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25.9.2023
Ct. No. 236
SB

C.O. 2107 of 2014

In the matter of : Syed Mohammad Ali Abul Ola @
Saiyed Sah Abul Olla

Mr. Mahamudul Hassan
Mr. Aritra Kumar Thokdar ... for the petitioner

Md. Salahuddin
Md. Ahsanuzzaman
Md. Raziuddinfor the Board of Auqaf

Mr. Shehnaz Tareq Mina
Mr. Intikhab Alam Mina
Mr. Protick Sardar ... for the O.P. Nos. 2 & 3

1. This is an application under Article 227 of the Constitution of India challenging the judgment dated 18.6.2014 passed by Wakf Tribunal, West Bengal in O.A. No. 1 of 2013 while dismissing the application under Section 83(2) of the Wakf Act, 1995 filed by Shah Syed Mohammad Ali Abul Ola challenging the order passed by Board of Wakf on 20.11.2012.
2. Heard Mr. Hassan learned counsel representing the petitioner, Mr. Mina representing the opposite party nos. 2 and 3 and Mr. Salauddin learned counsel representing the opposite party no. 1.
3. It is submitted by Mr. Hassan that in order to dedicate any property by way of Wakf the dedicator Wakif shall have to be the owner of the property.
4. Drawing my attention to the deed of Wakf executed by Mst. Jahannara Khatoon and Jb. Shah Syed Abdul Ofa, Mr. Hassan submits that none of the executors of the deed had the ownership

over the property that was dedicated. Therefore, the dedication is bad in law.

5. It is further submitted that predecessor in interest of the parties Shah Syed Adbul Basat Al-Quadri Al-Chisty who was the original owner of the property, and during his lifetime he executed a deed of settlement conferring life interest to his wife and mother of the petitioner Mst. Jahannara Khatoon and after her demise the settler indicated that the property would devolve upon the petitioner and opposite party no. 3 in equal share.
6. According to Mr. Hasan the terms laid down in the deed of settlement is eloquent enough to hold that the executors of deed of Wakf are not competent to execute the deed in terms of Section 176 of the Mahomedan Law. Therefore, the document styled as Deed of Waqf is invalid. The enlistment of the property register was in contrary to the provision of law and should be removed.
7. Refuting such contention Mr. Mina submits that though the mother opposite party no. 2 has been given the life interest but the Wakf is by user as laid down under Section 188 of the Mahomedan Law. It is further submitted that since after the demise of Shah Syed Adbul Basat Al-Quadri Al-Chisty a tomb was erected over the graveyard and people are offering prayer to that Majhar and it has become Wakf by user and the opposite party no. 2 is administering the property. In a Waqf by user, ownership is not required.

8. It is further contended by Mr. Mina that opposite party no. 2 is to get $\frac{1}{2}$ share in the property after the demise of his mother, therefore, under Section 19 of the Transfer of Property Act the opposite party no. 3 has acquired vested interest and is competent to transfer the same, therefore Section 176 of the Mahomedan Law cannot be said to have been violated by the execution of this document or the document is not lawful.
9. To buttress his point Mr. Mina relies upon the decision of Hon'ble Madras High Court in ***Laskhmana Pillai (died), Thiruvu Konar and ors. –vs- Alankaravel and ors.*** reported in **2022(4) MLJ 178** where it is held :

“42. A perusal of the above said provisions will clearly indicate that where the ultimate beneficiary is an unborn person, immediately on his birth, he acquires right, unless a contrary intention appears from the terms of the transfer. A reading of Section 20 also indicates that the said unborn person acquires a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth. In the present case, on the date of birth of Chellammal, she has acquired a vested interest in the suit schedule property, though her right of enjoyment has been postponed during the life of Thangammal and Arunachalathammal.

43. The learned counsel for the appellants relied upon a judgment of our High Court reported in AIR 1971 Madras 458, in which, paragraph No.7, the learned Single Judge of this Court has held as follows:

“7...When a property has been given to a person to be enjoyed for life without any power of alienation, leaving the remaindermen to take over the property absolutely after the intermittent life interest, can it be said that the life interest holder becomes the owner during his lifetime?. In such a case, the property vests in the ultimate donee to whom the absolute estate has been given after the life interest and he has a present right of future enjoyment. If the interest given is in the nature of woman's estate as understood in Hindu Law, then the remainderman takes only a contingent interest. Section 119 of the Indian Succession Act, 1925 says that where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at

the proper time shall normally become vested in the legatee on the testator's death and such interest is made heritable. Section 19 of the Transfer of Property Act also lays down that where, on a transfer of property, an interest therein is created in favour of a person specifying that it is to take effect after the termination of a prior interest in the same property given to some other person, such interest vests on the date of the transfer and such vested interest is made heritable. In cases of vested interests, the gift is complete and immediate but only the enjoyment is postponed. It is well known that a vested interest is both transferable and heritable.....”.

44. Hence, it is clear that the said Chellammal had acquired vested interests on her birth and gift in her favour is complete and immediate, but only the enjoyment is postponed. The vested interest is transferable and also heritable. While Arunachalathammal (life estate holder) was alive, Chellammal (vested interest) had chosen to deal with the properties by way of mortgage and sale deeds. The mortgagee as well as the purchaser would not be entitled to get possession till the termination of life interest of Arunachalathammal but the title will get conveyed in favour of the purchasers. In the present case, though vested interest had chosen to create encumbrance over the suit schedule property during the life time of the life interest holder, the life estate holder has never chosen to challenge the same. The plaintiffs in the present suit are the children of Chellammal who have no right whatsoever during the life time of Chellammal.”

10. Learned counsel representing the Board submits that the dispute as raised before this Court can only be adjudicated by the Tribunal and suit is required to be filed to answer the issue.

11. This Court has been invited to look into the order impugned whether it suffers from any perversity or the tribunal committed any jurisdictional error in passing of the order. Therefore, whether a Suit is to be filed or not cannot be relevant consideration for the adjudication of this application.

12. From the attending facts of the case it is admitted that the opposite party no. 2 does not have right, title and interest or in other words ownership to dedicate the property. The deed of

Wakf executed by the opposite party nos. 2 & 3 is ex facie in the breach of the provision as laid down under Section 176 of the Mahomedan Law.

13. So far the Wakf by user is concerned it appears that three sons of late Shah Syed Adbul Basat Al-Quadri Al-Chisty purchased a property measuring about 5 decimal of land comprising in plot no. 361 at Mouza Sahapur and the recital of the deed demonstrates that the property was purchased to bury Shah Syed Adbul Basat Al-Quadri ***Al-Chisty who died on 11.11.1975 and subsequent thereto the deed was registered and executed.***

14. Drawing my attention to the order impugned Mr. Mina submits that Wakf Tribunal refused to accept such proposition on the ground that Shah Syed Adbul Basat Al-Quadri Al-Chisty could not have been buried in a land owned by somebody else.

15. Since the deed indicates that the property was purchased with this specific purpose by three sons of deceased Shah Syed Adbul Basat Al-Quadri Al-Chisty who are the parties to this proceeding there is every reason to presume that the property was previously purchased and subsequently this instrument was created.

16. Section 54 of the Transfer of Property Act enunciates that:

“Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

17. Therefore, there is no difficulty to presume that subsequent to purchasing the property the consideration money that was promised by the sons of the deceased was paid and formally the

deed was executed in the year 1976. Learned Tribunal did not consider the issue in the light of Section 54 of the Transfer of Property Act.

18. So far Wakf by user is concerned it relates to the Majhar. The Majhar is built over the 5 decimal of land purchased in the year 1976 where the father of opposite party nos. 3 and 4 as well as the petitioner was buried.

19. Mr. Hassan submits that as one of the sons he is also participating in the URAS festival and all other religious festivals along with his two brothers and mother and he has nothing to say over the performance that takes place centering around the graveyard over the said piece of land being plot number 361 delineated in deed number 3568 for the year 1976.

20. Though Mr. Mina, is joining issue that over there Shah Syed Adbul Basat Al-Quadri Al-Chisty was not buried, when the recital of deed says that place of burial was over five decimal of land comprised within plot no. 361, there is no reason to presume anything contrary to that narrative in the recital of the deed. Though, plot no. 361 is a bigger plot of land and forms a part of deed of settlement executed by the predecessor-in-interest of the parties, this five decimal of land was purchased out of the said plot by three sons for the purpose as described in the recital of the deed.

21. The submission of Mr. Mina cannot be taken into consideration in view of Sections 91 and 92 of the Evidence Act. Therefore, I am of the view that learned Tribunal committed jurisdictional error

while passing this order and without taking into consideration the provision of Section 176 of Mahomedan Law and Section 19 of Transfer of Property Act, while passing the order learned Tribunal has made this order impugned perverse. In my humble opinion, the order impugned should not be allowed to remain in force and should set aside, which I accordingly do. The transfer created in exercise of the vested right, as laid down under Section 19 shall have to remain suspended so long the mother is alive.

22. But before parting with this case, I make it clear that it was a pious desire of the settler that the property would be enjoyed by his wife during her lifetime. The petitioner as well as opposite party no. 3 are the sons of opposite party no. 2 who is the mother. Therefore, she will administer the property absolutely as decided by the settler and income accumulated from the estate would be under her control. It is expected that she will not act with bias as after all petitioner and opposite party no. 3 are her two sons and mother should not be partisan.

23. Consequently the impugned judgement together with order of Board dated 20.11.2012 stand quashed.

24. With these observations, the revisional application is disposed of along with application if any.

25. Let a copy of the order be sent down to the learned Tribunal for information and necessary action.

(Siddhartha Roy Chowdhury, J.)

* *Vide Order dated 06.10.2023.*

06.10.2023

1. Inadvertent typographical errors are crept into the order dated 25.8.2023 passed in this revisional application.
2. The said order passed instead of “25.8.2023”, it should actually be “25.9.2023”.
3. In paragraph 1 “Shah Syed Mohammad Ali Abul Ola” has been depicted as “Shah Syed Md Ali Abdul Olali”.
4. In paragraph 12 it is written that “the deed of Wakf executed by the opposite party no. 2” and there is any inadvertent omission as to opposite party no. 3. The said sentence should be read as “The deed of Wakf executed by the opposite party nos. 2 & 3 is *ex facie* in the breach of the provision as laid down under Section 176 of the Mohammedan Law”.
5. In paragraph 23 the impugned judgement together with order of Board dated “28.11.2012” it should actually be “20.11.2012.”
6. All these typographical clerical mistakes be removed.
7. The other portion of the order shall remain unchanged.

(Siddhartha Roy Chowdhury, J.)