(1938) 06 CAL CK 0022

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1583 of 1936

Fazal Rahaman Mia, Mutwalli		APPELLANT
	Vs	
Moulvi Abdul Rashid Khan and Others		RESPONDENT

Date of Decision: June 8, 1938

Final Decision: Dismissed

Judgement

Sen, J.

This appeal is by the Plaintiff No. 2 whose suit was decreed by the trial Court in part and dismissed on appeal. The facts necessary to be stated for the purposes of this appeal briefly are as follows:-

The properties in suit together with other properties belonged to a Mahomedan named Ahmad Ali. On 1st May, 1902, Ahmad Ali executed a deed whereby he created a wakf with respect to the properties and appointed his four sons, who are Defendants Nos. 8-11 mutwallis. Six persons were appointed Panchayets to supervise the work of the mutwallis. These Panchayets were given powers to remove a mutwalli for misconduct or neglect of duty and to appoint a mutwalli in his place. Two of the Panchayets are the Plaintiffs in this case. Among other things the wakif directed that his sons, daughters, grandsons, grand-daughters, wife and others should be paid certain allowance out of the wakf estate by the mutwallis and in making this provision he made the following declaration:-

If the mutwalli appropriates to himself the said allowances without paying the same] every month, then the allowance holders will be able to realise the allowances due, by suit together with costs.

2. These provisions and directions are contained in paragraph 4 of the wakfnama. Two grandsons of the wakif instituted a suit against the Defendants Nos. 4-10 as mutwallis on 12th April, 1915, in the Court of Small Causes for the recovery of arrears of maintenance. A compromise decree was passed and in execution of the

compromise decree the Defendant No. 5 on 23rd June, 1918, purchased the property mentioned in Schedule (sic) of the plaint of the present suit and took delivery of possession through Court on 27th March, 1919. The purchase was in the benami of Defendant No. 7.

3. On 12th April, 1915, the Defendants Nos. 3 and 4 who are two daughters of the wakif brought a suit for recovery of arrears of maintenance and a similar decree on compromise was passed and in execution thereof the Defendant No. 6 purchased the properties included in Schedule (sic) of the plaint in this suit, also in the benami of Defendant No. 7 on 18th April, 1918. On 19th March, 1919, possession was taken through Court.

4. The mutwallis were removed by the Panchayets and two of the Panchayets have instituted this suit against various Defendants, the principal Defendants being Defendants Nos. 5 and 6. The Plaintiffs'' case is that the Defendants Nos. 5 and 6 have acquired no title to the wakf properties by their purchase at the sales in execution of the decrees passed in the two suits for the recovery of maintenance inasmuch as the decrees were against the mutwallis personally and not against the wakf estate. It was the Plaintiffs'' case that the sales passed only the interest of the mutwallis in the property and nothing more. Other grounds were also taken challenging the validity of the decree and sales but they need no consideration as they were not pressed by the Plaintiffs either in the lower Appellate Court or in this Court. The Plaintiffs alleged that the Defendants Nos. 5 and 6 were hampering the Plaintiffs in realising their rents and they prayed for a declaration that the properties of the wakf estate were not affected by the aforesaid decrees or sales in execution thereof and for recovery of possession of these properties if it be held that the Plaintiffs have been dispossessed.

5. The suit was contested at first by the Defendant No. 5 alone and it was decreed on 11th March, 1933. The decree was set aside by the Appellate Court on the finding that the Defendant No. 6 had not been served with summons and the suit was remanded for re-trial. At the retrial the Defendants Nos. 5 and 6 contested the suit.

6. Various defences were taken, giving rise to a large number of issues but it will be unnecessary to deal with most of them in this appeal. The suit was decreed by the trial Court except with respect to "one anna dar taluki right in the properties and the property No. 2 of Schedule 1 of the plaint." An appeal was taken by the Defendant No. 5 alone to the District Judge''s Court. this Court dismissed the suit and set aside the decree in its entirety on the following findings:-

(1) He has found that the Plaintiffs have not established that they were appointed mutwallis and that as Panchayets they are not competent to institute this suit.

(2) He finds further that the decrees were against the wakf estate and that the interest of the wakf estate in the properties sold passed by the sales in execution of the decrees.

(3) He holds that the question whether the interest of the wakf estate in the properties passed by the sales in execution was one which could not be raised by the Plaintiffs in this suit as sec. 47 of the CPC is a bar to such a suit.

(4) He accepts the contention that the suit is barred by limitation as against the Defendant No. 6.

(5) Lastly he decides that the wakf was an invalid one.

7. In setting aside the decree passed against the Defendant No. 6 who had not appealed the lower Appellate Court purported to act under Or. 41, r. 33 of the Code of Civil Procedure.

8. Against this decree the Plaintiff No. 2 Fazlal Rahman appeals, the other Plaintiff having died. Learned Advocate for the Appellant contends that the findings upon which the decree of the lower Appellate Court are based are erroneous in law. His further contention is that the learned lower Appellate Court in setting aside the decree passed against the Defendant No. 6 who has not appealed has acted upon an erroneous interpretation of the provisions of Or. 41, r. 33 of the Code of Civil Procedure.

9. I shall deal first with the point whether the lower Appellate Court was justified in law in setting aside the decree passed against the Defendant No. 6 although no appeal was filed by him. Ordinarily when a person submits to a decree it is no part of the Court''s duty to interfere and give that person gratuitously a relief which he has not prayed for and which possibly he may not want. The general principle of law is that when there is no appeal or motion the decree will stand. This principle should be adhered to unless it is found that such adherence will hamper the Court in doing complete justice. To meet this contingency Or. 41, r. 4 and Or. 41, r. 33 of the CPC have been enacted. These provisions give the Court a wide discretion to grant relief to persons who are not before the Court either as Appellants or Respondents. These discretionary powers, however, should be cautiously used and the exercise of these powers when it is not necessary would constitute, in my opinion, an error of law and procedure justifying an interference by this Court. In the present case, no injustice would result if the decree so far as the Defendant No. 6 is concerned were allowed to stand. The causes of action of the Plaintiffs against these two different Defendants were entirely separate and based upon separate transactions which took place at different times. The Defendant No. 5 purchased one plot of the land in suit in execution of a decree on 23rd June, 1918, and the Defendant No. 6 purchased a different plot in execution of another decree on 18th April, 1918. The decree passed in the suit under appeal was really not one decree but a combination of two decrees against two separate Defendants. In these circumstances it was not competent for the lower Appellate Court to exercise the powers with which Appellate Courts have been vested under Or. 41, r. 33 or r. 4. The maintenance of the decree against the Defendant No. 6 would not in any way embarrass the Court

in granting relief either to the Plaintiffs or to the Defendant No. 5 who had appealed. I hold, therefore, that so far as the Defendant No. 6 is concerned the decree passed against him must remain. I am supported in the view that I have taken on this point by the decision in the case of Mahendra Nath Kamilya v. Khetra Mohan Bera ILR 65 cal. 1193 at p. 1200 (1928).

10. I now take up for consideration the first point, viz., whether the Plaintiffs are competent to bring this suit. The Plaintiffs claim the right to sue as mutwallis. They say that they were appointed mutwallis by the Panchayets. The learned District Judge has found otherwise; and he decides that as the Plaintiffs are not mutwallis they have no locus standi to sue. Learned Advocate for the Appellant agrees that this Court is bound by the finding of fact that the Plaintiffs are not mutwallis but he says that the Court of Appeal below should have found that even though the Plaintiffs were not mutwallis, yet they had the right to bring the suit as persons interested in the wakf estate. I accept the finding that the Plaintiffs are not mutwallis but I agree with the learned Advocate for the Appellants that as persons interested in the wakf they have the right to bring the present suit. The Plaintiffs were Panchayets appointed to supervise the management of the mutwallis, they have an interest in the wakf and as such they are entitled to bring a suit to protect the wakf estate from waste. This view of the law was expressed in the case of Abdur Rahim v. Mahmed Barkat Ali L.R. 55 IndAp 96: s.c. 33 C.W. N 482 (1927) which was a case dealing with a public wakf. The same principle will apply with more vigour in the case of a private trust of this description where the Plaintiffs are specially entrusted with the work of supervision over the management of the trust estate. In this connection I would refer also the case of Girish Chandra Saw v. Upendra Nath Giridas 35 C.W.N. 768 (1931). On behalf of the Respondent it is contended that as the Plaintiffs sued as mutwallis they cannot be heard to say that they have the right to sue in any other capacity. I am not inclined to give effect to this argument; the fact that the Plaintiffs are intimately connected with the wakf estate as Panchayets is established beyond all challenge. If they are entitled to sue as such they should not be held to be disentitled to sue merely because they claimed to be mutwallis. I hold therefore that the Plaintiffs have locus standi to bring this suit.

11. The next ground upon which the suit has been dismissed is that the decrees passed by the Court of Small Causes in the suits for the recovery of maintenance brought by the grandsons and daughters of the wakif are binding on the wakf estate and that the rules in execution of those decrees passed the interest of wakf estate in the properties sold. Learned Advocate for the Appellant contends that the property of the wakf is inalienable, that the decrees were passed against the mutwallis personally and that what passed in the sales in execution was only such interest as the mutwallis may have had in the wakf properties. The determination of this point will involve the determination of the other question whether there was a valid wakf created by Ahmad Ali. If there was no valid wakf then obviously the question whether the property was inalienable or not will not arise. In fact, the

whole complexion of the case will be changed. The trial Court held that a valid wakf was created but the Court of Appeal below after saying that this is a question of academic importance decides that the wakf is invalid. Now the Defendant No. 5 who was the only Appellant in the Court below never challenged the validity of the wakf in his written statement. The learned District Judge notices this fact but in spite of it he goes on to hold that wakf was invalid. The Appellant by his pleadings was precluded from challenging the validity of the wakf and the learned Judge should not have allowed the Appellant to question the validity of the wakf in the appeal. I am of opinion further that the wakf is a valid one. It is true that the members of the wakif''s family benefit a great deal by the provisions of the wakf but there is a clear dedication for religious and charitable purposes which cannot be said to be illusory. The wakf deed, Ex. 1, was the subject-matter of a judgment of this Court. The judgment is Ex. 2. this Court has held that a valid wakf was created by the deed Ex. 1. It is true that all the parties are not bound by this decision but nevertheless the judgment should have been treated by the learned District Judge as an authoritative interpretation of the wakf deed. Having regard to the provisions of the Wakf Validity Act of 1930 which has retrospective effect, I am of opinion that the wakf is a valid one. The next point which arises for determination is whether the properties of this wakf can be alienated in execution of the decrees passed in the Small Cause Court suits mentioned above. The learned District Judge has held that they can be so alienated and that as a matter of fact they have been so alienated. Learned Advocate for the Plaintiff Appellant contends that a decree passed against a mutwalli even "as mutwalli" will not bind the wakf property unless it expressly says so, and he draws my attention to the remarks of Ameer Ali, J., in the case of Zubaida Sultan Begam v. Darwood Ismail Mokra [1937] 1 cal. 99 (1936) and to a passage in Art. 169A at page 174 of the Treatise on Mahammedan Law by the Rt. Hon''ble Sir Dinshaw Mulla (11th Edition). The decrees passed, I am told, have not been put in evidence; the sale certificates granted to the Defendants Nos. 5 and 6 in the sales in execution of the decrees however, have been placed before me. Both parties rely on these sale certificates for their respective cases. The two sale certificates are exactly in the same terms. I am concerned, however, with the sale certificate issued to the Defendant No. 5 for the purchase made by him on 23rd June, 1918. The judgment-debtors are described " as mutwallis to the estate of Ahammad Ali Miya." In the schedule of properties one property sold is described as " belonging to Ahammad Ali Miya and (now) to the judgment-debtor as mutwallis under the wakf," and the other is described as "belonging to Ahammad Ali Miya (now) owned and held by the judgment debtors as mutwallis under the wakf." Looking at the sale certificates I do not think that there can be any doubt that what was sold was not merely such interest as the mutwallis may have had in the wakf properties but the interest of wakf estate in the properties. As the decrees have not been produced I must presume that the sales were in conformity with the decrees and that the decrees passed were such as bound not only the mutwallis personally but the wakf estate itself. The case relied upon by the learned pleader for the Appellant and the

passage referred to in Mulla''s " Principles of Mahammedan Law " do not, in my opinion, affect the present case. It is true that a decree passed against mutwallis " as such " will not necessarily bind the wakf estate, but there can be no manner of doubt that in certain circumstances a decree passed in a suit against the mutwallis of a wakf estate would affect the wakf property. The question whether the decree affects the property of the wakf will depend upon the facts of the case in which the decree is passed. Where the sale certificate purports to pass the property of the wakf estate, if the Plaintiffs wanted to establish that the property of the wakf estate could not be sold, it was incumbent upon them to produce the decrees and show that they were not against the property of the wakf estate. The ruling and passage referred to above deal with the case where a stranger to the wakf advances money to the mutwalli for carrying out the purposes of the wakf and the principle is enunciated that such stranger has no right to be indemnified out of the wakf property unless the decree expressly so decides. The case here is quite different. The decree-holders in the suit were entitled to get the money claimed out of the income of the wakf estate and there is an express provision in paragraph 4 of the wakf deed, Ex. 1, that they had the right to recover this sum together with costs by suit. Obviously this means that they could realise this sum out of the estate. It cannot mean that they had no right of suit against the estate but only against the mutwallis personally. In view of all these circumstances, I am of opinion that the learned Judge was right in his finding that the decree was against the property of the wakf estate and that the interest of the wakf estate in the property was sold to the Defendant No. 5 in execution of the decree on 23rd June, 1918.

12. The question whether the suit is barred by limitation does not really arise for consideration in this appeal. Both Courts have held that so far as the relief claimed against the Defendant No. 5 is concerned, the suit is within time and these findings are not challenged. The lower Appellate Court held that the suit so far as it relates to the relief claimed against the Defendant No. 6 is concerned is barred by limitation. Now I have held that as the Defendant No. 6 has not appealed, the decree passed against him cannot be interfered with. It is not therefore necessary for me to decide whether the suit is barred as against the Defendant No. 6.

13. I next take up for consideration the objection that the suit is barred by sec. 47, Civil Procedure Code. Learned Advocates of both sides agreed that the suit was not barred by reason of the provisions of this section. The short answer to this objection is that question for decision in this suit is not one relating to the execution, discharge or satisfaction of a decree passed. The suit is for a declaration that the decree did not have a particular effect. The suit does not seek to disturb any decision arrived at in execution proceedings nor does it raise any question regarding the execution of the decree.

14. In view of the conclusion arrived at the appeal must be allowed in part. The decree of the trial Court in so far as it is against the Defendant No. 6 is maintained.

The Defendant No. 6 will pay the Plaintiff proportionate costs of the suit. The decree of the lower Appellate Court dismissing the suit as against the Defendant No. 6 is set aside.

15. The decision of the lower Appellate Court dismissing the suit as against the Defendant No. 5 is upheld. The Defendant No. 5 will get proportionate costs in the trial Court from the Plaintiff. The costs of this appeal and of the appeal in the Court below will be borne by the parties themselves.