
AIR 1967 Ori 55 : (1966) 32 CLT 510

Orissa High Court

Case No: Second Appeal No. 40 of 1964

Gulam Ali Saha and
Others

APPELLANT

Vs

Sultan Khan and
Another

RESPONDENT

Date of Decision: Feb. 28, 1966

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 101
- Evidence Act, 1872 - Section 32(3)

Citation: AIR 1967 Ori 55 : (1966) 32 CLT 510

Hon'ble Judges: G.K. Misra, J

Bench: Single Bench

Advocate: M.S. Rao, M.K.C. Rao and A.K. Rao, for the Appellant; Standing Counsel, for the Respondent

Final Decision: Dismissed

Judgement

G.K. Misra, J.

Defendants are the appellants. The suit is for declaration of title in plots 517 and 518, for confirmation and in the alternative for recovery of possession. A right of way has been claimed over plot Nos. 522, 1212, 1213 and 1214. There was a prayer for removal of obstruction and for recovery of damages. Plaintiffs are brothers. Their case is that they purchased plots 517 and 518 from one Md. Rasul Khan by a registered sale deed (Ex. 5) dated 20-8-37. Plaintiffs' vendor had purchased the lands from the ancestors of the defendants by a registered sale deed (Ex. 4) dated 17-6-19. Plaintiffs' case is that from 1919 to 1937 their vendor was in possession. He enclosed the area, dug a tank, grew certain trees and used the lands as a Ban. Plaintiffs continued to possess in their own right, title and interest after their purchase in 1937 till 1959. In the summer of that year, defendants put up a fence and blocked the passage from all sides. Later on they trespassed into the suit area and removed certain crops. Defendants admitted the sale

deed of the year 1919 but challenged it as being Benami without consideration. They asserted their own possession all through and denied plaintiffs' possession .

2. The courts below concurrently found that the plaintiffs had title to plots 517 and 518 and that they were all through in possession. They also declared plaintiffs' right of way over plots 522, 1212, 1213 and 1214. The trial Court decreed the claim for damages. The lower appellate Court disallowed the claim. Plaintiffs have not filed any appeal or cross-objection disallowing the claim for damages.

3. Prima facie the second appeal is concluded by pure finding of fact. Mr. Ranjit Mohanty made a faint attempt that the registered sale deed of the year 1919 was not supported by consideration. The document has been found to be genuine and acted upon by the Courts below. The recital in the document is that the consideration had been paid. The statement was made by the deceased predecessor in interest of the defendants and is binding on them as being against the pecuniary and proprietary interest of the vendor u/s 32(3) of the Evidence Act. Ultimately Mr. Ranjit Mohanty did not challenge the genuineness and passing of consideration under the sale deeds Exts. 4 and 5, and the possession of the plaintiffs and their predecessors in interest.

4. Mr. Mohanty advanced two contentions

(i) Plot Nos. 5.17 and 5.18 recorded as "Pir Imam Saheb" as per Exts. 8, 9 and 10 constitute Wakf property and alienation of such property is void ab initio; and

(ii) No amount of breach of trust by way of alienation by the trustees would alter the character of the trust and the legal character of the property.

5. There was controversy in the Courts below as to whether these two plots constitute wakf or sudaqah. The learned trial Court held it to be a wakf while the lower appellate Court considered it as sadaqah.

The distinction between "Wakf" and "Sadaqah" is that in the case of former the income only can be spent while in the case of latter the corpus of the property may be consumed. (See para 171 of Mulla Mahomadan Law, 11th Ed.).

"Pir" means a Mahomadan saint. "Pirottar" means lands assigned for the support of shrines of Mahomadan saints (See Madox Settlement Report, Vol. 1, 1900 Ed. Glossary). "Pir Imam Saheb" means the Samadhi of a Mahomadan Saint inside the mosque. A Durgah or shrine of a Pir, which has long been held in veneration by the public, constitutes a valid object of Wakf: [Sunni Central Board of Waqf, U.P. Vs. Sirajul Haq Khan and Others](#), and see also Para 178, Item 17 under the caption "A". The following valid objects of a Wakf of Mulla Mahomadan Law.

6. A mutwalli has no power to sell wakf property or any part thereof without the permission of the Court or unless he is expressly empowered by a deed of Wakf to do so.

In this case, there is no deed of wakf or any permission of the Court sanctioning alienation. The alienation, even though for consideration, is void ab initio.

Mr. Mohanty's first contention has full force.

7. There is some force in the second contention that no amount of breach of trust by way of alienation by the trustees will alter the character of the trust and the legal character of the property. This proposition is, however, subject to the law of limitation. If as a result of the unauthorised alienation the transferee acquires title by prescription, the wakf would be extinguished. The ownership would vest in the person acquiring title by prescription.

8. The identical question came, for consideration in AIR 1940 116 (Privy Council) . Sir George Rankin in delivering the judgment of the Board observed that the argument that the land and buildings of a mosque are not property at all, because they are "juristic person", involves a number of misconceptions. " A mosque does not acquire a juristic personality so as to deprive the building of its character as immovable property. While approving the dictum that the property of a mosque cannot in any circumstance be alienated, except for proper purposes and save as provided by the terms of the endowment or with the leave of the Court, the Judicial Committee was clearly of opinion that the wakf property was subject to the law of limitation. The final conclusion of their Lordships on the question of acquisition of title by adverse possession may be expressed in their own words:

"The property now in question having been possessed by Shikhs adversely to the Wakf and to all possessed interests thereunder for more than 12 years, the right of the Mutwali to possession for the purposes of the wakf came to an end under Article 144, Limitation Act, and the title derived under the dedication from the settlor or wakf became extinct u/s 28. The property was no longer for any of the purposes of British Indian Courts, "a property of God by the advantage of it resulting to creatures."

The suit out of which the Privy Council case arose was filed in October 1985 and Article 134-B had been introduced in the Indian Limitation Act in 1929.

In face of the aforesaid pronouncement of the Judicial Committee, it is difficult to accept Mr. Mohanty's contention that the plaintiff has not acquired title by prescription on the concurrent finding that from 1919 till the date of the suit, he and his predecessor are in continuous exclusive possession adversely to the trust. Section 10 of the Limitation Act has no application as the transfer was for consideration.

9. Confronted with the aforesaid difficulty Mr. Mohanty raised a further contention that there is no pleading or proof that there has been lapse of 12 years from the date of resignation or removal of the transferor within the meaning of Article 134-B. Such a point was never raised and the question cannot be permitted to be canvassed for the first time. Moreover Article 144 applies and this question does not arise. The further contention of Mr. Mohanty that the suit is not maintainable under the Wakf Act, 1954 without the Wakf

Board being made a party, cannot also be permitted to be argued for me first time in second appeal.

10. All the contentions fail. The Second appeal is dismissed with costs.