SUPREME COURT OF INDIA

Shri Hafazat Hussain s/o Mubarak Hussain

Vs.

Abdul Majeed s/o Sri Wali Mohd.

C.A.No.1505 of 1988

(S. Rajendra Babu and Doraiswamy Raju JJ.)

08.08.2001

JUDGMENT

D.Raju, J.

1. This appeal has been filed against the judgment dated 29.1.1985 of a learned Single Judge of the Allahabad High Court in Second Appeal No.591 of 1973 whereunder the suit filed by the respondents-plaintiffs came to be decreed by reversing the judgments of the courts below. For a proper appreciation of the nature of controversy and the grievance expressed before us, it becomes necessary to state the relevant facts and the conclusions recorded by the courts below at some length. The suit, out of which the present proceedings emanate, had been filed for a declaration that the property in dispute, which is the western portion of House No.D 50/222 (old No. D12/58), Mohalla Qazipura Kalan, Varanasi, is the subject-matter of Wakf and for recovery of possession of the same from the defendant. The case of the plaintiffs was that two houses Nos.D 50/39 and D 50/222, Mohalla Qazipura Kalan, Varanasi, belonged to Smt. Zohra Bibi, who was in her early years leading a life of a Prostitute. Subsequently, she got married to Haji Mohammed Siddiq. Thereafter, Zohra Bibi executed a deed of gift dated 10.4.1923 in favour of her husband and he, in turn, on 15.4.1923 executed a Wakf Deed comprising the above mentioned properties, according to which the original owner Smt. Zohra Bibi was to be the first Mutwalli and on her death her husband Hazi Mohammed Siddiq was to be the next Mutwalli. The income from the property was to be spent for charitable purposes and one of which was that Rs.5/- per month from the income was to be given to the Mosque Rangileshah for the expenses of the same. Smt. Zohra Bibi died in the year 1948. The evidence on record established that the registry in respect of the house, originally recorded in the name of Smt. Zohra Bibi Tawayaf, was cancelled and got recorded in the name of Smt. Zohra Bibi, wife of Hazi Mohammed Siddiq as Trustee in the year 1923 and thereafter it was mutated again in 1949 in the name of Allah - owner and Hazi Mohammed Siddiq Mutwalli, in cancellation of entry made in 1923, apparently after the death of Smt. Zohra Bibi in 1948. After the death of Zohra Bibi, her husband appears to have apparently become avaricious and started adopting ways and means to appropriate the same for himself. As part of such endeavours, he first seems to have moved an application before the District Judge, Varanasi, for permission to sell House No. D 50/39 in Miscl. Case No.139 of 1949 and sold the same after obtaining permission. Thereafter, he got a suit filed in Suit

No.46/53 by the original defendant in the present suit by name Mubarak Hussain. Hazi Mohammed Siddiq did not put up any defence and, therefore, it appears to have been decreed on 12.9.1953. A pretended effort to get the decree set aside was made, but was not successful. As per the final decree passed in the said suit, the defendant in the present suit came into possession of western portion of house bearing No.D 50/222. On 2.1.1957, Hazi Mohammed Siddiq died and before his death he appears to have appointed the plaintiffs as Mutwallis of Waqf Mosque Rangileshah and also of the Wakf created by him. The plaintiffs also claimed that they were appointed Mutwallis by Sunni Central Board of Waqf. The partition suit filed by Mubarak Hussain, the defendant in the present suit as well as the other proceedings instituted by the Hazi Mohammed Siddiq were said to be collusive and manipulated and consequently could not affect the claim of the plaintiffs in the present suit.
The defendant in the present suit, who was said to be the brother of late Smt. Zohra Bibi, contended that the properties in question were purchased from out of the income earned by Smt. Zohra Bibi as a prostitute and, therefore, the same could not be the subject-matter of a Wakf under the Muhammadan Law; that the gift deed by Zohra Bibi and subsequent wakf deed by her husband are manipulated documents brought into existence by her husband and that Hazi Mohammed Siddiq never came into the possession of the properties as donee. It was further claimed that after the death of Zohra Bibi, the defendant, as brother, was entitled to one half and her husband came to inherit the other half of the property and it is only in such context and consequences, in the partition suit filed by the defendant in Original No.46/53, that there was a compromise decree and in terms of the preliminary and final decree passed therein the defendant was legally put in possession of his share. The status of the plaintiffs as Mutwallis was disputed and put in issue and it was contended for the defendant that not only they have no locus standi to file the present suit but in any event the previous judgment and decree of the competent court is binding on the plaintiffs and the present suit was also barred by res judicata.

2. On the above claims and counter claims, the suit was tried by the learned Civil Judge, Varanasi, in which about 13 issues came to be framed. While dealing with the respective claims and disposing of the suit, the learned Trial Judge initially sought to decide the other issues on the supposition that the property held by Smt. Zohra Bibi was not a tainted one, relegating the question of tainted nature or otherwise of the said property for consideration separately at the end. On such consideration, the learned Trial Judge upheld the claim of the plaintiffs to be the Mutwallis not only on the basis of a joint application said to have been given by the plaintiffs and Hazi Mohammed Siddiq before his death on 26.2.1956 informing the Tax Superintendent, Municipal Board, Varanasi, that the plaintiffs are the Mutwallis, but also on the basis of the order dated 26.7.1957 said to have been passed by the Sunni Central Board of Waqf, appointing the plaintiffs as Mutwallis. The right to sue, therefore, was held to enure to the plaintiffs. On the question of validity of the gift executed by Smt. Zohra Bibi and the wakf deed executed by her husband, the learned Trial Judge held that not only the deeds were valid and a valid wakf had been created but the same had been acted upon. As for certain proceedings instituted by Mohammed Siddiq before the Court as also the partition suit and decree said to have been passed in the partition suit instituted by the defendant in the present proceedings, they were held also collusive and they did not have any legal force or effect in law. As a sequel to the above finding of facts specifically recorded on the basis of

the oral and documentary evidence produced before the Trial Judge, it was also held that the decree in the partition suit being collusive in nature and void could not be held to be binding on the present plaintiffs and the present suit cannot said to be hit by the principles of res judicata engrafted under Section 11, CPC. Despite these findings of facts, surprisingly, the learned Trial Judge went on to rely upon the self-serving claims made by the Mubarak Hussain defendant in the present suit, that the suit properties were acquired out of income earned by Smt. Zohra Bibi as a prostitute and, therefore, as per Mohammadan Law, no valid wakf can be said to have come into existence. Reference has also been made to the non-inclusion of the wakf in question in the list of wakfs published under the Wakf Act, 1936 and the learned Trial Judge further held that since within the time stipulated in Sections 4 and 5 of the Muslim Wakf Act, no action has been taken by the plaintiffs to get the wakf included in the said list of wakfs, the plaintiffs cannot be granted any relief and, therefore, the suit was dismissed by a judgment and decree dated 10.5.1960.

3. Aggrieved, the plaintiffs pursued the matter on appeal before the District Court in Civil Appeal No.319 of 1960 and the First Additional District Judge, Varanasi, by his judgment and decree dated 21.10.1972 dismissed the appeal. The First Appellate Judge, after noticing the facts considered by the learned Trial Judge, has chosen to record that before considering any other issue in the suit as has been done by the learned Trial Judge, the first point for determination in the appeal should be as to whether Smt. Zohra Bibi acquired the properties in question from out of her earnings as a prostitute and whether a wakf could be validly created in respect of the same and also as to whether she had performed any Tauba and, if so, its effect in the Muslim Law. As a matter of fact, on finding that the learned Trial Judge had not specifically gone into this aspect, two additional issues were framed by the First Appellate Judge on the question as to whether the disputed house was acquired out of the earnings of Zohra Bibi as a prostitute and whether a valid Wakf could have been created in respect of such property. He has permitted additional evidence to be let in at that stage and on the basis of materials noticed by him came to the conclusion that there had been no proper proof of the claim that Zohra Bibi performed any Tauba at the time of her marriage, which took place prior to the gift deed and to the wakfnama and in the absence of the same, the gift deed as well as deed of wakf had to fail as merely devices to get over the prescription in Muslim Law. As a consequence thereof, the learned First Appellate Judge came to the conclusion that Zohra Bibi alone must be deemed to be the owner of the disputed house until her death and that thereafter it devolved upon her heirs including Hazi Mohammed Ziddiq, her husband, and Mubarak Hussain, said to be her brother. On that view of the matter, the decree passed in the partition suit vide 46/53 was held to be not illegal or ineffective. Further it was held that though the plaintiffs may be Mutwallis of the Mosque Rangileshah, they cannot claim any interest in the disputed property, since there had been no valid Wakf created in law. The learned First Appellate Judge also rejected the claim based on the Wakf on account of the non-inclusion of the said Wakf in the list of Wakfs published. The claim about the availability of other sources of income from the house property was rejected by stating that there was no material whatsoever on record to show the extent of monthly income from the other property. In order to come to the conclusion that the property in question was purchased by Zohra Bibi only from out of her earning as a prostitute, the learned First Appellate Judge took into consideration the interested version of the defendant

projected in the earlier partition suit as well as that of her husband for selfish reasons to usurp the very property, which was dedicated by himself to the Wakf, carried away by the mere fact that she had been living as a prostitute prior to her marriage. Consequently, the appeal came to be dismissed by the First Appellate Judge.

4. Aggrieved, the matter has been further pursued before the High Court. The learned Single Judge in the Second Appeal, for the first time, in our opinion, has attempted to properly marshal and analyse facts in their proper perspective without surmises or allowing assumptions or imagination to take the place of an objective process of judicious consideration and by his judgment and decree dated 29.1.1985 held that the property in dispute is a Wakf property and that the plaintiffs are entitled to a declaration therefor and also for recovery of possession of the same and with consequential mesne profit, as claimed. The learned Single Judge has set out in detail the manoeuvres of the husband Mohammed Siddiq and Mubarak Hussain, the brother of late Zohra Bibi, after her death, as to how from 1949 itself these two persons were operating in different directions, though with the common purpose and aim of appropriating the property for themselves. It is seen from the details thereof that when the claim of the husband to sell came to be rejected by an order dated 30.5.55 (Ex.-7) of the District Judge, and that to set aside the ex-parte decree in the partition suit filed by Mubarak Hussain, the husband filed an application, both seem to have been drawn nearer, resulting in an agreement dated 28.4.56 (Ex.G) entered into between them to share the property equally with self serving and fictitious recitals, opposed to facts noticed even by the Trail Court on the basis of evidence on record. This resulted in the passing of a final decree dated 28.4.56 (Ex.D), after getting the application to set aside the ex-parte decree dismissed. The learned Judge also felt that apart from strong misconception on vital aspect of the law, the findings of courts below were the result of biased approach and therefore called for his interference. After adverting to the relevant passages from the various sources governing the law on the subject, it was held by the learned Judge in the High Court that once the property changed hands, even the stigma, if any, did not attach thereafter to the property and therefore the erroneous assumption of law to the contrary by the Courts below vitiated their findings as to the character of the property and the capacity to make it the subject matter of a Wakf. The learned Judge also took pains to demonstrate how the courts below, particularly the lower appellate court misdirected itself in the matter of legal principles governing a valid and completed gift. The burden was also found to have been wrongly cast upon the plaintiffs as to the proof of the manner and nature of acquisition of the property in dispute. Concrete materials on record to show the resourcefulness of Zohra Bibi to raise funds and generate other income has been pointed out to demonstrate how the courts below readily surmised, even in the absence of any positive proof by the defendant by any legally acceptable evidence, that the property was purchased from tainted earnings. Reference has also been made to the overwhelming evidence on record as to how the Gift Deed and deed of Wakf have been acted upon throughout and the necessary ingredients required in law to be established, which stood fully answered. The conclusion arrived at by the courts below on the basis of Section 4 & 5 of the Muslim Wakf Act 1936 and the non-inclusion of the Wakf in the list of Wakfs published was found to be once again based on conjectures, ignoring the evidence available on record to show that the total monthly rent from the property was Rs.408 (vide Ex.12) and as to how having regard to the portion of the

income earmarked for the Wakf purposes and the use of Wakif and their descendants, the Act itself was not applicable.

5. The learned counsel for the appellant strenuously contended that the learned Single Judge, who dealt with the Second Appeal, has gone out of the permissible limits within which alone concurrent findings of fact could be interfered with at the Second Appellate stage. The learned counsel invited our attention to the relevant portions of the judgment to substantiate his grievance in this regard. Per contra, the learned counsel for the contesting respondents, with equal vehemence, attempted to justify the reasoning of the learned Judge in the High Court by also pointing out how and in what manner the First Appellate and the Trial Judge committed errors of law to warrant interference at the Second Appellate stage.

6. We have carefully considered the submissions of the learned counsel appearing on either side. No doubt, it has been repeatedly pointed out by this Court that concurrent findings recorded by the Trial Judge as well as the First Appellate Judge on proper appreciation of the materials on record should not be disturbed by the High Court, while exercising Second Appellate Jurisdiction, but at the same time, it is not an absolute rule to be applied universally and invariably since the exceptions to the same also were often indicated with equal importance by this Court, and instances are innumerable where despite such need and necessity warranting such interference, if the Second Appellate Court mechanically declined to interfere, the matter has been even relegated by this Court to the Second Appellate Court to properly deal with the claims of parties in the Second Appeal objectively keeping in view the parameters of consideration for interference under Section 100 of the Civil Procedure Code. Therefore, it becomes necessary to see whether the learned Single Judge in the High Court has transgressed the permissible limits.

7. The judgments of the Trial and First Appellate Court could be said to be concurrent only in the sense that both the courts have chosen to reject the suit as well as the First Appeal and on the question as to whether the property in dispute was acquired by Zohra Bibi from out of her income earned as a prostitute. In other respects, namely, the factum of creation of the document of gift, Wakf deed, the conduct of the parties throughout thereafter in acting upon the same and the collusive and void nature of the proceedings before the Court instituted by Hazi Mohammed Siddiq and Mubarak Hussain, the conclusions could not be said to be concurrent. The learned First Appellate Judge has noticed a flaw in the judgment of the Trial Court to the extent that there was no specific issue as it ought to have been as to whether the properties were acquired by Zohra Bibi from her earning as a prostitute, and framed it as an additional issue. It has been pointed out supra that the learned Trial Judge despite castigating the Court proceedings instituted by Hazi Mohammed Siddiq, the husband of Zohra Bibi, as also the partition suit instituted by Mubarak Hussain, the defendant in the present proceedings, against the Hazi Mohammed Siddiq for partition of his half share, to be collusive and the decree procured thereon to be not only void but illegal and not binding upon any one or affecting the property, has chosen to place reliance upon the claims in such make-believe and collusive proceedings to hold that Zohra Bibi acquired the properties in question out of her earnings as a prostitute, overlooking the position that though a prostitute she had other income from properties as well to purchase the disputed property and the

further fact that the defendant miserably failed to substantiate his claim about the tainted nature of acquisition of the same. The Second Appellate Judge was able to indicate and highlight the serious infirmities and illegalities committed by the learned Trial Judge as well as the First Appellate Judge, and the necessity for his interference to prevent total miscarriage of justice, with convincing reasons. The findings recorded by the Trial Court as well as the First Appellate Court was shown to be not only vitiated due to perversity of reasoning but also due to surmises and misreading of the materials on record. On a careful and critical scanning through of the judgment in the Second Appeal, we are unable to agree with the learned counsel for the appellant that any findings of fact concurrently recorded were mechanically interfered without justification or by transgressing the limitations on the exercise of jurisdiction under Section 100, CPC. The reasons assigned by the learned Judge in the High Court for the conclusions arrived at do not suffer from any infirmity warranting our interference in this appeal. The appeal, therefore, fails and shall stand dismissed. The parties shall bear their own costs.