
(2008) 12 PAT CK 0073
In the Patna High Court
Case No : S.A. No. 333 of 2002

Syed Shah Taquiuddin Ahmad

APPELLANT

Vs

Masood Alam and Others

RESPONDENT

Date of Decision : 15-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Waqf Act, 1995 — Section 15(2)(i), 3(f), 36, 56, 57

Citation : (2009) 2 PLJR 356

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.N. Hussain, J.—Heard learned counsel for the appellant. This second appeal has been filed by the sole plaintiff-respondent-appellant against the judgment and decree of the learned court of appeal below, by which the judgment and decree of the learned trial court was reversed.

2. The matter arises out of Title Suit No. 85 of 1988, which was filed by the appellant as Sajjada Nashin and Mutawalli of Khanquah Waqf Estate comprising of Alam Shahi Waqf and Farrukh Seiri Waqf duly recorded in the Bihar State Sunni Waqf Board (hereinafter referred to as "the Board" for the sake of brevity), for declaration of its title over the suit property and for confirmation of possession and alternatively for recovery of possession if the defendants were found in possession thereof, and for other ancillary reliefs.

3. The said suit was decreed on contest with cost by the learned Munsif, Sasaram vide judgment and decree dated 25.9.1992 holding that the suit filed by the plaintiff was maintainable, that there was no oral gift in favour of the defendants, that the alleged Parwana (Yaddasht) in their favour was forged not executed by the ex-Mutawalli, that the defendants had acquired no title in the suit property and that they were merely trespassers liable to be ejected.

4. The defendants challenged the said judgment and decree of the trial court in Title Appeal No. 125 of 1992, which was allowed by the learned Additional District Judge-III, Sasaram vide his judgment and decree dated 23.9.2002 and the judgment and decree of the trial court was set aside on the only ground that the suit was not maintainable as the plaintiff being the Mutawalli of the Waqf Estate had no right to sue as per the provisions of the Waqf Act, 1954 (hereinafter referred to as "the Act" for the sake of brevity) and the decision of this Court in case of Maulvi Raza Ansari & Ors. vs. Shyam Lal Sah, reported in AIR 1983 Patna 299. However, other findings of the trial court were affirmed by the lower appellate court.

5. In the said circumstances, the only issue and that too a pure issue of law involved in this second appeal is whether a Mutawalli under the provisions of law has right to sue for the purpose of discharging his duties of protecting and administering the Waqf property. It is not in dispute that the Board had granted permission to the plaintiff to file the suit with respect to the suit premises for the reliefs claimed in the suit and in that circumstances the defendants had themselves filed a rejoinder dated 22.9.1989 (Ext. 13) in the suit accepting that the Board was neither a necessary party nor a proper party for the suit.

6. From the very beginning the question of power and duties of a Mutawalli has been under consideration of jurists, lawyers and Courts. In Mulla's Principle of Mahomedan Law, the term "Mutawalli" is defined in section 202 as a superintendent or manager and not an owner or a trustee in the technical sense. In Tyabji's Muslim Law, Section 529 provides that a Mutawalli may do all acts reasonable and proper for the protection of the Waqf property and for the administration of the Waqf.

7. In the said circumstances, the Hon'ble Privy Council in its decision in case of Saadat Kamal Hanum vs. Attorney General, Palestine, reported in AIR 1939 P.C. 185 specifically held that the office of Mutawalli though only a managership, provides continuous representation of the Waqf and of all its interests therein. Furthermore, a Full Bench of Allahabad High Court in case of Moattar Raza & Ors. vs. Joint Director of Consolidation, U.P. Camp at Bareilly & Ors., reported in AIR 1970 Allahabad 509 also held that a Mutawalli may do all acts reasonable and proper for the protection of Waqf property and for administration of Waqf as provided in Section 529 of Tyabji's Muslim Law.

8. Section 9 of the CPC casts a duty upon the courts to try all suits of civil nature excepting suits which are barred by any law expressly or impliedly. Hence, the Hon'ble Apex Court in case of Smt. Ganga Bai Vs. Vijay Kumar and Others, specifically held that there is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by Statute, one may bring a suit of his choice at his own peril. It was also held that a suit for its maintainability requires no authority of law and it is enough that no Statute bars the suit.

9. Considering the said settled principles of law the Hon'ble Apex Court in case

of Bibi Saddiqa Fatima Vs. Saiyed Mohammad Mahmood Hasan, upheld the claim of the Mutawalli in absence of the Board. Earlier also various High Courts of our country including Patna High Court entertained the claims of the Mutawallis raised in a civil suit including claim of recovery of possession in the absence of the Board, such as in case of Munshi Abdul Hamid & Ors. vs Garib Das & Ors., reported in (1962) ILR 41 Patna 503, in case of Shahi Jama Masjid, Merta vs. Kanhaiya Lal Bhagat & Ors., reported in AIR 1973 Rajasthan 322, in case of Hashim Husain & Ors. vs. Ahmad Raza & Ors., reported in AIR 1974 Allahabad 305, and in case of Hazera Khatoon & Ors. vs. Abdul Latif & Another, reported in 75 Calcutta Weekly Notes 114.

10. So far the provisions of the Act are concerned Section 3(f) defines Mutawalli as person appointed for managing and administering any Waqf property, whereas, Section 6 thereof provides that in case of dispute regarding the Waqf Estate, the Board or the Mutawalli of the Waqf or any person interested therein may institute a suit in a civil court of competent jurisdiction for deciding the question. Furthermore, Section 36 of the Act while enumerating the duties of the Mutawalli does not specifically mention instituting or defending any suit or proceeding but in clause (e) thereof it clearly casts a duty upon the Mutawalli to do any act, which he is lawfully required to do and in clause (a) thereof it provides that he should carry out the directions of the Board.

11. Section 36 of the Act speaks about the duties of the Mutawalli but it does not include management and administration of the Waqf property as duties of the Mutawalli, but Section 3(f) of the Act provides that the Mutawalli has to manage and administer the Waqf property. Hence it is quite apparent that the duties of the Mutawalli as prescribed in Section 36 of the Act does not bar or take away the duties of a Mutawalli as prescribed in the Personal Law merely because the said duties are not expressly included in the duties of a Mutawalli under the Act.

12. In addition thereto Sections 56, 57, 59 and 60 of the Act provide the situation when the suit with regard to any Waqf Estate or its properties is filed by a person other than the Board out of which Section 60 provides that no suit by or against a Mutawalli can be compromised without sanction of the Board. Thus, it is quite apparent from the said provisions that as per the Act the suit can be filed by a Mutawalli with respect to a Waqf Estate, but he cannot compromise the suit without the permission or sanction of the Board.

13. Looking to the scheme of the Act, specially Sections 56, 57, 59 and 60 thereof, it is quite clear that the Mutawalli has a right to file a suit for the purpose of discharging the duties as Mutawalli for protecting and administering the Waqf property, which he is lawfully required to do as per the specific provisions of the Act.

14. So far provision of Section 15(2)(i) of the Act is concerned, it only provides that instituting/defending a suit/proceeding is one of the functions of the Waqf Board but nowhere in the Act any bar is provided for the Mutawalli to institute or

defend a suit with respect to the Waqf Estate, rather Sections 56, 57, 59 and 60 of the Act mentioned above clearly indicate that the suit regarding any waqf estate can be filed by a person other than the Board, namely, Mutawalli specially for protecting and administering Waqf property, which he is lawfully required to do.

15. In the said circumstances, learned counsel for the appellant submits that the law laid down by this Court by a Division Bench in case of Maulvi Raza Ansari & Ors. vs. Shyam Lal Sah, reported in AIR 1983 Patna 299=1983 B.B.C.J. 433 is per incuriam with respect to the specific provisions of Sections 56, 57, 59 and 60 of the Act as well as section 9 of the CPC and also the law settled by the Hon''ble Apex Court in case of Smt. Ganga Bai Vs. Vijay Kumar and Others, and in case of Bibi Saddiqa Fatima Vs. Saiyed Mohammad Mahmood Hasan, .

16. In the said circumstances, the following substantial questions of law arise for consideration in the instant second appeal:-

(i) Whether there is any bar provided in the Act prohibiting the Mutawalli from filing suits or proceedings, with regard to a Waqf or its properties?

(ii) Whether in absence of any bar of filing a suit, the Mutawalli, who is the plaintiff in the instant case, can be non-suited, merely on the ground that he is a Mutawalli?

(iii) Whether Sections 15(2)(i) and 36 of the Act could be legally deemed to be bar against the Mutawalli with respect to the filing of suits/proceedings with respect to Waqf property?

(iv) Whether the decision of this court in case of Maulvi Raza Ansari & Ors. vs. Shyam Lal Sah, reported in AIR 1983 Patna 299 is per incuriam with respect to Sections 56, 57, 59 and 60 of the Act as well as Section 9 of the Code of Civil Procedure?

(v) Whether the said decision of this Court is per incuriam with respect to the law settled by the Hon''ble Apex Court in case of Smt. Ganga Bai Vs. Vijay Kumar and Others, and in case of Bibi Saddiqa Fatima Vs. Saiyed Mohammad Mahmood Hasan,

(vi) Whether the filing of the suit by the Mutawalli can be legally held to be bad even when he had been permitted by the Board to file a suit with respect to a Waqf property?

17. This second appeal will be heard by a larger Bench as questions including the question with respect to the decision of a Division Bench of this Court being per incuriam are involved, for which this case may be placed before Hon''ble the Chief Justice.

18. Admit. Issue appeal notices to the respondents by ordinary process, for which Talbana etc. must be filed within one week, failing which, this appeal shall stand dismissed without further reference to a Bench.

19. Call for the records of the case from the court below. Learned counsel for the appellant is directed to file two more copies of the memorandum of the second appeal alongwith the impugned judgments and decree attached thereto by 12.1.2009.