

SUPREME COURT OF INDIA

Bibi Aisha

Vs.

Bihar Subai Sunni Majlis Avaqaf

C.A.No.323 of 1965

(R. S. Bchawat and K. S. Hegde, JJ.)

24.07.1968

JUDGEMENT

BACHAWAT, J.:-

1. The Bihar Subai Sunni Majlis-e-Awaqaf a body corporate established under the Bihar Waqfs Act, 1947 instituted a suit for setting aside a registered mokarrari lease deed dated November 18, 1949 executed by defendant No. 4 Sheikh Gholam Bari in favour of defendants 1 to 3 and for restoration of possession of the properties covered by the document, viz., the houses and shops being holdings Nos. 27 and 28 formerly known as holdings Nos. 22 and 23 in Ward No. 8 at Mohalla Muradpore P. S. Pirbahore in the city of Patna (Baakipur). The plaintiffs case is that the properties were dedicated by way of waqf by a Waqfnama dated August 20, 1827 executed by Mist. Bibi Mannu Khanam Jan. The successive Mutawallis under this deed were Sheikh Azmatullah, Sheikh Ataullah, Sheikh Habibur Rahman, Bibi Zaibunnissa and Sheikh Gholam Bari. The Trial Court decreed the suit and this decree was confirmed by the High Court. Both the courts concurrently found that Mst. Bibi Mannu Khanam Jan dedicated the properties by way of waqf by a deed dated August 20, 1827. The correctness of this finding is challenged in this appeal.

2. In Mohalla Muradpore in the city of Patna (Baakipur) there is an ancient mosque known as the mosque of Mst. Bibi Mannu Khanam Jan. It is not disputed now that Mst. Bibi Mannu Khanam Jan established this mosque. There are shops, rooms, katra and other structures to the east, west and the south of the mosque. To the east of the mosque are the disputed holdings Nos. 27 and 28. On September 25, 1948 Gholam Bari filed before the Waqf Board a return in Form No. 1 under Rules 6 and 11 of the Bihar Waqfs Act, 1948. In this return he stated that the properties were given in waqf to the mosque by Mst. Bibi Mannu Khanam Jan under the deed of waqf dated August 20, 1827. With this return he filed an English translation of the waqf deed. The translation was attested by him. P. W. 5 Mehdi Hasan, the Nazir of the Waqf Board proved that Gholam Bari also filed the original waqfnama together with its copy in Persian. The copy bore the following endorsement signed by Gholam Bari. "The copy corresponds to the original." The original waqfnama was returned to Gholam Bari and the copy was retained in the office of the Waqf Board. At the trial Gholam Bari did not produce the original deed. Accordingly the copy of the deed and its translation were exhibited.

3. The Trial Court and in the High Court Misra J. accepted the testimony of Mehdi Hasan and held that the copy of the original waqfnama was admissible in evidence. We agree with this finding. Tarkeshwarnath J. ruled that the copy was not admissible mainly on the ground that paragraph 7 of the plaint stated that the deed of waqf was in the plaintiff's custody. We agree with Misra J. that the averment in the plaint should be regarded as a general statement referring to the true copy which was left in the plaintiff's office. Under Section 65 (a) of the Evidence Act secondary evidence may be given of the existence, or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, and when after the notice mentioned in Section 66, such person does not produce it. Where the case falls under S. 65 (a) any secondary evidence of the contents of the document is admissible. In the present case the conditions of S. 65 (a) were satisfied. The plain copy of the waqf was therefore admissible. On behalf of the appellant it was argued that Cl. (f) of S. 65 was applicable and that as the certified copy of the deed dated August 20, 1827 was permitted by the Evidence Act to be given in evidence a certified copy alone was admissible in evidence. There is no substance in this contention. If the case falls under clause (a) any secondary evidence of the document is admissible, though the case may also fall under clause (f). Clause (a) is not controlled by clause (f). In the case of *A Collision Between The Ava*, (1879) ILR 5 Cal 568 a question arose as to whether secondary evidence could be given of the contents of a certificate granted by the Board of Trade. The loss of the document attracted Cl. (c) of Section 65 and the failure to produce it after notice attracted Cl. (a). Clause (f) of Section 65 was also applicable. Wilson J. ruled that a certified copy need not be produced and any secondary evidence was admissible. We agree with this decision. Wilson J. said:

"By S. 65 in cases under Cls. (a) and (c) any secondary evidence is admissible; in cases under Cls. (e) and (f) only a certified copy. The present case falls under Cl. (a) or (c) and also under (f). In such a case which rule applies? I think the words, "In cases (a), (c) and (d) any secondary evidence is admissible," are too clear and too strong to be controlled by anything that follows, and that, therefore, in this case any secondary evidence might be received."

4. The existence of the deed of waqf dated August 20, 1827 is proved by numerous admissions made by Gholam Bari and his predecessors-in-title. The existence of the deed was admitted in a petition filed by Bibi Zaibunnisa before the District Judge, Patna on January 13, 1928, in the return filed before the plaintiff by Gholam Bari on September 25, 1948; in the petition dated February 15, 1949 and a statement dated March 21, 1949 filed by him before the President of the Bihar Subai Sunni Majlis-e-Awaqf. Other documents and admissions also clearly show that the disputed holdings are waqf properties.

5. The copy of the waqf deed shows that Bibi Mannu Khanam Jan appeared before the Darulquazaya Azimabad for admitting the execution and making a declaration and the Quazi signed the deed and put the seal of the Registry Office on 21st Rabiul Awal, 1233 A. H. The year 1233 is evidently a mistake for 1243. The deed was executed on 19th Muharram 1243 A. H. corresponding to 20th August 1827. No copy of this deed is now found in the records of the registration office. It appears that the document was presented for registration under Regulation XXXIX of 1793. Under that Regulation the Quazis were required to keep copies of all deeds and other papers which they might draw up or attest, to keep a list of such papers and to deliver the list and papers to their successors. The Regulation made no provision for the maintenance of a proper register book. The disputed waqf deed was registered in 1827. At this distance of time no copy of the deed is traceable in the registration office. But from other unimpeachable evidence, it is satisfactorily established that Mst. Bibi Mannu Khanam Jan executed the waqf deed dated August 20, 1827 and that the disputed holdings are waqf properties. In this view of the matter it is not disputed that the courts below rightly decreed the suit.

6. The appeal is dismissed with costs.

Appeal dismissed.