persons connected with the welfare of the above institutions, for bearing the expenses of lighting of such institutions, for imparting religious education etc., and for scholarship to five girl students of Girls College, Aligarh at the rate of Rs. 10 each.

8. A sum of Rs. 3,000 per month was separately provided from the income of the wakf property for the maintenance of the library and in case the mutwalli at any point of time considers it proper the library would be entrusted to the Aligarh Muslim University and named Habib-ur-Reham Khan Sherwani Library.

9. The remaining income was directed to be divided and spent upon all the heirs of the wakif.

10. The deed specifically provides that till the inheritance of the wakf it would remain in the hands of his sons and grand sons all his heirs, i.e., his sons, daughters and wife would be entitled to share in the income of the wakf but the heirs of his wife and daughters would not get any benefit.

11. The mutwalli was authorised to utilise the part of income of the wakf for the benefit of himself and his brothers. The children of the brothers were not entitled for any benefit. However, the heirs of brothers would be entitled for stipend for their education and the widows of the brothers to a maintenance and residence and expenses for the marriage of their daughters.

12. Lastly, a specific arrangement for the wife of the wakif provided that she

would continue to live in the family residence at Habibganj.

16. The above features of the wakf deed implicitly speak that apart from payment of land revenue, Government dues, maintenance expenses of the wakf property, remuneration of mutwalli, establishment of fund for repairs and maintenance of religious institutions and other expenses in connection thereto and for imparting education and scholarship to girl students and for library, the remaining income of the wakf is to be divided and spent for the benefit of the heirs of wakif which includes his sons, daughters and wife but not the heirs of wife and daughters so long as the management of the wakf continues with the sons and grandsons of the wakif. Thus, only the heirs of wife and daughters have been excluded and not those of sons and grandsons. Logically, the daughter of the son, i.e., granddaughter of the wakif has not been excluded from the benefit of the wakf. The relevant part of the wakf deed in this connection both in Hindi and English as supplied by the parties is reproduced hereinbelow:

The remaining income after expenses aforesaid shall be distributed amongst my heirs in the following manner. As long the Tauliyat shall remain with my sons and grandsons, the profits shall be distributed amongst all the legal heirs, that is, my sons, daughters and wife in accordance with the law of inheritance. The heirs of my daughters and wife shall not be entitled to any share after the death of my daughters. The profit shall be distributed amongst generations in this manner.

(Emphasis supplied)

17. Mr. Manoj Gupta, learned Counsel for Plaintiff/Respondent No. 1 has argued that the granddaughter of the wakif would not be his heir according to the Mohammedan law and would not be one of the "beneficiary" under the wakf.

18. The contents of the wakf deed read as a whole amply demonstrate that the intention of the wakif in creating the wakf-alal-aulad was for benefit of his family and all his heirs. It provides that so long as his sons and grandsons remain mutwalli of the wakf all the income of the wakf, after meeting out the expenses detailed in the earlier part of the wakf, would be shared and divided amongst all the heirs, i.e., his sons, daughters and wife in accordance with the law of inheritance but the heirs of his daughters and wife would not be entitled to any share. The reference to all heirs therein to mean his sons, daughters and wife is only illustrative in nature and is not exhaustive. It specifically excludes the heirs of his wife and daughters from the benefit of the wakf but does not exclude the children of his sons which shows that the intention of the wakif was to bestow the benefit of the wakf to all his grandchildren (sons' children) irrespective of their sex, i.e., to say he had no intention to exclude granddaughters from its benefit. This is particularly clear from the extracts of the wakf deed reproduced above. The words "in accordance with law of inheritance" has only been referred to in context of determination of the share of each of the heirs in the income of the wakf. It does not provide that his legal heirs are to be construed in the manner provided to by the Shariyat or the Mohammedan Law. The heirs are to

be determined as per language of the wakf deed which clearly spells out that the heirs include his sons, daughters and wife and exclude the heirs of daughters and wife but not that of the sons. Therefore, by implication the daughters of the sons or the sons of sons have not been excluded. Accordingly, in my opinion, as per the language used in the wakf deed the daughter of the son of the wakif is included within the legal heirs of the wakif and as such, is one of the beneficiaries under the wakf deed. The finding to the contrary recorded by the lower appellate court is based upon complete misreading of the wakf deed and, as such, cannot be sustained under law.

19. It may be relevant to mention here that presently one of the grandsons of the original wakif is admittedly mutwalli of the wakf and therefore, the wakf is in the hands of a grandson of the wakif.

20. Section 3A of the Wakf Act, 1995 defines a "beneficiary" to mean a person or object for whose benefit the wakf is created and to include religious, pious and charitable objects and any other object of public utility sanctioned by the Muslim Law. Therefore, in the totality of the facts and circumstances and looking to the object for which the wakf was created, it appears that the intention of the wakif was to provide benefit to all his heirs including all children of his sons irrespective of their gender. There was no intention on his part to make any distinction between his grandchildren, i.e., children of his sons on the basis of sex.

21. Heirs in context of this wakf deed appears to mean all those who are connected with the wakif through a common progenitor or of ties common lineage. Besides, as indicated earlier, the object and the intention of the wakif in creating the wakf was to benefit primarily all his descendants of his male lineage and there is no express exclusion of the granddaughters depriving them the benefit of the income of the wakf.

22. Therefore, applying the "doctrine of cypress" which means "as nearly as possible" the income of the wakf should be applied and spent in furtherance of the intention of the wakif as nearly as possible which eventually is to benefit the children of his sons including sons' daughters. Therefore, the Defendant/Appellant who is none other than the daughter of the one of the sons of the wakif is one of the heirs who falls within the ambit of a "beneficiary" as defined u/s 3A of the Waqf Act.

23. In view of above, the submission of the learned Counsel for the Plaintiff/Respondent that the Defendant/Appellant is not the heir of the wakif according to Shariyat cannot be accepted. The Defendant/Appellant is held to be one of the heirs of the wakif and beneficiary under the wakf.

24. No doubt the Defendant/Appellant has been held to be an heir of the wakif and consequently, the beneficiary of the wakf. But the question is whether as a beneficiary of the wakf is she entitled to live in the wakf property. According to the wakf deed she is entitled to benefit in the wakf only for a limited purpose, i.e., share in the income of the wakf and there is no specific provision for their

residence. However, in Radhakanta Deb (supra), in a wakf-alal-aulad the property vests in the beneficiaries meaning thereby that the beneficiaries are the owners. Therefore, by necessary implication the beneficiaries also get the right of residence in the wakf property as co-owners. Thus, the Defendant/ Appellant is held to be entitled to live therein as a co-owner and her occupancy cannot be termed as of licensee.

25. In view of the above discussion the judgment and order of the lower appellate court dated 18.8.08, passed by the Additional District Judge in v.Civil Appeal No. 6 of 2003, Riyazur Rehman Khan Sherwani v. Smt. Faiqa Khatoon, is set aside and that of the Court of first instance dismissing the suit is restored. Appeal succeeds and is allowed with no orders as to costs.

26. The Court puts on record its appreciation for the valuable help rendered by counsel for both sides Sri S. C. Verma and Sri M. K. Gupta in explaining the wakf deed which is originally in Urdu and providing all assistance with precision and all fairness.