SUPREME COURT OF INDIA

Garib Das

Vs.

Munshi Abdul Hamid

C.A.No.1158 of 1967

(S. M. Sikri and G. K. Mitter, JJ.)

13.11.1969

JUDGEMENT

MITTER, J.:-

1. This is an appeal from a judgment of the Patna High Court reversing a judgment of the Subordinate Judge, Bhagalpur and decreeing the plaintiff's suit for a declaration that a pucca house situated in Mohalla Nathnagar within the Bhagalpur municipality was an endowed property under the deed of wakf dated June 21, 1914 and for recovery of possession of the same with mesne profits from defendants 1 to 3 (the appellants to this court) who had obtained sale deeds in respect of this property on December 27, 1949.

2. One Tassaduk Hussain was the owner of the disputed house and admittedly executed a deed of wakf on June 21, 1914 in respect of the same for the benefit of a mosque and Madarsa at Nathnagar and had the same registered. In terms of the deed the donor was to remain in possession of the house as Mutawalli and his wife was to be the Mutawalli after his death. The document provided that after the death of both the husband and wife the Mutawalli would be elected by the panchas of the

Muslim community of Nathnagar and so long as the donor and his wife were living they would maintain themselves from the income of the property and spend the balance left for the mosque and the Madarsa. Tassaduk Hussain executed and registered three deeds on 10th December, 1949 by one of which he purported to cancel a gift deed dated November 4, 1939 executed in favour of some of his relations in respect of the disputed house. By the second document he cancelled another registered deed of gift dated August 2, 1948 executed in favour of another relation of his in respect of the identical property. And by the third document he purported to cancel the deed of wakf of 1914. Thereafter he executed and registered three separate sale deeds on March 27, 1949 one in favour of the appellant Garib Das, a second in favour of Shamlal and a third in favour of Gobind Lal. All these three deeds were in respect of portions of the disputed property. Tassaduk Hussain died in July, 1950.

3. The suit was filed by the first plaintiff as the elected Mutawalli of the wakf created by Tasaduk Hussain joining with him plaintiffs 2 and 3 as members of the Sadar Nathnagar Masjid Committee. Garib das, Shyam Lal and Gobind Lal, the aliencees from Tasaduk Hussain were impleaded as defendants first party. There was a number of other defendants also. The first three defendants were described as tenants in the suit properties. The plaintiffs claimed to set aside the deeds in favour of the said persons on the ground that as a valid wakf had already been created in favour of the mosque and Madarsa and had been acted upon, the deed of cancellation of December 10, 1949 and the sale deeds in favour of the first three defendants could not affect the wakf. A prayer was also made that as the said three defendants who were tenants had repudiated their tenancy they had forfeited the same and they had become trespassers and were liable to eviction as such.

4. The Subordinate Judge who tried the suit found the deed of wakf to be invalid holding, inter alia, that there could be no reservation for the benefit of the donor in the case of an endowment purportedly in favour of a mosque. He also held that the endowment was bad for uncertainty on the ground that the mosque and the Madarsa mentioned in the wakf could not be identified and that Tasaduk Hussain never had any intention to create a wakf.

5. The High Court set aside the findings of the Subordinate Judge holding "that there was no evidence to indicate that for at least 25 years before the execution of the document of 1914 Tasaduk Hussain did anything to justify the inference that it was not his intention to create the wakf in question." The High Court held that the inference sought to be drawn by the Subordinate Judge from the fact that the original deed of wakf was not in possession of the panchas but came from the custody of the defendants as showing that no dedication to wakf was ever intended was not justified. According to the High Court as Tasaduk Hussain was the mutawalli for life it was but natural that the original deed should remain in his custody and when he changed his mind he would make over the document to the defendants at the time of the execution of the sale deeds. The High Court also found on the evidence that Tasaduk Hussain himself used to meet directly some of the items of expenditure of the mosque and there never was any occasion for the panchayat or the Muntazim to write up accounts in respect of the expenditure met by Tasaduk. According to the High Court the fact that Tasaduk Hussain did not by his conduct or otherwise express any intention before 1939 to indicate that the deed of wakf was a sham or illusory transaction and that the deed of gift of 1939 in

respect of the same property in favour of his distant relations was never acted upon, made the case of the plaintiffs that Tasaduk Hussain spent his savings over the Masjid and Madarsa probable. Further as Tasaduk Hussain had married again in or about 1937 it was probable that thereafter he changed his mind and executed the deed of gift of 1939 having acted in terms of the wakf for 25 years from 1914. The High Court held that the fact that the disputed property was not mutated in his name as mutawalli in the records of the Bhagalpur Municipality was not relevant as he was the founder of the wakf and no transfer of physical possession was necessary.

6. The High Court's conclusions were: (1) that Tasaduk Hussain had created the wakf in question in 1914 and he continued to be the mutawalli of the same until his death. (2) the wakf was not a sham or illusory transaction. (3) It was not bad for uncertainty or vagueness. (4) It was not bad or void on account of reservation of some benefit in favour of himself and his wife. On this view the High Court held that the sale deeds in favour of the contesting respondents did not confer any title on them in respect of the disputed property and they were trespassers after 27th December, 1949 though they were tenants of some portion of the house before that date. Consequently they were liable to mesne profits as prayed for by the plaintiffs. The High Court allowed the prayer for declaration of title as against defendants 4 to 31 and held that the plaintiffs are entitled to recover possession of the suit properties with mesne profits.

7. Learned counsel appearing for the defendants-appellants urged four grounds before us. They were as follows:-

1. The High Court had erred in granting a decree for possession and mesne profits when these prayers had been abandoned in the trial court.

2. The High Court should have held that Tasaduk Hussain had no intention to create a wakf inasmuch as the deed of wakf of 1914 was never acted upon.

3. The deed of wakf was void for uncertainty inasmuch as there were at least two mosques in Mohalla Nathnagar and the deed of wakf did not specify which of the mosques the donor wanted to benefit.

4. The suit should fail inasmuch as the plaintiffs had not been in possession within 12 years of the date of the suit or their dispossession.

8. We propose to deal with the first of these points last. On the second point the law seems to be

clear that a wakf inter vivos is completed by a mere declaration of endowment by the owner. According to Mulla's Principles of Mahomedan Law, 16th Edition, page 178, Article 186, this view had been adopted by the High Courts of Calcutta, Rangoon, Patna, Lahore, Madras Bombay, Oudh Chief Court and recently by the Allahabad High Court and the Nagpur High Court. Further, the founder of a wakf may constitute himself the first mutawalli and when the founder and the mutwalli are the same person, no transfer of physical possession is necessary. Nor is it necessary that the property should be transferred from the name of the donor as owner into his name as mutawalli. An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not intended to be acted upon.

9. It is also settled law that the settler and those claiming under him are not precluded from showing that no wakf had been created and that the deed was not intended to operate as a wakf but was illusory and fictitious. This is a question of intention evidenced by facts and circumstances showing that it was not to be acted upon. For the purpose of such enquiry subsequent conduct, if it is merely a continuation of conduct at the time of execution, is irrelevant.

10. On the question of intention, we see no reason to take a view different from that adopted by the High Court, specially as the contesting respondents had failed to discharge the onus which lay heavily on them to prove that Tasaduk Hussain did not intend to create a wakf in respect of the disputed property or that it was not acted upon.

11. Counsel for the appellant relied on the Mussalman Wakf Validating Act, 1923 and specially to Sections 3 and 10 thereof and contended that the non-furnishing of particulars relating to the wakf in terms of Section 3 when it was alleged that account books were written in respect of the income from the mosque went to show that no wakf was really created inasmuch as failure to comply with Section 3 attracted the penalties prescribed in Section 10. This contention had been rejected by the High Court which held that no account books were ever written. Reference may also be made in this connection to a statement of law in Mulla's treatise of Mahomedan Law, 12th Edition, Page 175 under Article 171A that the Act of 1923 did not apply to any wakf under which any benefit was, for the time being, claimable by the wakif or any of his family descendants.

12. On the third point our attention was drawn to the deed of wakf which merely mentions that Tasaduk Hussain had settled the whole and entire property to "the mosque and Madarsa at Mohalla Nathnagar" and the surplus of the usufruct thereof was to be spent over the same. If the document had stood by itself and if there were more than one mosque in Nathnagar there might be scope for contention that the donor had no particular mosque in mind when he created the wafk. But the doubt, if any, is resolved by the High Court relying on the document dated 10th December 1949 executed by Tasaduk Hussain showing that in the deed of 1914 the mosque referred to was "Barhi Masjid and Madarsa". As the donor was the best person to know which mosque and Madarsa he had in mind and he had identified the same by the document of 1949 we see no reason to take a view different from that of the High Court or hold the deed void for uncertainty.

13. The fourth point has no substance inasmuch as Article 142 of the Limitation Act was not applicable to the facts of the case. The suit was filed in 1955 within six years after the death of Tasaduk Hussain who died only a few months after the execution of the documents relied on by the appellants.

14. We however find that we must remand the matter for determination of the first point raised by the counsel for the appellants. The issues settled by the Subordinate Judge on 30th August, 1957 at page 17 of the printed record include issue 10, namely, Are the plaintiffs entitled to get a decree for recovery of possession of the properties in the suit?" and issue 12 reading "Are the plaintiffs entitled to get a decree for mesne profits and if so, to what extent?" Our attention was drawn to the judgment of the Subordinate Judge at page 81 of the printed record which shows that the learned Judge only considered nine issues which do not include the above issues 10 and 12. But it may be that in view of issue 8 as finally recast by the learned Judge in delivering his judgment and reading "Are the plaintiffs entitled to any decree as prayed for"? original issues 10 and 12 became superfluous. Besides, the learned Judge did not have to give any decision on issue 8 as he found that the wakf was not valid. In the judgment of the High Court there is no reference to all this and in the concluding paragraph it was recorded that in view of the finding that the sale deed in favour of the contesting respondents did not confer any title on them they were trespassers after 27th December, 1949 though they were tenants of some portions before that date.

15. Reference was made to Sections 11 and 18 of the Bihar Buildings (Lease, Rent and Eviction) Control Ac, 1947 under which a decree for eviction could only be passed at the relevant time by the Controller appointed under the Act. As the High Court judgment is not explicit on this point, we think it only proper to remand the matter to the High Court for determination of issue 8 above with special reference to the prayer for eviction and mesne profits. Except as above, the appeal is dismissed and the judgment of the High Court upholding the validity of the wakf and its binding character if affirmed. The costs will abide by the result of the decision of the High Court.

Appeal dismissed.