

Bench:

Mr. Justice Bhishmadev Chakraborty

And

Mr. Justice Md. Akhtaruzzaman

First Miscellaneous Appeal No. 317 of 2018

Mofti Moulana Syed Abdur Rahman

..... appellant

-Versus-

Md. Kadar Ali and others

..... respondents

Md. Saidur Rahman with Ms. Shaheen Akter Jahan
Advocates

..... for the appellant

Mr. Tabarak Hossain, Senior Advocate with

Mr. Mahmudul Mursalin, Advocate

..... for the respondents

Judgment on 27.02.2024

Bhishmadev Chakraborty, J.

This appeal is directed against the judgment and order of the Additional District Judge, Court No.1, Sylhet passed on 03.01.2018 in Miscellaneous Case No.27 of 2001 under section 50 read with section 35 of the Wakf Ordinance, 1962 (Ordinance, 1962) allowing the miscellaneous case.

Facts relevant for disposal of the appeal, in brief, are that respondents 1-9 as petitioners filed Miscellaneous Case No.27 of 2001 in the Court of District Judge, Sylhet stating facts that Hazarat Syed Shah Bahauddin (R) known as Putla Shah, one of the disciples of Hazarat Shahjalal (R) went to *Vadeshwar* about 700/800 years ago to preach Islam religion. At that time a mosque was constructed and a pond was excavated on the gifted land of local devoted muslims. The mosque is known as Dakshinbhag Jame Masjid. The mosque and entire properties were managed by the elderly muslims of that area and thereafter by a *panchayat*

which was subsequently turned as a managing committee. The suit property was 0.50 acres which was recorded in the name of Masjid Managing Committee in SA *Khatian* 2910, plots 7624, 7625 and 7626 of Vadeshwar mouja. The managing committee maintained proceedings of the management of the mosque from 1960. Lastly in the year 1998 a committee of 11 members was formed where Syed Siddique Ullah was a member. When the abovesaid Siddique Ullah engaged with the activities subversive to the interest of the mosque, the committee expelled him. He then filed a petition to the Administrator of Wakf (respondent 10) on 01.11.1998 for enlisting the property as waqf estate in the name of Syed Zaker and others alias Dakshinbhag Jame Masjid Wakf Estate. In the application he claimed that a wakf deed was executed on 12 Falgoon of 1289 BS by the original owners of the property. The petitioner masjid committee raised objection against the step of enlistment by filing application to the Wakf Administrator. The application for enlisting the suit property as wakf property was heard on several occasions and finally the claim of the masjid committee was rejected by the Administrator on 15.05.2001 and applicant Syed Siddique Ullah was appointed as *mutawalli* and his committee was approved. The petitioner then filed the aforesaid miscellaneous case under section 50 of the Ordinance, 1962 for setting aside the order passed by the Wakf Administrator.

The present appellant firstly as opposite party 2 and subsequently represented by opposite party 4 contested the miscellaneous case by filing written objection. In the objection they denied the fact of the case and contended that the case is not maintainable in its present form; that it is

barred by limitation and not maintainable under section 102 of the Ordinance, 1962. It was further stated that his predecessor Syed Jakir Ibna Syed Roson and others were the original owners of the property and they dedicated it by an unregistered wakf deed executed on 12 Falgoon, 1289 BS. In the deed it has been stipulated that the successors of the original owners would be the *mutawalli* and Imam comprising of local elderly pious muslim. They would receive and maintain the account of different gifts and donations dedicated for the mosque. The predecessors of Siddique Ullah were appointed *mutawalli* and Imam and they used to look after the mosque according to the desire of the wakif. In 1993, the petitioner Masjid Committee destroyed previous accounts and valuable documents kept with the mosque and styled '*Mojlish-e-Khas*' as managing committee. A constitution was adopted in 1962 to manage the wakf estate but due to conflicts between the successors of *wakif* and the local *musallies* another constitution was adopted by violating the conditions of the wakf deed and Syed Siddique Ullah was expelled. He filed an application to the Administrator of Wakf on 01.11.1998 for enlisting the property as wakf property and accordingly it was enlisted on 03.06.1999 in EC Case No.18078 of 1999 and Siddique Ullah was appointed as *mutawalli*. He created a managing committee '*Mojlish-e-Khas*' consisting of 11 members to manage the affairs of waqf estate and the administrator approved the said committee. On an application filed by the Masjid Managing Committee to the then State Minister, an Inspector of Wakf made an inquiry and furnished a report in favour of the wakf estate and consequently the Administrator by its order dated 15.05.2001 rejected the claim of the

Committee. Siddique Ullah being the *mutawalli* has been looking after and managing the mosque and the property of the estate and, therefore, the miscellaneous case would be rejected.

During trial, the petitioner examined 1 witness Md. Obadur Rahman, General Secretary of the managing committee as PtW1 and their documents were exhibits 1-8. The committee of the wakf estate examined 2 witnesses OPtW 1 Mufti Moulana Syed Abdur Rahman and OPtW 2 Dalim Ali and their documents were exhibits Ka-Yeo. However, the Additional District Judge considered the oral evidence and documents produced by the parties and by its judgment and order passed on 03.01.2018 allowed the miscellaneous case, giving rise to this appeal by the committee of the wakf estate.

Mr. Md. Saidur Rahman, learned Advocate for the appellant takes us through the materials on record and submits that the learned Additional District Judge failed to take into account the fact that Syed Zakir and other successors of Hazrat Syed Saha Bahauddin was the recorded owner of the property of *Touzi* No.3945 and *Thak* No.4983 and they made a deed of waqf on 12 Falgoon, 1289 BS; the SA *Bujrat khatian* was prepared in the name of Syed Zakir and subsequently SA *Khatian* 2910 was finally prepared and published in the name of Vadeshwar Dakshinbhag Jame Masjid represented by its *mutawalli* Syed Abdul Fatta and that the disputed property has been finally enrolled as Syed Zakir and others alias Dakshinbhag Jame Masjid Wakf Estate bearing EC No.18708 on 03.06.1999 on the basis of an application of the successors-in-interest of the estate. The Wakf Administrator correctly rejected the application of the

Masjid Managing Committee on 15.05.2001 but the Additional District Judge erred in law in not taking into account the aforesaid facts and law and as such the impugned judgment and order is to be set aside. The Additional District Judge travelled beyond the provision of law of section 50 of the Ordinance, 1962 and relying only on SA *Khatian* allowed the miscellaneous case which is required to be interfered with by this Court. He further submits that the findings and decision that the wakf deed requires to be registered under section 17 of the Registration Act is perverse because under Muslim Law wakf means a permanent dedication by a muslim and as such its registration is not mandatory. Mr. Rahman finally submits that enlistment of property as wakf estate after long lapse of execution of the deed is not barred under section 47(7) of the Ordinance, 1962. The provisions laid in the aforesaid section are not mandatory and as such the findings and decision of the learned Judge to that effect cannot be sustained in law. Since the Masjid Managing Committee failed to prove their claim over the disputed property they are estopped from raising any question that it is not a wakf property. The Additional District Judge ought to have rejected the miscellaneous case considering the aforesaid facts and law and by not doing so erred in law which is to be interfered with by this Court in appeal. This appeal, therefore, should be allowed and the order passed by the wakf administrator on 15.05.2001 be upheld.

Mr. Tabarak Hossain, learned Senior Advocate for respondents 1-9 submits that the aforesaid Dakshinbhag Jame Masjid is a very old mosque. From long ago the affairs of the Masjid and pond, *i.e.*, the property measuring .50 acres along with others were being managed by the

managing committee of the mosque. Moulana Syed Siddique Ullah was a member of the aforesaid committee. He was expelled from the committee due to his activities against the smooth functioning of the mosque. Thereafter, he filed an application to the Wakf Administrator on 01.11.1998 for enrollment of the property as wakf estate. The wakf administrator by its order dated 03.06.1999 enlisted the property as wakf estate provisionally. In enlisting the property he relied on an unregistered wakf deed dated 12 Falgoon, 1289 BS. Mr. Hossain submits that the Masjid Managing Committee specifically stated in the case that the deed is forged and created only to grab the property of the mosque. He pointed us exhibit-‘Ga’ the wakf deed and submits that it is found on the naked eyes that it has been created recently on an old blank stamp paper. As per the wakf deed 7(seven) persons dedicated the property for wakf estate but the exhibit-‘Kha’ proves that 5 persons were the owners of the property. Quantum of land as mentioned in the wakf deed and in the *thak* are not same. The deed proves that it was created by the appellant and his men. He adds that the Administrator enlisted the property provisionally but no such provision is provided in the Ordinance. He then refers to section 47 (7) of the Ordinance, 1962 and submits that after coming into force the aforesaid law, the claimant ought to have filed the application to the concerned authority within 03 months but they slept for years together and filed the application in the year 1998 for enrollment without making any explanation as to the delay. Mr. Hossain further submits that the appellant has nothing to show that he is an heir of the wakif. He refers to the provisions of section 186 of Mullah’s Mohamadan Law, 21st edition and submits that provisions are

there how a wakf is completed which is absent in the alleged deed. The learned Judge considering the evidence of OPtW 1 found that the Masjid Managing Committee has been managing the affairs of the property. The judgment and order passed by the Additional District Judge is based on oral evidence and the documents produced, which may not to be interfered with by this Court in appeal. The appeal, therefore, having no merit would be dismissed.

We have considered the submissions of both the sides, gone through the materials before us and the provisions of law referred to by the parties. It is found from exhibit-1 series that .50 acres of land of SA *Khatian* 2910 plots 7624, 7625 and 7626 has been recorded in the name of Masjid Managing Committee. The Committee paid rent to the concerned authority through exhibit-2 series. Exhibit-4 series are the resolutions of the committee and exhibit-5 series are of income and expenditure of the committee. The above documents prove that the Masjid Committee has been managing the affairs of the property from long ago. In the miscellaneous case they stated of maintaining the record of the property from 1960. We do not find anything in the record that before 1998 there was any sort of claim that the property was wakf property. In the year 1998 Siddique Ullah for the first time filed an application to the Wakf Administrator for enlistment of the property as wakf property. In enlisting the property Siddique Ullah relied on the unregistered deed dated 12 Falgoon, 1289 BS corresponding to 24.02.1883 AD.

We have perused the order passed by the wakf administrator and the deed exhibit-‘Ga’ submitted by the alleged *mutawalli* of the wakf estate. In

the aforesaid document we find the writing of the stamp vendor on the back leaf very old but the writing of the front page is found to be recent. We have clarified the signatures of the executants put on the deed. In the clarification, we find more or less all of the signatures of the executants are given by the same person. Moreover, in the aforesaid deed no *mutawalli* was appointed which is a condition precedent of a valid wakf. Section 186 of the Mullah's Mohamedan Law (20th edition) reads as follows:-

“A wakf inter vivos is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. This view has been adopted by the High Courts of Calcutta, Rangoon, Patna, Lahore, Madras and Bombay, and by the Oudh Chief Court. According to Muhammad, the wakf is not complete unless, besides a declaration of wakf, a *mutawalli* (superintendent) is appointed by the owner and possession of the endowed property is delivered to him.” (*emphasis supplied*)

For the sake of argument, if we accept the unregistered deed of wakf exhibit-‘Ga’ as a genuine document, it cannot be termed as a valid dedication because in condition 1 it has been written, “ওয়ারিশান হইতে উপযুক্ত ইমাম ও মোতওয়াল্লী হইবেন এবং উপযুক্ত না থাকিলে মোতওয়াল্লী ইমাম নিয়োগ করিবেন এবং মসজিদের দান খয়রাত হইতে ইমামের হাজিরা দিবেন।” but no *mutawalli* was appointed therein.

Moreover, in the instant case the so called *mutawalli* failed to prove that the original owner of the suit property was his predecessor in interest. In exhibit-‘Kha’ *Touzi* No.3945 of *Thak* No.4983 property has been shown as 1 acre whereas property in exhibited-‘Ga’, the wakf deed, has been shown 1.5 *keder*. Therefore, exhibit-‘Ga’ do not support exhibit-‘Kha’ as to the quantum of property.

The wakf deed was executed on 24.02.1883 AD but the claimed *mutawalli* filed application for enlistment of the property on 01.11.1998. There is no explanation in any where why they slept for more than 100 years in filing an application for enlistment. Although, the provisions of section 47(7) of the Ordinance, 1962 is not mandatory but since the application has been filed after more than 100 years, the claimed *mutawalli* had to explain the delay which was not done. From the evidence of OPTW 1 it is found that he did not deny that he was a member of the Masjid Managing Committee. The Committee alleged that for Siddique Ullah's activities against the property of the mosque he was expelled from the committee in the year 1998. It appears that after he was expelled from the Masjid Committee, he filed the application to the Administrator for enrolment of the property as wakf property. We further find no provision in the law to enlist a property as wakf property provisionally which the Administration has done in this case. The Additional District Judge in its judgment travelled every four corners of the case and rejected the claim of the appellant for enlistment of the property as wakf property and allowed the miscellaneous case. We do not find any illegality in the impugned judgment and order. The miscellaneous case under section 50 of the Ordinance, 1962 is found maintainable as well. The submission of Mr. Rahman thus bears no substance.

In the discussion made hereinbefore, we find no merit in this appeal. Accordingly, the appeal is dismissed without any order as to costs.

The order of stay stands vacated.

The judgment and order passed by the Additional District Judge in Miscellaneous Case No.27 of 2001 is hereby affirmed.

Communicate the judgment and send down the lower Court records.

Md. Akhtaruzzaman, J.

I agree.