

(1995) 05 AHC CK 0082
In the Allahabad High Court
Case No : Second Appeal No. 1812 of 1983

Sunni Central Board of Waqfs, Lko. and Anr.	APPELLANT
Vs	
Devi Charan & Ors.	RESPONDENT

Date of Decision : 02-05-1995

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : (1995) 05 AHC CK 0082

Hon'ble Judges : R.B.Mehrotra, J

Final Decision : Allowed

Judgement

R.B.Mehrotra, J.—This is a plaintiffs appeal. The facts necessary for the decision of the appeal are as under:

The Sunni Central Board of Waqfs, Lucknow through its Secretary and Waqf Alal Khair through its Manager and Secretary Sri Waris Ali Khan, filed Civil Suit No. 325 of 1970 against Sri Devi Charan and others for the following reliefs :

(a) The saledeed executed by Sm. Maqsudan Nisa in favour of defendants No. 3 to 5 for consideration of Rs. 3,000, dated 26th of November, 1964, registered in Register No. I, Bound No. 877 at serial Nos. 237 and 238 and saledeed executed by defendants No. 3 to 5 in favour of defendants No. 1 and 2 for consideration of Rs. 4,500, dated 27th October, 1965, registered in Register No. I Bound No. 907, at pages 96 and 97 at serial No. 3952, dated 7121965 may be declared cancelled.

(c) The plaintiffs may be declared to be entitled to recover the rent of three years from the defendant No. 6 at the rate of Rs. 288.

(b) Cost of the suit.

The details of the plots in dispute were mentioned at the bottom of the plaint.

2. The suit was contested by the defendants No. 1 and 2, who pleaded that the property which they had purchased from defendants No. 3 to 5 was not a Waqf property and in any case, they were bona fide purchasers of the property, as

such were entitled to the benefit of Section 51 of the Transfer of Property Act.

3. On the pleadings of the parties, issues were framed by the trial Court. Out of the issues framed, only following issues are relevant for the purpose of decision of the present appeal:

(1) Whether the saledeeds are liable to be cancelled on the grounds mentioned in the plaint ?

(2) Whether the plaintiffs are entitled to recover rent from the defendants. If yes, to what amount ?

(3) Whether the property in suit is situated in plot No. 2506 ?

(4) Whether the defendants are entitled to the protection of Section 41 of the Transfer of Property Act ?

(5) Whether the plaintiffs have filed a suit within 12 years from being dispossessed from the property ?

(6) Whether defendants No. 1 and 2 and their predecessor in interest are in possession as owners of the property for more than 12 years ?

4. The trial Court decided Issues No. 1 and 3 together and arrived at a finding that since the entries in the Waqf Board Register have been made bringing the plot in dispute as a Waqf property during the pendency of the suit, the rights of the defendants in regard to the said property are not affected and further held that the plaintiffs have failed to prove that the disputed land is situated in plot No. 2506 which is recorded as Waqf property in the Waqf Register maintained under the U. P. Muslim Waqf Act, 1960 (hereinafter referred to as the Act). On the aforesaid basis, the conclusion drawn by the trial Court that the saledeeds executed in favour of the defendants No. 1 and 2 and 3 to 5 were not liable to be cancelled.

5. On issues No. 6 and 7, the trial Court held that the defendants had been in possession of the property for more than 12 years and the property is not a Waqf property.

6. On issue No. 5, the trial Court held that the defendants No. 1 and 2 were bona fide purchasers of the property and were entitled to the protection of Section 41 of the Transfer of Property Act.

7. Aggrieved by the aforesaid judgment, the plaintiffs preferred Civil Appeal No. 6 of 1981 in the court of the District and Sessions Judge, Budaun. Plaintiffs' appeal has been dismissed by the lower appellate court, vide its judgment dated 31/5/1983. Aggrieved thereby the present second appeal has been filed.

8. I have heard learned counsel for the appellants.

9. Following substantial questions of law arise for consideration in the present second appeal:

(1) Whether in a case where a property is recorded in the register of the Waqf Board maintained in accordance with the provisions of the U. P. Muslim Waqf Act, the presumption is in favour of Waqf?

(2) Whether any transfer of Waqf property, without the consent of the Waqf Board, is ab initio void ?

(3) Whether in case where the property is recorded as a Waqf property, the burden of proof is on the person who denies the correctness of the entries made in the register of the Waqf property ?

10. For appreciating the aforesaid substantial question of law, certain facts in regard to the controversy involved between the parties, the subject matter of the present appeal, are required to be noticed.

11. Plaintiffs' case, in brief, was that "Takia" known as "Takia Sana Ullah Shah and Talkin Shab" exists in the entire plot No. 2506 according to the map and Khasra abadi and it is situated in Mohalla Sotha Town, Buddaun and the said land is a Waqf property and a mosque and few graves and some buildings exist in different portions of this plot. Sana Ullah died issueless and Talkin Shah left his two daughters Smt. Nanhi and Smt. Batool at the time of his death and these two daughters became Mutwalli of the said Waqf property. Nanhi and Batool also died and thereafter Ewaz Shah, husband of Smt. Batool, became the Mutwalli of the said Waqf. Ewaz Shah remarried Maqsudan Nisan and Smt. Maqsudan Nisa became the Mutwalli of the said Waqf after the death of Ewaz Shah. The said Waqf Alal Khair came under the management of the plaintiff No. 1 and in view of the provisions contained in U. P. Act No. 13 of 1936, it is registered at serial No. 168 as Waqf property in the Waqf Register maintained under the aforesaid Act, plaintiff No. 1 appointed a Committee for the Management of the Waqf property and Waris Ali Khan as a Secretary of the said Committee, as such he is entitled to sue in respect of the said property. Smt. Maqsudan Nisan became dishonest and she without any right executed a sale deed, dated 26/11/1964 in favour of defendants No. 3 to 5 in respect of the disputed portion of the Waqf property detailed at the foot of the plaint. Thereafter, defendants No. 3 to 5 sold the said property to defendants No. 1 and 2 through the sale deed, dated 27/10/1965. Defendant No. 6 is a tenant on behalf of Maqsudan Nisan, who was Mutwalli of the Waqf property. Later on when the property was sold to defendants No. 1 and 2, they obtained a fictitious decree for ejectment of defendant No. 6 and for recovery of the arrears of rent from defendant No. 6. Since neither the Board nor the Waqf was a party, the said decree is not binding on the plaintiff. This was the case of the plaintiff as stated in the plaint.

12. Both the courts below have approached the matter with an angle that even though plot No 2506 in which it is alleged that the property is situated, was recorded in the Waqf Board Register maintained under the provisions of the Act, even then the burden of proving that the property was a Waqf property was on the plaintiff and the plaintiff has failed to prove it to be Waqf property. The stress

of the courts below is on the conduct of the defendants wherein they have been dealing with the property as their personal property and on the basis of this conduct, a presumption has been drawn in favour of the defendants holding that the plaintiffs have failed to prove that the property was a Waqf property. On this point, the lower appellate court has dealt with the matter that even though the property was registered at aerial No. 168 as Waqf property in the register of Waqf maintained under the Act of 1936, entries were not binding on strangers to the property and in support of the aforesaid proposition, has relied upon a decision of the Hon'ble Supreme Court in the case of The Board of Muslim Wakfs, Rajasthan v. Radha Kishan AIR 1979 SC 289. On the basis of the aforesaid decision, the lower appellate court held as under:

"I have considered the provisions of the U. P. Muslim Waqf Act. In my opinion, the contesting defendants are not estopped or debarred from proving their title over the property in suit. Right, title and interest of the contesting defendants and their predecessors in title in the property in suit is not extinguished merely because the property in suit is registered as Waqf property by the plaintiff No. 1. The defendants and their predecessors in title were not under any obligation to take recourse to law against the entry made by plaintiff No. 1 Board in respect of the property in suit."

13. The approach of the lower appellate court clearly shows that on the basis of the aforesaid decision of the Hon'ble Supreme Court, the court came to the conclusion that the defendants are not estopped or debarred from proving their title over the property in suit, which means that the presumption of correctness of the entries in the Waqf Board Register is not conclusive of the question that the property is a Waqf property. Assuming the conclusion to be correct, scope for examining the issue was as to whether the defendants have proved it beyond doubt that the property was not a Waqf property. Merely on the basis that Ewaz Shah executed a sale deed in favour of Maqsudan Nisan and subsequently Maqsudan Nisan sold it to defendants No. 3 to 5 and defendants No. 3 to 5 sold it to defendants No. 1 and 2, it is not established that the property was not a Waqf property. It was obligatory on the defendants to establish by an independent evidence that Ewaz Shah, who was admittedly the Mutwalli of the Waqf property in relation to the Waqf in dispute; was in his own rights dealing with the property and was recorded as proprietor in some basic records. Both the courts below have throughout laboured under a mistake as if it was the plaintiffs, who had to prove that the entire plot No. 2506 was a Waqf property.

14. In Anjuman Islamia through Zahir Uddin v. Latafat Ali, AIR 1950 All 109. A Division Bench of this court held:

"After the creation of the Waqf, it was not open to his heirs to divide the Waqf property among themselves either privately or through Court and to transfer it. It is quite unnecessary to decide whether the partition decree was collusive. Even if it were not collusive, it would not have any effect against God. The property did not belong to Latafat Ali etc. Similarly, it is not necessary to decide whether

the contesting defendants are bona fide purchasers. Even if they were bona fide purchasers, they cannot seek protection under Section 41, T.P. Act, against God. Latafat Ali, etc., could not pass a better title to them than what they themselves had and they had none. I am not satisfied even with the bona fides of the defendants. The Waqf deed was a registered deed and there was reference to it in the pleadings of the parties to the partition suit. The defendants, if they had acted bona fide, must have known that the property was the subject matter of Waqf. Kakainandan (husband of Smt. Jamuna Kunwar, defendant 4) and Mohd. Kamil (defendant 11) stated that they were not aware of the Waqf deed before they purchased the property. I am unable to believe them. Kakainandan is himself a lawyer and the Waqf deed was referred to in the first sale deed in favour of Maqbool Ahmed, defendant 25."

15. In *Ahmad G.H. Ariff etc. v. The Commissioner of Wealth Tax Calcutta*, AIR 1971 SC 1691, the apex Court while considering the question regarding the effect of declaration of the property as Waqf property, held :

".....He has referred to the incidents of such a right with particular reference to the Mohammedan Law relating to I Waqf. That law owes its origin to a rule laid down by the prophet of Islam, and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." Once it is declared that a particular property is waqf, the right of the waqf is extinguished and the ownership is transferred to the Mutawalli (Almighty ?) (Vide *Vidya Varuthi v. Balusami Ayyer*, 48 Ind App 302 at p. 312 : AIR 1922 PC 123 at p. 127)."

16. In *Syed Mohd. Salie Labbani (Dead) by L.Rs. v. Mohd. Hanifa (Dead) by L.Rs.*, AIR 1976 SC 1569, it has been held:

"..... In our view the question of the person who actually made the construction is wholly irrelevant because all the constructions made by any person used for religious purposes incidental to offering prayers in the mosque would be deemed to be accretions to the mosque itself, and there is unchallenged evidence to show that all the constructions were used by the Mohammedan community for the purpose of offering their prayers in the mosque on special occasions."

17. Before examining the decision of the Hon'ble Supreme Court rolled upon by the lower appellate court, it is necessary to refer to the statement made in the plaint and the reply thereof in the written statement and the document on which the plaintiffs had placed reliance (Ext. 12) for canvassing that plot No. 2506 where the property in dispute is situate, is a waqf property.

18. Paragraph "6" of the plaint stated that the property in dispute is registered at serial No. 168 with plaintiff No. 1 under the provisions of U. P. Act No. 13 of 1936 (U. P. Muslim Waqf Act, 1936). In paragraph "21" of the written statement, it is mentioned

"(21) That the property in dispute is not recorded as Waqf at No. 168 of the Gazette of 1938, the property is recorded as :

"Do Qita Dukanat Waqai Kotwali Jadeed" to the north of the property in dispute, is another property piece of vacant land on which Banney used to keep his "Tal" and of which now Sri Shiam Saran is the owner. To the north of that piece of land is a Masjid and the small shops and this is that property which is recorded as Waqf at No. 168 of the Gazette."

19. Ext. 12 is the document wherein the property is recorded as Waqf property at serial No. 168 in the register maintained" by U. P. Waqf Board under 1936 Act. The entries in the register are as under:

20 Details of the property given to Ext. 12, which was contained in the register of 1936 Act, if translated into English, will be as below:

"Two shops situate at Kowali in addition and inclusive of Khasra No. 2506 and 2499 public grave yard and mosque."

21. In the background of the pleadings, Ext. 12 is to be interpreted, which clearly means that as far back as in the year 1938, entire plot No. 2506 in addition to the two shops situate therein and mosque and graveyard along with Khasra No, 2499 were recorded as Waqf property. The trial Court did not consider the aforesaid document in its correct prospective by only referring to the statement of the defendants that the said entry has been made in the Register during the pendency of the suit. This finding is completely against the record as according to the own admission of the defendants, plot No. 2506 was recorded as Waqf property as far back as in the year 1938 and one Ghulam Ewaji Sadar was recorded as its Mutwalii.

22. Various decisions of the Hon"ble Supreme Court this Court, referred to earlier, clearly lay down that once the property is a Waqf property, it will always remain a Waqf property and nobody has a right to treat the property as personal property or to dispose of the property except in accordance with the provisions of the U. P. Muslim Waqf Act where the permission of the Board is a *tine quo non* for disposal of the Waqf property. According to Mulla's Principles of Mohammedan Law, the Waqf property cannot be alienated without the permission of the court (See paragraphs 193, 207 and 208 of the Mulla's principles of Mohammedan Law).

23. It has also been laid down by the Courts that once the property is declared to be a Waqf property, the transferee cannot claim any protection of Section 41 of the Transfer of Property Act. The courts below have committed patent error of law in holding that respondents No. 1 and 2 were bona fide purchasers and were entitled to protection of Section 41 of the Transfer of Property Act.

24. The lower appellate court has placed reliance on a decision of the Hon"ble Supreme Court in *The Board of Muslim Wakfs, Rajasthan v Radha Kishan*, reported in AIR 1979 SC 289. In the aforesaid decision, the Hon"ble Supreme

Court was confronted with two questions, firstly, whether a Commissioner of Waqf appointed under subsection (1) of Section 4 of the Waqf Act, 1954 has the jurisdiction under subsection (3) of Section 4 to enquire whether a certain property is a Waqf property or not, when such a dispute is raised by a stranger to the waqf, and secondly, if so whether the failure of such person to institute a suit in the Civil Court of a competent jurisdiction for decision of such question within a period of one year as provided for under subsection (1) of Section 6 makes the inclusion of such property in the list of Waqfs published by the Board under subsection (2) of Section 5 of the Act, final and conclusive under subsection (4) of Section 6. The apex Court reversed the decision of the Rajasthan High Court on the first question and held that the Commissioner of the Waqf was within his jurisdiction in holding the disputed property to be the Waqf property and held that the Board of Muslim Wakfs, Rajasthan was justified in including the property in the list of Wakfs published under subsection (2) of Section 5 of the Act. Answering the second question, the Court held that the list of Wakfs so published by the Board was not final and conclusive under subsection (4) of Section 6 against the respondents No. 1 and 2 due to their failure to bring a suit within one year as contemplated by subsection (1) of Section 6 and on that basis held that the respondents are at liberty to bring a suit for establishment of their right and title, if any, to the property.

25. The aforesaid decision does not lay down that prima facie presumption of correctness and finality is not attached to the entries made in the Waqf Register. In the present set of circumstances, assuming that the entries have not become final against the transferee a heavy burden lay on the defendants to establish that the entries were incorrect. The approach of the courts below in putting the burden on the plaintiffs to prove that the property was a waqf property was patently erroneous. The Hon'ble Supreme Court in the aforesaid case was not confronted with the problem involved in the present case as under the various provisions of the 1936 Act and 1960 Act, a detailed procedure is provided for objecting to the property included as a Waqf property and under the provisions of 1960 Act, the Waqf has been authorised to take appropriate action for eviction against the persons occupying the Waqf property in a summary manner through Collector of the district and the Waqf Board has been prohibited for obtaining the aforesaid relief, by a suit. However, since Section 69A of 1960 Act, has been brought into effect from 31101971 and U. P. Act No. 28 of 1971 which also provided that the said section will have no effect on the pending suits, the said provisions of the said section are not attracted in the present matter as the suit was filed by the Waqf Board in the year 1970, when the aforesaid provision was not operative.

26. It is pertinent to mention here that if the property was a Waqf property then the Mutwalli Ewaz Shah had no right to sell a part of the property favour of his wife Maqsudan Nisan in lieu of dower debt. The said saledeed ab initio void and the Mutwalli had no right to execute the saledeed. Ewaz Shah had clearly been recorded as Mutwalli in Ext. 12 which categorically states that entire plot No.

2506 is included in the Waqf property. So it is clear that plot No. 2506 is concerned, it was included as Waqf property as far back as in the year 1938 and no rights could accrue to anybody in the aforesaid property. The only question which involves for consideration is whether the property in dispute is situate in plot No. 2506? The trial court, however held that property is not situate in plot No. 2506. The appellates court leaving the said question as undecided, held:

"The property in suit might fall in plot No. 2506, but this entire plot is not waqf property as Ewaz Shah and his transferee Smt. Maqsoodan Nisan dealt with a portion of this plot as personal property these .. persons did not treat the disputed property as waqf property....."

This finding is patently erroneous in law. So far, plot No. 2506 is concerned, it was clearly included as part of waqf property in Ext. 12 and merely by its wrong user, the property cannot loose the character of the waqf. The vital question for determination still remains, if the property in dispute is in plot No 2506 ? The lower appellate court did not decide the question on an assumption that even if the property is situate in plot No. 2506, it will have no effect on the decision, as the property was dealt with privately by Mutwalli, this assumption is contrary to law.

27. The trial Court considered the question also in a very slip shod manner. On the basis of the report of the survey Commission, the trial Court discarded the report of the Court Amin holding that the property in dispute is not situate in plot No. 2506 but accepted the survey commission's report subject to the objection and held that since the report of the survey commission only states that some part of the property is situate in plot No. 2497 and some part of it is situate in plot No. 2506, it is not proved by the plaintiffs that the property is situate in plot No. 2506. However, the final court fact i.e., the lower appellate court did not advert to the said question, which is a vital question, for decision of the suit. Even assuming that the part of the property is situate in plot No. 2506, in the circumstances of the case, it will have to be considered as to whether the remaining part though not exactly situate in plot No. 2506 should be considered to be contiguous to plot No. 2506. However, since the matter is purely a question of fact which can be more appropriately decided by a court of fact. I do not express any final opinion on this aspect of the matter.

28. In view of the discussion made above, the decisions of both the courts below suffer from wrong approach and the findings recorded therein are vitiated in law, but keeping in mind that the matter is pending right from the year 1970, I set aside only the judgment of the HI Addl. District and Sessions Judge passed in Civil Appeal No. 6 of 1981 The Sunni Central Waqf Board v. Sri Devi Charan, decided on 2151983 and direct the lower appellate court to decide the appeal afresh in the light of the observations made in this judgment, within four months of the receipt of the certified copy of this judgement. The appeal is accordingly allowed with costs.

29. Office is directed to send back the records of the courts below by a special messenger, within 15 days of the delivery of the judgment.