

(2011) 01 AHC CK 0116

Allahabad High Court

Case No: Second Appeal No. 911 of 2008

Smt. Faiqa Khatoon

APPELLANT

Vs

Riyazur Rahman Khan Sherwani
and Others

RESPONDENT

Date of Decision: Jan. 21, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 1

Hon'ble Judges: Pankaj Mithal, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Pankaj Mithal, J.

A Waqf-Alal-Aulad was created by Dr. Maulvi Hazi-ur-Reham Khan Nawab Sarvar Yar Jang Bahadur in the year 1945. His grand-son Zia-ur-Rehman Khan Sherwani is a Mutwalli of the said waqf. His real sister Smt. Faiqa Khatoon is living in a part of the waqf property allegedly with the permission of the earlier Mutwalli. The aforesaid Mutwalli filed a suit for her eviction from the portion of the waqf property occupied by her. She defended the suit alleging herself to be one of the beneficiary of the waqf. The suit was dismissed by the lower court but in appeal it was decreed by the lower appellate court. The Second Appeal preferred by the Defendant-Appellant Smt. Faiqa Khatoon was allowed vide judgment and order dated 15.12.08. The judgment, order and decree of the lower appellate court was set aside and that passed by the court of first instance dismissing the suit was restored. The Defendant-Appellant Smt. Faiqa Khatoon was held to be one of the beneficiaries under the waqf entitled to live in the portion of the waqf property.

2. The Plaintiff-Respondent Zia-ur-Rehman Khan Sherwani has applied for the review of the judgment and order dated 15.12.08.

3. I have heard Sri M.K. Gupta, learned Counsel for the applicant (Plaintiff-Respondent) in the presence of Sri S.C. Verma, learned Counsel for the Defendant-Appellant.

4. The first submission of Sri M.K. Gupta, learned Counsel for the Plaintiff-Respondent is that after the pronouncement of the judgment and order in this appeal new evidence has been discovered which despite due diligence was not available earlier and in view of the same the judgment and order requires to be reviewed. The said evidence is in the form of a Urdu Magazine "The Jamhoor", 1951 edition carrying an article by Khan Bahadur Dr Sheikh Mohammad Abdullah, Advocate one of the witnesses to the aforesaid wakf deed to the effect that the Waqif initially had created the Waqf-Alal-Aulad even for the benefit of the daughters of the family but later on he made certain changes and excluded the daughters of his sons from such benefit. He has further submitted that the relevant clause of the wakf deed wherein the daughters of the sons were actually excluded from the benefit of the wakf was not considered by the Court and as such there is an error apparent. in the judgment.

5. No doubt in view of provisions of Order 47 Rule 1 CPC a review application can be filed on discovery of new and important evidence which was not within the knowledge and was earlier available even after exercise of due diligence. But such an evidence must be of such a nature as would tilt the result of the suit/appeal. The appeal involved the interpretation of the wakf deed. The court had interpreted the same after minutely going through each and every clause of the same. Therefore, any article published in any magazine expressing the real intention of the Wakif may not be useful so as to effect the result of the appeal when the intention of the wakf deed has been ascertained from the contents of the deed itself. Moreover, the aforesaid new material has not been sought to be brought on record as part of the evidence in accordance with law. Therefore, it cannot be considered as part of the evidence. The article appearing in the magazine cannot be relied upon and read in evidence unless it is proved and supported by any oral evidence. The mere allegation that the same was not within knowledge and was available despite due diligence, which aspect has been disputed in counter, cannot be accepted as no reason has been assigned as to how the Plaintiff-Respondent after the decision of the second appeal acquired knowledge of the same. In view of the aforesaid facts and circumstances no case for review on the ground of discovery of new material has been made out.

6. The other aspect that certain part of the wakf deed has escaped notice of the court in interpreting the same cannot be accepted for the simple reason that the daughters of the son were held to be the beneficiaries of the Waqf-Alal Aulad on consideration of the complete wakf deed. There is no error apparent on the face of the record.

7. Accordingly, there is no cause for reviewing the judgment and order dated 15.12.08 on this ground also.
8. The review application is devoid of substance and is rejected.