

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Abdul Wahhab Miah

Mr. Justice Muhammad Imman Ali

Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.552 OF 2009.

(From the judgment and order dated 24.04.2008 passed by the High Court Division in Civil Revision No.1266 of 1999.)

Md. Hafizuddin : Appellant.

=Versus=

Mozaffor Mridha being dead his heirs: Respondents.
1.Asia Begum and others :

For the Appellants : Mr. Syed Amirul Islam, Senior Advocate, instructed by Syed Mahbubar Rahman, Advocate-on-Record.

For the Respondents : Mr. Farid Ahmed, Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.

Date of hearing on : 11.07.2017, 01.08.2017 & 08.08.2017

Date of judgment on : 17.08.2017

J U D G M E N T

Hasan Foez Siddique, J: This appeal is directed against the judgment and order dated 24.04.2008 passed by the High Court Division in Civil Revision No.1266 of 1999 making the Rule absolute reversing the judgment and decree dated 09.03.1999 passed by the then Subordinate Judge-in-charge, Patuakhali in Title Appeal No.14 of 1997 reversing those dated 03.02.1997 passed by the Senior Assistant Judge, Patuakhali Sadar, Patuakhali in Title Suit No.40 of 1993.

The relevant facts, for the disposal of this appeal, are that the appellant instituted the

aforesaid suit for declaration that the sale deeds described in schedule 'Ka' to the plaint are collusive, void, fraudulent, inoperative and those are not binding upon the plaintiff stating, inter alia, that the plaintiff is the Mutwalli of Md. Asaq Waqf Estate. The land described in the schedule 'Kha' to the plaint is the waqf property of the said Waqf Estate and the same was enrolled vide E.C. No.10481. The plaintiff was appointed as Mutwalli of the said Estate on 08.09.1986. He filed an application under Section 64 of the Waqf Ordinance to the Waqf Administrator for eviction of the unauthorized occupants from 'Kha' scheduled land. The Waqf Administrator, by an order dated 04.01.1993, directed the plaintiff to file a suit in the Civil Court for declaration that the kabala deeds as described in the schedule-'Ka' to the plaint are void, inoperative and those are not binding upon the plaintiff. Accordingly, the plaintiff filed instant suit against respondents impugning the kabala deeds, (1) deed No.3360 dated 16.03.1976 executed by Md. Fazlul Karim Howlader in favour of Mozaffar Mridha; (2) deed No.1003 dated 20.04.1962 executed by Abdul Karim Mridha in favour of Abdul Gani and (3) deed No.11889 dated 07.10.1965 executed by Abdul Karim Mridha in favour of Ansaruddin Mollah in respect of the land

as described in schedule-Kha to the plaint stating that those 'Kha' scheduled land are waqf property by virtue of waqf deed executed by Md. Asoq Ali and no one was entitled to transfer the same except taking the prior permission of waqf administrator and for the benefit of the waqf estate which was not taken before execution of those deeds.

The defendant-respondents contested the suit contending that the land measuring an area of 2.48 acres out of 3.03 acres appertaining to C.S. Khatian No.136 and Plot No.2275 and R.S. Khatian No.1 and Plot No.4203 was recorded in the name of Nirmal Kantha Roy who auction purchased the same on 24.03.1941. Md. Fazlul Karim and Abdul Karim took settlement of the said land from Nirmal Kantha Roy in 1348 B.S. They defaulted to pay rent of years 1351 to 1354 B.S. to the landlord. Thus, Nirmal Kantha filed Rent Suit No.398 of 1948 and got decree and, in execution of the said decree, the said land was again sold in auction. Hossain Ali and Keramat Ali auction purchased the same on 21.07.1948. Meanwhile, Fazlul Karim and Abdul Karim paid the auction money. Consequently, their raiyoti interest was not extinguished. They filed Title Suit No.488 of 1956 for permanent injunction against Hossain Ali and others and got decree.

These defendants, purchasing the suit land by the impugned kabala deeds, have been possessing the same. The suit should be dismissed.

The trial Court dismissed the suit. The plaintiff preferred appeal and the appellate Court allowed the appeal and decreed the suit. Then the defendants filed a civil revisional application in the High Court Division and obtained Rule. The High Court Division, by the impugned judgment and order, made the said Rule absolute. Thus, the plaintiff has preferred this appeal getting leave.

Mr. Syed Amirul Islam, learned Senior Counsel appearing for the appellant, submits that the High Court Division failed to consider that the alleged auction in 1941 was held without serving any notice to the Wakf Commissioner and Mutwalli of the waqf estate and that they were not impleaded in the Rent Suit as well inasmuch as they were the necessary parties. He submits that the High Court Division erred in law in interfering the decision of the appellate Court inasmuch as it was the duty of Fazlul Karim, father of the plaintiff Mutwalli, to pay rent and taxes of the waqf property from the income of the said property. He concocted the story of selling the waqf property in auction for non-payment of rent. He could not claim waqf property as his personal property. He submits that

the High Court Division failed to notice that Fazlul Karim continued to be Mutwalli of Md. Asaq Estate after its enrollment vide E.C. No.10481 on 30.01.1942 in the office of Waqf Commissioner he could not become owner of the waqf property and as a manager of the same it was his duty to protect the waqf property. He submits that pursuant to rent decree passed in Rent Suit No.398 of 1948 the property could not be said to have lost its waqf character.

Mr. Farid Ahmed, learned Senior Counsel appearing for the respondents, submits that the property in question was sold in auction in 1941 and auction purchaser settled the same to Fazlul Karim and Abdul Karim. Thereafter, the landlord filed Rent Suit No.398 of 1948 and got decree and the same was again sold in auction in execution of the said decree and one Hossain Ali and Keramat Ali auction purchased the same but Fazlul Karim and Abdul Karim, the judgment debtors, paid the entire auction money and protected their ownership in the property and that the defendants are the subsequent purchasers from Fazlul Karim and Abdul Karim, the High Court Division, considering all those facts and evidence on record, rightly made the said Rule absolute.

The High Court Division observed that the property, in question, was made waqf by virtue of the waqf deed dated 30.01.1922. The High Court Division held that the same lost its waqf character due to the auction held in 1941 and finally it observed that, at present, the suit land is not the property of said Asaq Waqf Estate.

It is the case of the plaintiff that suit land originally belonged to Mohammad Asoq. From the judgment of Title Suit No. ~~488 of 1956~~ ~~208 of 1958~~ (ext-Ga) it appears that the plaintiffs of that suit, namely, Mahammad Fazlul Karim Howlader and Abdul Karim Howlader sons of Haji Mohammad Asoq admitted that their father Asoq Ali Fakir, was Usat Nim Howla raiyat and his name was duly recorded in Khatian No.136. The High Court Division observed that admittedly, by virtue of registered waqf deed dated 30.01.1922 (ext.3), the suit land became the property of Md. Asoq Waqf Estate. In such view of the matter, we have no hesitation to hold that the suit land originally belonged to Mohammad Asoq. From ext.3 it appears that Mohammad Asoq executed a waqf deed in respect of the suit land and his other lands. From waqf deed, it further appears that Asoq had 4 sons namely Mohammad Hachon, Mohammad Hossain, Mohammad Fazlul Karim and

Mohammad Abdul Karim. Mohammad Asoq appointed himself as first Mutwalli of the waqf Estate and it was stipulated that after his death, his first son Mohammad Hashon would be the Mutwalli. In the waqf deed it was, inter alia, stated, "আমি জীবিত থাকা পর্যন্ত আমি এই ওয়াকফ থেকে মোতওয়াল্লী থাকিয়া নিম্নলিখিত নিয়ামাধিনে কার্য্য করিব। আমার অবর্তমানে এই ওয়াকফনামার নিয়ম অনুসারে আমার জ্যেষ্ঠপুত্র গ্রহীতা শ্রী খান মহাম্মদ হাচন মোতওয়াল্লী থাকিয়া নিম্নের তপছিলের লিখিত সম্পত্তি সান ও সংরক্ষন করিবেন। মোত্তাকীন মোতওয়াল্লী নিযুক্ত হইলে ওয়াকফের ফান্ড হইতে তাহার নিজের ভরন পোষনের ব্যয় ইত্যাদি লহিবেন না। আমার নিযুক্ত বা মোতওয়াল্লী অভ্যন্তরে আমার কনিষ্ঠ ৩ পুত্র মধ্য যিনি সৎ বিবেচক ও বুদ্ধিমান এবং সম্পত্তি রক্ষা করার উপযুক্ত হইবেন তিনিই মোতওয়াল্লী থাকিবেন। এইরূপ পুত্রপৌত্রাদি ক্রমে যিনি সৎ বিবেচক ও বুদ্ধিমান এবং কার্যক্ষম হন তিনি মোতওয়াল্লী হইবে। মোতওয়াল্লী ওয়াকফের ষ্টেট হইতে আপন ভরন পোষনের ব্যয় ইত্যাদি পাইবেন না। মোতওয়াল্লীগণ সম্পত্তি সম্বন্ধীয় শাসন সংরক্ষন ও মলিকানের প্রাপ্য রাজস্ব ইত্যাদি আদায় জন্য নিম্নের তপশীল লিখিত ২১নং সম্পত্তির ২২৭৫/ দাগের।/. দুই কানি নাল জমি যাহা আমার নিজ খাস দখলে আছে তাহা মোতওয়াল্লী আপন খাস দখলে রাখিয়া তদউপস্থিত দ্বারায় অত্র ওয়াকফের লিখিত সম্পত্তির রাজস্ব ইত্যাদি পরিশোধ করিবেন তদ অন্যথায় মোতওয়াল্লী পদ হইতে অবসর হইবেন এবং তৎ বাদে আমার বংশীয় তপশীল উক্ত মোতওয়াল্লী পদে নিযুক্ত হইবেন। ওয়াকফের সম্পত্তি সম্বন্ধে যখন যে দেওয়ানী কি ফৌজদারী যে কোন প্রকারের যেরূপ কোন মোকদ্দমা উপস্থিত হয় তাহা মোতওয়াল্লী নির্বাহ করিবেন এবং তাহার উপযুক্ত খরচ ওয়াকফের ষ্টেট বহন করিবেন। ষ্টেটের টাকা থেকে জমা কোন নিস্পত্তি কি কার্য্য করিতে হইলে মোতওয়াল্লী নিজের অভিপ্রায় এবং বংশীয় অন্যান্য ব্যক্তিগণ সহিত পরামর্শ মতে যাহা ভাল হয় বিবেচনা করে বা সেই প্রকারেই করিতে পারিবেন। মোতওয়াল্লী ষ্টেটের হানি জনক কোন কার্য্য করিলে ও তাহা সাব্যস্য হইলে উক্ত মোতওয়াল্লী কার্য্য হইতে তাহাকে অবসর করিয়া আমার গ্রামস্ব ভদ্র বিশিষ্ট ব্যক্তিগণ অন্য আমার বংশীয় থাকে মোতওয়াল্লী মনোনীত থাকিবেন। তিনিই মোতওয়াল্লী হইবেন মোতওয়াল্লী নিযুক্ত গ্রামস্ব ভদ্র বিশিষ্ট ব্যক্তিগণের পর সম্পূর্ণ ক্ষমতা রইলেন।"

The waqif Mohammad Asoq started the recitation his waqf deed saying "-----খোদাতালার কৃপায় আমি সামীত্ত্ব সমূহের অধিকার হইয়াছি। সেই খোদাতালার নামে সৎ কার্য্যে উদ্দেশ্যে আমার স্বত্ত্বের তপশীল বর্ণিত সম্পত্তি হতে আমার স্বজ্ঞানে সুস্থ শরীরে সরলান্ত-- ----- ওয়াকফ করিলাম।"

It is the case of the contesting defendants that one Nirmal Kantha Roy auction purchased the land of C.S. Khatian No.136 (disputed Khatian) on

24.03.1941 in a Revenue sale. From whom, Fazlul Karim and Abdul Karim (two sons of Waqif Mohammad Asoq) took settlement of the said land. The High Court Division did not find any paper to prove the facts of Revenue Sale and auction purchase by Nirmal Kantha Roy. We also did not find any documentary evidence in support of the claim of Revenue sale and auction. The High Court Division observed that in the plaint the plaintiff admitted the existence of that auction and purchase of the same by Nirmal Kantha Roy. We have perused the contents of the plaint of this suit. We do not find any such admission of the plaintiff in the plaint that Nirmal Kantha Roy auction purchased the suit land in Revenue Sale held on 24.03.1941. The High Court Division misread the plaint, thereby, erroneously observed so. The defendants also did not produce any papers regarding settlement alleged to have been given by Nirmal Kantha to Fazlul Karim and Abdul Karim, the executants of the impugned deeds.

From ext. 'Ka' it appears that Nirmal Kantha Roy filed Rent Suit No.398 of 1948 on 15.04.1948 against Fazlul Karim and one Abdul Mridha stating that he purchased touzi No.1565 of Taluk Nabkeshore Datta in Rent sale under the provision of Act II of 1859 on 24.03.1941 and got sale

certificate and took over possession through Court. In that suit, he prayed for realization of defaulted rent of Rs.1104/-. From ext 'Ka-1' copy of the decree dated 24.08.1948 it appears that the defendants deposited the decretal dues with cost. Copy of the judgment of the said suit has not been filed. From ext-'Kha' certified copy of the register of application for the execution of the decree it appears that auction held in Rent Suit No.398 of 1948 was set aside and the Execution case was disposed of on full satisfaction on 01.03.1949. In the said suit, neither wakf Commissioner nor the Mutwalli of Asoq Ali Waqf Estate was impleaded as party. From the judgment and decree passed in Title Suit No. 488 of 1956 (ext.Ga 208 of 1958) and Ga-1) it appears that Mohammad Fazlul Karim Howlader and Abdul Karim Howlader sons of late Mohammad Asoq, filing the said suit, obtained decree against Hoshen Ali Fakir son of Sabbat Ali Fakir and Keramat Ali Fakir son of Monsur Ali Fakir. They are nobody of the Waqf Estate. In that case also neither the Wakf Commissioner nor the Mutwalli of Asoq waqf Estate was impleaded as party. It is to be mentioned here again that in the waqf deed the waqif categorically stated that "ওয়াকফের সম্পত্তি সম্বন্ধে যখন যে দেওয়ানী কি ফৌজদারী যে কোন প্রকারের যেরূপ কোন

মোকদ্দমা উপস্থিত হয় তাহা মোতওয়াল্লী নির্বাহ করিবেন।” It was the duty of Fazlul Karim and Abdul Karim to pay the defaulted rent or decreetal dues to protect the waqf property which was made by their father. Without doing so, they executed the impugned deeds. Since in all those transactions and suits Waqf Commissioner and Mutwalli of the Waqf Estate were not impleaded as party those are not binding upon them.

The origin of waqf is to the direct prescriptious, of the Prophet (Sm) Ibn Omer as stated in the Jamaa ut Tirmizi that “Omer (R:) had acquired a piece of land in (the canton of) Khaibar, and proceeded to the Prophet (Sm) and sought his counsel, to make the most pious use of it, (whereupon) the Prophet (Sm) declared, ‘tie up’ the property (asl or corpus) and devote the usufruct to human beings, and it is not to be sold or made the subject of gift or inheritance; devote its produce to your children, your kindred, and the poor in the way of God. In accordance with this rule Omer dedicated the property, in question, and the waqf contained in existence for several centuries until the land became wastage. (relied on Commentaries on Mohomedan Law by Amir Ali Syed).

According to Imam Abu Hanifa the meaning of waqf is the detention of a specific thing in the ownership of waqf and the devoting of its profit or products "in charity of poors or other good objects". Imam Abu Yusuf said, "Waqf signifies the extinction of the waqif's ownership in the thing dedicated and detention of all the thing in the implied ownership of the Almighty Allah, in such a manner that its profits may revert to or be applied 'for the benefit of Mankind.'

Three basic principles governed the waqf: the trust was required to be irrevocable, perpetual, and inalienable. Once property was declared waqf by its owner, the trust thereby created was irrevocable. It means (i) inalienable lands used for charitable purposes and (ii) pious endowments.

The origin of Waqf can be traced to the impulse of Muslims to do charitable deeds i.e., to endow property 'in the way of the Almighty Allah'. According to Section 2(1) of the Mussalman Waqf Validating Act, 1913 "Waqf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable. According to section 6(10) of the Bangol Waqf Act, 1934 'waqf' means the permanent dedication by a person professing Islam of any

movable or immovable property for any purpose recognized by the Islamic Law as pious, religious or charitable and includes a waqf by user.

The waqf is irrevocable after possession is handed over to the Mutawalli. The waqif divests himself of the ownership of the property and of everything in the nature of contract from the moment the waqf is created. In purely metaphorical sense the expression "ownership of God" is used but unlike Hindu Law, since conception of a personal God is not recognized, there is no ownership of God or no property belongs to God in the Jural sense, although the ownership of the property becomes reverted in God because God is originally owner of all thing.

We have already found that the High Court Division held that the disputed property is waqf property of Mohammad Asoq Waqf Estate created by a registered waqf deed executed and registered on 30.01.1922 (ext.3) which was duly enrolled in the office of Waqf Commissioner vide E.C. No.10481 on 30.01.1942 under the provision of the Bengal Waqf Act, 1934. Section 70 of the Bengal Waqf Act 1934 specifically provides:

Section 70(1): In every suit or proceeding in respect of any wakf property or of a mutwalli as such except

a suit or proceeding for the recovery of rent by or on behalf of the mutwalli the Court shall issue notice to the Commissioner at the cost of the party instituting such suit or proceeding.

(2) Before any wakf property is notified for sale in execution of a decree, notice shall be given by the Court to the Commissioner.

(3) Before any wakf property is notified for sale for the recovery of any revenue, case, rates or taxes due to the Crown or to local authority notice shall be given to the whose order the sale is notified.

(4) In the absence of a notice under sub-section (1) any decree or order passed in the suit or proceeding shall be declared void, if the Commissioner, within one month of is coming to know of such suit or proceeding, applied to the Court in this behalf.

(5) In the absence of a notice under sub-section (2) or sub-section (3) the sale shall be declared void, if the Commissioner, within one month of his coming to know of the sale, applies in

this behalf to the Court, or other authority under whose order the sale was held."

Since Waqf Commissioner and Mutawalli were not impleaded as parts in view of section 70 of the Bengal Waqf Act, 1934 any judgment and decree passed in respect of disputed waqf properly is not binding upon the Waqf Commissioner/Administrator or Mutwalli of the waqf property. We do not find anything in the pleading in the contesting defendants or in the evidence that the provisions of section 70 of the Bengal Waqf Act, 1934 had been complied with in the proceeding of alleged Rent Sale, Rent Suit No.389 of 1948 and in Title Suit No.488 of 1956. We have already found that no evidence was produced in support of the claim of the defendant that Nirmal Kantha auction purchased the suit land in Rent Sale allegedly held on 24.03.1941.

From the recital of waqf deed it appears that the object, for which the property in question has been dedicated, is charitable, pious or religious in nature and a portion of the usufructs should be used by the descendents. Therefore, the dedication was complete and it could not be divested for any other purposes. Therefore, when a property can be used only for religious or charitable purpose, it

acquires a permanent character. The waqf property vests in the implied ownership of the Almighty in the sense that nobody can claim ownership of it. Even in waqf al aulad, the property is dedicated to the Almighty and only the usufructs are used by the descendants. Once the property is given to waqf, it remains for the waqf for ever. The property cannot be alienated or transferred nor is it subject to the rights of inheritance. It cannot be sold or given away to anybody except in accordance with law. The Islamic Law is a sacred Law, and, thus transaction, or obligation is measured by the standards of religious and moral rules. Those rules are developed through analogical reasoning by Muslim Jurists. When ownership of the waqf property is relinquished by the waqif, it cannot be acquired by any other person, rather it is arrested or detained. In section 56 of the Bangladesh Waqfs Ordinance 1962 Mutwalli's power of alienation of waqf property has been restricted like section 53 of the Bengal Waqf Act, 1934 where the bar to transfer of immovable property of a waqf was provided.

From plain reading of section 70(1)(4) of the Bengal Waqf Act, 1934 it is apparent that in every suit or proceeding in respect of any waqf property the court shall issue notice to the Commissioner

at the cost of the party instituting such suit and proceeding and, in absence of such notice any decree or order passed in the suit or proceeding shall be declared void.

We have already found that no such notice was issued of alleged Rent Sale, Rent Suit No.398 of 1948 and Title Suit No.488 of 1956 upon Waqf Commissioner and Mutwalli. Even they were not impleaded as party in those suit or proceeding. In such view of the matter, the decree or order passed in those suits or proceedings are not binding upon the Waqf Commissioner and by those decrees or orders the Waqf character of that suit land had not been extinguished.

Since the property, in question, is waqf property and the same was not transferred by its actual owner, by the impugned deeds, title of the disputed waqf property had not been vested to the recipients of those deeds and those are mere papers transaction.

Accordingly, we find substance in the appeal.

Thus, the appeal is allowed. Impugned judgment and order of the High Court Division is set aside.

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