
(1967) 07 AHC CK 0009

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 1296 of 1963

Syed Simtey Hasan

APPELLANT

Vs

Joint Director, Consolidation, U.P. Camp at Bareilly and others

RESPONDENT

Date of Decision : 27-07-1967

Acts Referred:

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 152, 18

Citation : (1968) 38 AWR 55

Hon'ble Judges : M.H. Beg, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.H. Beg, J.—This writ petition is directed against the orders passed between 8-2-1962 and 5-1-1963 by all the authorities concurring from the Consolidation Officer to the Joint Director under the UP Consolidation of Holdings Act. The Consolidation authorities rejected the claim of the Petitioner to a cotenure holder's rights as only the names of the opposite parties 5 to 10, who are the descendants of Farzand Hasan, the deceased brother of the Petitioner, were entered in the revenue records on a large number of plots which are in dispute.

2. The rights claimed on behalf of the Petitioner as well as the opposite parties 5 to 10 were sought to be derived from "khudkasht" rights which arose from proprietary rights before the abolition of Zamindari in UP. All the claim-ants accepted the position that all the land, in which their rights arose, was dedicated under a wakf deed executed on 8-2-1918 by Sibte Hasan a certified copy of which has been annexed to the petition. I find that the wakf deed, which was before the consolidation authorities, declared that Sibte Hasan was conferring the rights of beneficiaries and imposing the obligations of Mutawallis upon each of the male descendants who were given the right to benefit. He gave the benefits generation after generation to his male descendants and imposed certain duties upon them to meet expenses of the marriages of the females and other charitable objects. Thus, it is clear that the male descendants of Sibte

Hasan had common interests as beneficiaries and common obligations as co-mutawallis. The wakf deed shows that the beneficiaries and Mutawallis who obtained rights generation after generation excluded their descendants during their own lives. In other words, the male beneficiaries of each generation came in when there was no male ancestor alive between them and Sibte Hasan and took the share of their deceased father equally. Sibte Hasan died sometime in 1924 and was succeeded by his two sons, Simte Hasan, the Petitioner, and Farzand Hasan, the father of opposite parties 5 to 7, as beneficiaries and co-mutawallis under this waqf. At the time when the UP ZA and LR Act came into force Farzand Hasan was alive and was a co-mutawalli and co-beneficiary with the Petitioner. There could be no doubt that whatever rights were acquired before the UP ZA and LR Act vested in the two co-beneficiaries and co-mutawallis according to their shares under the waqf even if the effect of the UP ZA and LR Act was to terminate, the waqf. The real question was: what is the effect of UP ZA and LR Act upon these rights?

3. A waqf under the Muslim Law is defined as a permanent dedication of property for a purpose recognised as religious, pious, or charitable. The maintenance of the progeny is also, according to the Muslim view, a religious, pious, and charitable object. Nevertheless, as a distinction was made between "private" waqfs, for the benefit of families of individuals, and "public" waqfs, for wider charitable objects, by applying notions derived from English law, the so called "private" waqfs for the "aggrandisement of the family" were declared invalid by the Privy Council in *Abdul Fata Mahomed v. Rasamaya* 22 IA 76. This led to the passing of the Muslim Waqf Validating Act of 1913 which validated waqfs for the benefit of families of authors of wakfs. By this Act, the character of "waqf", as a dedication for pious, religious, or charitable Objects, in which the proprietary rights of the dedicator or wakf ceased in accordance with the basic principles of Muslim Law, was not altered at all. Indeed, even in a private wakf the ultimate objects are public or extended charities. The vesting of property in God as a juristic entity is common to both private and public wakfs. The Muslim Waqf Validating Act imposes the condition upon "private" wakfs that the ultimate object of benefaction must be a permanent and more extended, pious, religious or charitable object. The vesting of the property in God takes place at the time of dedication and not afterwards. There is no divesting of ownership and re-vesting in new owners of each stage. No such interpretation can be placed on any provision of the Muslim Wakf Validating Act of 1913. The beneficiaries and Mutawallis are not entitled to anything more than what has been given by the deed of waqf. The Mutawallis cannot, in any case, acquire rights adversely against the waqf. The assumption underlying the decisions of the consolidation authorities, that separate rights were acquired as holders of khudkasht land by Farzand Hasan before the abolition of the zamindari in Uttar Pradesh is, therefore, basically erroneous. This view rests on an obvious misconception about the nature of rights in a wakf under the Muslim Law.

4. It must, however be borne in mind that a wakf, being a permanent dedication

or tying up of property, cannot subsist where that property is made transferable. The effect of Section 152 of the UP ZA and LR Act was to make bhumidhari rights transferable rights. Therefore, all those rights of the mutawallis or beneficiaries of the waqf which became converted into bhumidhari rights u/s 18 of the UP ZA and LR Act necessarily became free from the restrictions to which waqf property is subject. It has been contended by Mr. Iqbal Ahmad, on behalf of the Respondents, that whatever rights the beneficiaries and Mutawallis had, were converted into rights to obtain compensation. This may be the position with regard to a part of proprietary rights in land. It may be that the compensation itself became charged with some liability to carry out the terms of the waqf. But, that is not a matter before me for decision. The khudkasht rights which the Mutawallis and the beneficiaries enjoyed under the waqf were converted by statute into rights u/s 18 of the UP ZA and LR Act. And, those rights went to the whole body of mutawallis and beneficiaries and not to individual mutawallis even though the waqf had ceased with regard to land.

5. Another question which arose in this case was whether the beneficiaries and mutawallis could possibly enjoy khudkasht rights in the waqf properties when the proprietor's rights had vested in a non human juristic entity. In Mohammad Qamar Shah Khan Vs. Mohammad Salamat Ali Khan, a Division Bench of this Court held that the status of a mutawalli in a private waqf was that of a private owner. It was held there that in a "private waqf" the proprietary rights vest in the mutawalli and the beneficiaries. The Division Bench held the view that in a private waqf the position of a mutawalli was practically that of an owner. It observed: "It is true that, according to the view taken in AIR 1921 105 (Privy Council) and Narain Das Aurora v. Abdur Rahim 1920 Cal. 379, the estate in the waqf property vests in God after the creation of a public waqf. But, we doubt if it can be argued in private waqfs the estate vests in God. The correct view would be to hold that the estate vests in the beneficiaries. In case of private waqfs a mutawalli is practically speaking the owner, with one limitation and that is that he cannot make a transfer of the waqf property. But, in every other respect, his position is the same as that of an owner. A mutawalli holding a property in the case of a private waqf cannot be said to be a mere manager or a superintendent. A manager holds the property during the pleasure of the proprietor. But, the mutawalli in private waqfs holds the property during his life. After his death mutawalliship will go to his heirs. If there are several heirs they will all be entitled to the profits of the waqf estate. The mutawalli in the case of a private waqf would not be accountable to any outsider in respect of the income of the waqf property".

6. It may be pointed out, with great respect, that the above mentioned statement runs counter to the decision of the Privy Council in AIR 1924 44 (Privy Council) where, citing the well-known case of Vadya Varuthi v. Balusami AIR 1922 PC 123, it was observed that "when once it is declared that a particular property is waqf or any such expression is used as implies waqf the right of the waqif is extinguished and the ownership is transferred to the Almighty". It was

also brought out there that a mutawalli in a waqf is not a trustee in the technical sense. The following passage was quoted: "Under the Mahomedan Law the moment a waqf is created all rights pass out of the wakif and vest in God Almighty. A curator, whether called mutawalli or sajjadanashin, or by any other name, is merely a manager". Lord Sumner, giving the opinion of the Privy Council, thus stated a proposition applicable to all wakfs: "The property, in respect of which a waqf created by the settlor, is not merely charged with such several trusts he may declare, while remaining his property and in his hands. It is in very deed "God's acre", and this is the basis of the settled rule that such property as is held in waqf is inalienable, except for the purposes of the waqf".

7. Apparently, the Division Bench of this Court, which decided Mahomed Qamar's case (supra) had only the decision of the Calcutta High Court in Abdur Rahim's case (supra) before it, and the Privy Council decision was not, for some reason, cited. An examination of the facts of Abdur Rahim's case (supra) shows that there was a partial dedication for the settlor's family also there although, as the case was not governed by the provisions of the Muslim Waqf Validating Act, 1913, the effect of the enactment of 1913 was not before their Lordships. The Muslim Waqf Validating Act, 1913, invalidating what was called a private waqf, makes no distinction in principle so far as the vesting of the property is concerned between private and public waqfs. It was not the intention, in enacting the Muslim Waqf Validating Act, 1913, that the property should vest in the beneficiaries so long as the income of the waqf was used for the benefit of the Settlor's family, but it became vested in some juristic entity only when the income of the waqf was utilised for more extended, religious and charitable objects.

8. It has been pointed out by Mr. Sadiq Ali, on behalf of the Petitioner, that this is a case governed by the Shia Law because the wakif was a Shia and says so in the waqf deed. A table from Tyabji's Mohamedan Law (3rd ed. 1940 p. 530) was placed before me in which it is mentioned that, according to Shia texts, the ownership of the waqf vests in the beneficiaries whereas, according to the views of Sunni jurists, Abu Yusuf and Imam Mohammad, the ownership vests in God. In this table, we also find that Abu Hanifa took the view that the ownership of the wakif subsists. Tyabji also mentions (at p. 565) that Shia authorities consider the property to be transferred to the beneficiaries or the object of the wakf. After that, relying upon the pronouncement of Lord Sumner in Abdur Rahim v. Narain Das (supra), Mr. Tyabji noted the general principle of Muslim Law that the property dedicated is not merely charged with trust but is in very deed "God's acre" and it cannot be used for purposes outside the waqf. In other words, the mutawalli cannot carve out an interest for himself as that would be defeating the objects of the waqf. Even while indicating the position of a waqf in Shia Law, Mr. Tyabji observed that it was "permanent" and was regarded as "an approach to God" (Seep, 565). In a footnote (No. 26 at p. 565) of Tyabji's book, it was pointed out that it was dangerous to adopt English terminology. Property itself is divided by Muslim jurists into corpus (ain) and usufruct (munafa). The ownership

of the two parts both of which are "wakf" properties--can be split up. Therefore, when Muslim jurists speak of any thing implying "vesting" of wakf property, which includes both kinds of property, it has to be carefully ascertained which kind of wakf property is spoken of. Tyabji did not set out any particular statements of particular jurists which could be interpreted, and a foot note (No. 26 on p. 565) describes the discussion as "academic". Moreover, we are concerned today with what has been called "Anglo-Muslim" law, resulting from judicial pronouncements and statutory law which have taken Muslim law beyond the views of early Muslim jurists in a number of respects.

9. I do not think that the question of vesting of the property in a juristic entity, Almighty God, or, in actual living human beings, the mutawalli and the beneficiaries, makes any difference to the consequences of the waqf in the present case. Speaking for myself, I would say that if the "corpus" is tied up permanently and vests in a permanent proprietor that proprietor can only be a juristic entity and not a mortal being. Even if that juristic entity is conceived to be the institution called waqf and not God Almighty the difference is merely of nomenclature. This does not make any difference to the obligations of the mutawallis or rights of beneficiaries.

10. In this connection, I may also mention the pronouncement of the Privy Council in AIR 1939 185 (Privy Council) where it was held, relying on the above mentioned pronouncement of Lord Sumner, that waqf property is not vested in a mutawalli. It was held here that even the beneficiary can represent the waqf qua an outsider, although the normal rule is that the mutawalli represents the wakf and files suits on behalf of the wakf. There is nothing in *Mohammad Qamar v. Salamat Ali* (supra) which runs counter to the last mentioned proposition. In fact in *Mohd. Qamar's* case (supra) the Division Bench of this Court was really concerned with determining the meaning of the term "cosharer" as used under the Agra Tenancy Act. It held that, for the purposes of the Agra Tenancy Act, the Mutawalli and beneficiaries, even though bound by the terms of the waqf, could be held to be "cosharers" as defined in the Agra Tenancy Act. The other observations made by the Division Bench were not really necessary for the decision of this question. I, therefore, do not think that a reference of the case before me to a larger bench for a reconsideration of what was laid down in *Mohammad Qamar v. Salamat Ali* (supra) is called for in this case. The result of the above mentioned analysis of the position of the mutawallis under the Muslim Law, irrespective of whether the property vests in God or in the waqf as an institution or in the beneficiaries or mutawallis, is that the mutawallis and beneficiaries are bound by the terms of the waqf so long as it lasts and cannot claim interests hostile to, inconsistent with, or adverse to the waqf.

11. It was contended that, in the present case, we are concerned with the rights under the U. P. Tenancy Act and the UPZA and LR Act and not with the rights under the waqf. It is true that neither of these two enactments are concerned with questions of Muslim Law. The U.P. Tenancy Act does not even mention the

case of a waqf or of mutawallis or beneficiaries under it. The result is that whatever rights are created under the terms of a waqf have to be fitted into the categories given in the U.P. Tenancy Act. "Land", under the U.P. Tenancy Act, can be either cultivated by the proprietor as his "sir" or "khudkasht" or it can be cultivated by a tenant. The proprietor could also make a contract with a thekedar. In the present case we are not concerned with any theka. The classes of tenants recognised by the UP Tenancy Act given in Section 21 of the Act are: (a) permanent tenureholders; (b) fixed rate tenants; (c) tenants holding on special terms in Oudh; (d) ex-proprietary tenants; (e) occupancy tenants; (f) hereditary tenants; and (g) non-occupancy tenants. Now, from amongst these classes of tenants, the only capacity in which the wakif and his heirs could occupy the land was that of exproprietary tenants. In order, however, that they may have the status of exproprietary tenants, these rights, which arise by operation of law, should be claimed. Moreover, Section 26 dealing with exproprietary tenants shows that certain facts have to be proved in order to give rise to exproprietary tenancies. It has to be proved to be land which had been cultivated continuously for three years before the date of the transfer as Sir or Khudkasht. As the consolidation authorities have pointed out, there is no evidence that the land in dispute was Sir or khudkasht of Sibte Hasan at the time when the waqf was made. Moreover, neither of the two sides have set up a case of exproprietary tenancy. Therefore, the consolidation authorities could not go into the question whether any exproprietary tenancy rights arose. The only other position left was that of cultivation of land as khudkasht under the UP Tenancy Act.

12. "Khudkasht" is defined by Section 3(9) as "land other than sir cultivated by a landlord, an under-proprietor or a permanent tenureholder as such either himself or by servants or by hired labour". In the present case, even if one has to assume that the proprietary rights vested in God Almighty, or, in the alternative, in the waqf as an institution, its representatives or servants were the mutawallis. The object of the waqf was to benefit the beneficiaries. Therefore, the mutawallis and the beneficiaries could only be deemed to be cultivating the land on behalf of the proprietor. The UP Tenancy Act, into which these rights and obligations had to be fitted, left no other capacity open to the beneficiaries--cum--mutawallis in this case. Cultivation by them could, I think, be construed as cultivation by the proprietor through his agents and servants. Hence, the character of the land in question, at the time when the UP ZA and LR Act as passed, was land "deemed to be held by an intermediary as khudkasht".

13. Section 18 of the UP ZA and LR Act confers upon all the persons, where there are more than one person holding the land in the same capacity, the rights given by it, that is to say "bhumidhari" rights. The section does not select certain individuals out of a whole body holding land in one of the capacities given in the section. Therefore, whatever quantum of rights or share of rights were enjoyed by the members of the body of co-mutawallis under the waqf could be converted into bhumidhari rights in the same proportion as the rights they had under the waqf. It was not a case of mere sirdari rights. It is true that Section 6 of the UP

ZA and LR Act extinguishes all rights, title and interest of all the intermediaries. This section, read with Section 152 of the Act, certainly brings the waqf to an end. It terminates rights of whoever was the proprietor. A waqf would be completely inconsistent with the character of bhumidhari rights inasmuch as a bhumidhari right is a transferable right in land whereas waqf property, except as regards usufruct, is non-transferable. Therefore, there could be no doubt that the waqf came to an end so far as rights in the corpus of the land were concerned. Once, however, the waqf came to an end, the distribution of shares of the bhumidhari rights would be governed by the terms of the waqf deed. There is nothing in the UP ZA and LR Act which prevents such a consequence following logically on the termination of the waqf in land by operation of law.

14. I may mention that reliance was placed by Mr. Sadiq Ali on *Sher Ali v. Hamid Ali* 1940 AWR (HC) 343 for the proposition that when a person holds a property in the capacity of a mutawalli under a waqf and the right of the mutawalli itself comes to an end as the waqf is found to be invalid, the capacity of the holder does not become adverse as against the heirs of the wakif. The heirs of the wakif were held to be entitled to their legal shares in the property. This case has only indirect application so far as distribution of shares is concerned, inasmuch as rights in the present case are governed by the provisions of Section 18 of the ZA and LR Act. That provision does not make any difference, as already pointed out, between persons holding land in one of the capacities given therein. The right will go to the whole class. The quantum of share in that right will be determined by other provisions of law. In the present case, according to applicable law, the shares were to be determined by the terms of the wakf which had taken the place of devolution of shares by inheritance. The wakf had not been declared abinitio invalid. It had just been broken up by operation of law so that rights in land became freed from it.

15. A case cited on behalf of the opposite parties was the decision of the Supreme Court in *Rana Sheo Am lar Singh v. Allahabad Bank* 1961 AWR 546 SC where it was held that Section 18 of the ZA and LR Act could not be said to constitute an exception to the consequences provided in Section 6 of the Act which terminated the proprietary rights of the intermediary in the Sir and khudkasht and in grove land. These rights became vested in the State free from all encumbrances. That was a case dealing with a mortgage. It was pointed out that bhumidhari rights conferred by the Act would flow from the State and are new rights unconnected with compensation for the abolition of proprietary rights. This is a logical consequence of the Act. Applying the principles laid down in this decision, it could be said that the compensation could, in the hands of the mutawallis, continue to be subject to the wakf. But, the bhumidhari rights became freed from the waqf created in 1918. This, however, does not answer the question of the shares in bhumidhari rights which arises. The two questions are entirely different.

16. Another case brought to my notice was *Mahendra Singh v. Attar Singh* 1967

AWR 173 where it was held that the bhumidhari rights are special rights not controlled by notions derived from Hindu Law or Mahomedan Law. This proposition cannot be questioned. Therefore, a contention for the Petitioner, that the waqf subsists even in respect of bhumidhari rights, cannot be accepted and has not been accepted by me. No question of any control over bhumidhari rights by any law outside the UPZA and LR Act arises here. The question which arose here was that of shares in bhumidhari rights. Section 18 of the ZA and LR Act does nothing beyond conferring rights upon classes mentioned therein. The shares of persons of each class are determined by other laws.

17. The reasoning adopted by the consolidation authorities seems to be that some of the plots, which had been recorded in the names of Hakim Raza and others, having been declared to be the Sirdari of the opposite parties 5 to 10 as a result of a suit filed in 1954, all plots became Sirdari plots. This view is not comprehensible to me. The consolidation authorities did not mention entries on plots in dispute existing prior to the abolition of Zamindari, but the case of the opposite parties 5 to 10, that the land was the khudkasht of Farzand Hasan for 20 years was apparently accepted by consolidation authorities. It was held by the Deputy Director of Consolidation that evidence indicated that Farzand Hasan, the father of opposite parties 5 to 10, came into possession of the land in dispute as his "khudkasht" some twenty years back round about the settlement in 1349 F. It also appears that some tenants had also cultivated some land and there were some entries in their favour also. The Deputy Director, however, held that, in the plots now in dispute Farzand Hasan acquired separate rights "as khudkasht was a matter of personal cultivation by the zamindar". On the basis of these findings, Mr. Iqbal Ahmad argued that the rights acquired by Farzand Hasan, and, therefore, by opposite parties 5 to 10, were separate "sirdari" rights which arose only after the abolition of Zamindari. The contention was that they resulted from litigation with Hakim Raza, and others where these rights were held to flow from the khudkasht rights of Farzand Hasan. The view that Farzand Hasan could acquire separate rights before the abolition of Zamindari, although he was a mutawalli under the waqf, is not correct in law. It implies that Farzand Hasan could deny his character as mutawalli of the waqf even before the waqf in land came to an end under the ZA and LR Act. The rights after the abolition of zamindari were only those which could arise from pre-existing rights. After the abolition of Zamindari they were governed by Z A and LR Act. I do not find it possible to understand how the rights acquired were merely "Sirdari" rights. Section 18 of the ZA and LR Act confers bhumidhari rights upon those who cultivated land as "khudkasht". The "khudkasht" was not of Farzand Hasan but of the waqf for reasons already given. When the waqf came to an end the rights of "khudkasht" were converted into new "bhumidhari" rights. The new rights had to be shared by the beneficiaries of the waqf in proportion to their beneficial interests under the legally valid but broken up waqf.

18. The only way in which Farzand Hasan and his heirs could have acquired separate rights after the abolition of zamindari and the termination of the waqf in

the plots in question was by a possession adverse to that of Simte Hasan who had become a cosharer in the same right as that enjoyed by Farzand Hasan. There could be no adverse possession so long as the waqf lasted. After the waqf ceased, there could be an adverse possession of a co-sharer against another by proof of ouster only. There is no finding given by the consolidation authorities that Farzand Hasan or his sons ever asserted a right against the Petitioner. The mere filing of a suit to recover land from some persons who were in illegal possession of it does not convert the possession of the Plaintiff cosharer into a possession adverse to another cosharer in the same right. It does not amount to a notice to the other cosharers of any adverse claim. The Petitioner was not even impleaded in that suit. The allegation of the opposite parties that the Petitioner was consulted about filing the suit, even if believed, indicated that the Petitioner must have had some interest in the land. The suit could be a device adopted by the cosharers to recover property from strangers. The possession of one cosharer, according to a well-established principle of law, is possession by all the cosharers. Unless and until a cosharer brings his adverse claim to the knowledge of the other cosharers there can be no ouster. There being no claim of ouster and no rights u/s 210 of the UPZA and LR Act having been set up, the rights of the opposite parties could not have matured against Simte Hasan. Indeed, it is not possible to say that Simte Hasan was under an obligation to file a suit u/s 209 of the ZA and LR Act until a person had taken or was retaining possession otherwise than in accordance with the provisions of law. The possession of a cosharer over joint lands, however exclusive his cultivation may be, cannot be said to be a possession taken or retained otherwise than in accordance with the provisions of law unless there is an ouster. As already mentioned, no such case seems to have set up at all before the consolidation authorities. The findings given by the consolidation authorities being contrary to the above mentioned well-established principles of law are patently erroneous and must be set aside.

19. In the result, I allow this writ petition and quash the orders of the Respondents 1 to 4 and direct that the case may be decided now in accordance with the law as indicated above. In the circumstances of the case, parties will bear their own costs.