

2025 SCC OnLine Cal 681

In the High Court of Calcutta
(BEFORE BIBHAS RANJAN DE, J.)

Jalaluddin Khalifa and Others ... #

Versus

Amirul Islam Khalifa and Others ... #

CO No. 1613 of 2022

Decided on January 22, 2025

Advocates who appeared in this case :

M. Hossain, Raja Ghosh, Tanweer J. Mandal, Arnab Dutt, Ms Labani Dey and Ms Mohua Biswas, Advocates, for the appearing parties.

The Judgment of the Court was delivered by

BIBHAS RANJAN DE, J.— The challenge in this revision application is the judgment dated 15-3-2022 passed by the learned waqf tribunal, West Bengal in connection with Suit No. 72 of 2016 by invoking jurisdiction under Article 227 of the Constitution of India.

Background

2. The case of the petitioners in brief is that their predecessors viz. Hazi Ibrahim Khalifa created a Waqf by executing Waqf Deed on 27-11-1933 dedicating properties measuring 25 acres 72 decimals for the maintenance of his family and for religious, pious and charitable purposes. The Waqf Estate is enrolled with the Board of Auqaf under EC No. 1454 in the name of "Hazi Ibrahim Khalifa Waqf Estate" under classification of Waqf-alal-aulad. It is pleaded that plaintiffs are beneficiaries of the Waqf Estate and are entitled to be Mutawalli of the Waqf Estate. Plaintiffs are enjoying the Waqf properties with their residence and perform charitable and religious activities as per direction of the waqif. The Plot No. 46 measuring 1.86 acres under C.S. Khatian No. 931, L.R. Khatian Nos. 2781, 3762, 3791 and 3870, Mouja-Zirakpur, JL No. 94, PS Basirhat, District North 24 Parganas is part of the Waqf Estate and same is shown in the schedule of the suit property. It is further pleaded that in the month of January 2016, one Md. Nurul Islam Khalifa (since deceased) tried to make pucca construction over Schedule B property which is part of Schedule A property, illegally. Plaintiffs and other beneficiaries of the Waqf Estate raised objection. Defendant 1 (now deceased) allegedly claimed 1.22 acres of Schedule B property out of 1.86 acres as his secular property by virtue of registered partition deed being No. 10991 dated 3-12-1956. It is stated that registered partition deed dated 3-12-1956 is illegal and after knowing the illegality of partition deed, plaintiffs made

complaint before Board of Auqaf and Board of Auqaf sent a letter to Defendant 1 (since deceased) on 13-7-2016 with a direction to make his comment regarding registered Partition Deed but no fruitful result sprouted. It is pleaded that Defendant 1 (now his legal heirs) have no right, title and interest in the suit property and cannot claim Schedule B property as secular property. The main purpose of executing Partition Deed was to grab the waqf property illegally and for personal gain. It is pleaded that it is a settled law that once a waqf always a Waqf and transfer of Waqf property is illegal. It is pleaded that cause of action arose firstly on 3-12-1956 when alleged Deed of Partition was executed but it lastly arose in the month of January 2016 when defendants started to make pucca construction over the Schedule B property illegally.

3. Thereafter, the petitioners filed a suit vide Suit No. 72 of 2016 before the learned Waqf Tribunal, West Bengal, praying for a decree of declaration that the Partition Deed being No. 10991 dated 3-12-1956 was null and void and/or invalid and/or inoperative. A further prayer was also made for a decree of declaration disentitling the respondents' deceased father to have any right, title and interest in respect of the suit property in a secular manner by virtue of the Partition Deed being No. 10991 dated 3-12-1956 and for a decree of permanent injunction restraining the respondents' deceased father, their men, agent and associates from interfering into the suit premises in any secular manner which was rejected by the learned Tribunal vide the judgment dated 15-3-2022. Being aggrieved by and dissatisfied with the impugned judgment, the revisionists have preferred the instant application.

At the bar

4. Learned counsel, Mr Arnab Dutt, appearing on behalf of the petitioners has contended that there is no dispute that the subject property is Waqf aulad property under the name and style of Hazi Ibrahim Khalifa Waqf Estate. Mr Dutt has referred to the provision of Section 104-A of the Waqf Act and submitted that transfer of Waqf property byway of sale deed, exchange, mortgage, etc. shall be construed as void ab initio. It has been further contended that Waqf property cannot be partitioned by metes and bound segregating the same into different shares demolishing the unity of Waqf property. With regard to limitation, Mr Dutt has highlighted the provision of Section 107 of the Waqf Act which mandates non-application of the Limitation Act in a suit for possession of immovable property comprised of any Waqf or for possession of interest in such property. Referring to Sections 104-A and 51, Mr Dutt has argued that no partition/exchange deed can be executed in respect of any Waqf property without the prior permission of the Waqf Board. In support of his contention, Mr Dutt

relied on a case of *Commr. of Waqfs v. Golam Ahmed*¹, wherein the Hon'ble Division Bench of this Court dealt with an issue of public Waqf which was partitioned and even a compromise decree was passed. Therefore, the nomenclature of the abovereferred case has got no similarity with the case at hand.

5. In opposition to that, learned Counsel, Mr Tanweer J. Mandal, appearing on behalf of the defendant/Opposite Party 1 has referred to the deed of Waqf and contended that construction of residential building by the Mutuwali or their legal heirs were allowed for the residential purpose. In support of his contention, Mr Mondal referred Para 16 of the deed of Waqf. Mr Mondal has referred to the alleged deed of partition and submitted that the same is a mere family arrangement and money was paid out of good gesture and it was not a document of transfer in any form.

6. Mr Mondal has relied on the ratio of following cases:

- *Ramaswami Naidu v. Gopalakrishna Naidu*².
- *P.K. Mohan Ram v. B.N. Ananthachary*³.
- *Ahmed G.H. Ariff v. Commr. of Wealth Tax*⁴.
- *Sk. Aftab Hossain v. Biswanath Chakraborty*⁵.

7. Through the abovereferred judgments, Mr Mondal, has tried to highlight the fact that the court should carefully examine the document as a whole, look into its substance, treatment of the subject by settlor/executant, intention as appearing from the express language or by necessary implication and prohibition, if any, against revocation thereof and the form or nomenclature of the document.

Analysis

8. Entire dispute arising out of the contentious issues only revolves around the partition deed executed by the predecessors-in-interest of the parties to the suit.

9. Before delving into the merit of the case at hand, I think it would be apt to first reproduce the specific observations made by the learned Tribunal in answer to the prayers of the plaint which are to the effect that:

“So far as prayer (a) is concerned, suit properties are admittedly Waqf properties neither parties are claiming suit properties as their personal properties. Grievances of the plaintiffs mainly are in Ext. A/Ext. 5 which was executed by their own grandfather along with father of Defendant 1. By executing Ext. 5/Ext. A neither Haji Md. Samsuddin Khalifa nor Raisuddin Khalifa ever intended to transfer the Waqf property. They admitted suit properties as Waqf properties and their descendants/legal heirs are also admitting suit properties as Waqf properties. In the record of Board of Auqaf, the suit

properties are also recorded as Waqf properties. Then where is the question of redeclaration of the suit properties as Waqf properties.

So far as prayer (b) is concerned, the Partition Deed being No. 10991 dated 3-12-1956 was/is family arrangement to use and occupy the certain properties by the descendants of the waqif for residential purpose. The Waqf in question is the private (Waqf-alal-aulad) Waqf and there is whisper in the deed of waqf to use and occupy the property (Schedule B property) by the descendants for residence and also to get benefit of usufruct from the remaining waqf property. Both the plaintiffs and defendants are descendants of waqif. Perhaps they are fighting for getting more area of the waqf properties for their use and occupation as residence. This is not suit for partition before us, so we cannot quantify the share of parties in this case it is made clear that no suit for partition relating to Waqf property is maintainable within ambit of the Waqf Act. But fact remains that Partition Deed dated 3-12-1956 is not a "transfer" under any stretch of legal sense and hence there is no need to declare the same as null and void. Moreover, same is time-barred.

So far as prayer (c) is concerned, both the plaintiffs and defendants are entitled to get the benefit from the Waqf Estate as per stipulations made in the Deed of Waqf. None of the parties are strangers in Waqf Estate. No group can have better right over the other. Rights of the parties are confined to the mandates of Deed of Waqf. As a family arrangement, Haji Md. Samsuddin Khalifa and Raisuddin Khalifa executed deed dated 3-12-1956. By this document no party can derive any secular right. The property in question was Waqf, is Waqf and will remain Waqf and there is no question of deriving title, right or interest from Ext. A/Ext. 5.

So far as prayer (d) is concerned, defendants cannot be restrained from using the suit property as Waqf property. Defendants are admitting that, suit properties are waqf properties and they are not saying that suit properties are their secular properties and hence there is no question restraining them from using the properties permanently by decree of permanent injunction.

So far as prayers (e) and (f) are concerned, we do not find any reason to grant either cost of litigation or any other relief in favour of plaintiffs."

10. Now coming to the case at hand, after scrutiny of the pleadings as well as the arguments advanced and also the Waqfnama, it is an admitted position of fact that the subject property is a Waqf property having the nomenclature of Waqfalal-aulad within the meaning of Section 3 (r)(iv) of the Waqf Act, 1995 (for short Act of 1995). In addition to that, it would be safe to conclude that the tenor of the waqfnama clearly spells out that it is not a public Waqf but a private

Waqf for the maintenance of his family as well as for religious, pious and charitable purposes. It is also revealed from the Waqfnama that the parties/predecessors-in-interest of the parties are beneficiaries of the Waqf Estate and are entitled to be Joint Mutawallis of the said estate. The parties to this application are enjoying the Waqf property by using it as their residence as well as by performing charitable and religious activities in consonance with the Waqfnama.

11. It is further admitted that on 3-12-1956 a partition deed was executed between the grandfather of the respondents and the grandfather of the petitioners herein for a monetary consideration to the tune of Rs 162 which was paid by the grandfather of the respondents to the grandfather of the petitioners in respect of some excess land.

12. Mr Dutt has contended that the said partition deed was actually a deed of exchange which is barred under Sections 51 and 104-A of Act of 1995. It is submitted that deed of exchange cannot be executed without the prior permission of the Board of Auqaf.

13. In this regard, it would be pertinent to first discuss about the essentials of a valid deed of exchange as envisaged in Section 118 of the Transfer of Property Act, 1882 which runs as follows:

"118. 'Exchange' defined.—

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale."

14. The Supreme Court in a plethora of decisions has summarised the requirements for a valid exchange which are—

- Mutual transfer of Ownership : Both parties must transfer ownership of their respective properties to each other.
- Written Instrument : The transfer of property in an exchange must be executed through a registered instrument if the value of the properties involved is Rs 100 or more. This aligns with the provisions of Section 54 of the Transfer of Property Act, which mandates that such transfers must be made by a registered instrument.
- Registration : As per Section 49 of the Registration Act, any document that is required to be registered but is not, will not confer any title or be admissible as evidence in court. Therefore, an exchange deed must be registered to be valid and enforceable.
- Consideration : Unlike a sale, an exchange does not involve a monetary consideration. Instead, the value of the properties exchanged serves as the basis for the transaction.

- Possession : While delivery of possession is not explicitly stated as a prerequisite for the validity of an exchange, it is generally implied that possession should be transferred to effectuate the exchange.

15. Now coming to the case at hand, from nowhere it can be ascertained that there was mutual transfer of ownership of any immovable property which is sine qua non for a valid "exchange". Moreover, a bare perusal of waqfnama especially Clause 12 would clearly indicate the fact that the Wakif, namely, Hazi Ibrahim Khalifa himself by executing the deed of Waqf, partitioned and settled several portions of the Waqf Estate in between his sons and their upcoming generations for their residential as well religious purposes which have been duly performed by the parties. In addition to that, Clause 16 of the said Waqfnama would further crystallize the fact that the Wakif himself permitted his successors or mutawallis to carry on construction works for their own convenience at their own costs. So, strictly keeping in mind the contents of the Waqfnama it can easily be understood that the wakif himself permitted the petitioners as well as the respondents to do construction work in the said Waqf Estate for their residential purpose.

16. Moreover, it is not the case that the respondents ever challenged the status of the said property to be a secular property. It is unrebuttable that a property which is made Waqf once shall always remain the same. A careful scrutiny of the alleged deed of partition/Apus Bantannama would reflect that at best the partition deed can be termed as an amicable family rearrangement between two brothers who were then joint mutawallis of the subject property.

17. The discussion in the foregoing paragraphs clearly boils down to the fact that the plea of the petitioners in connection with the fact that the alleged deed of transfer would tantamount to sale or an exchange is not sustainable. Therefore, the connected prayer of the petitioners that the alleged Bantannama was in violation of Sections 51 and 104-A of the Waqf Act does not have any legs to stand. From that point of view, in no stretch of imagination, the said partition deed can be termed as sale/gift/exchange/transfer of Waqf property/alienation of Waqf property without prior sanction of Board and as a sequel the said deed cannot be said to be void ab initio which will attract the provisions of Sections 51 and 104-A of the Act, 1995.

18. Mr Dutt harped on a string of limitation by referring to the provision of Section 107 of the Act, 1995. It is argued that provisions of the Limitation Act have no application in the suit involved in this revision application.

19. Section 107 of the Act, 1995 deals with non-application of the Limitation Act, 1963 in a suit for possession of immovable property

comprised in any Waqf or possession of any interest in such property. Therefore, in a suit for possession within the meaning of Section 52 of the Act, 1995, provisions of the Limitation Act, 1963 does not apply. Section 52 of the Act clearly spells out the power of the Board of Waqf to initiate inquiry in this regard and after being satisfied that the transfer of Waqf property was made without the previous sanction of the Board in contravention of the provision of Section 51, the Board may sent requisition to the Collector having jurisdiction. But the suit involved in this revision application does not deal with any prayer for recovery of possession.

20. At this juncture, I would like to shift my focus towards the issue of limitation. It is the case of the petitioners that the cause of action only arose in the year 2016 when the defendant/opposite parties herein started to make pucca construction over the subject property. But nowhere in the plaint it is averred on behalf of the petitioners that the partition deed executed in the year 1956 was not within their knowledge prior to 2016 and only in the month of January 2016 the petitioners first came to know about the previous partition deed. If that be the position Article 59 of Part IV of the schedule to the Limitation Act, 1963 applies wherein a suit for cancellation or setting aside an instrument, has to be filed within 3 years from the date of execution of the said instrument. In the case at hand, it is admitted that the partition deed was executed in the year 1956 whereas the suit was filed in the year 2016 i.e. well beyond the period of limitation.

21. In the aforesaid view of the matter, I am unable to interfere with the judgment impugned in this revision application.

22. As a sequel, the instant revision application being CO No. 1613 of 2022 stands dismissed.

23. Interim order, if there be any, stands vacated.

24. Connected applications, if there be, also stand disposed of accordingly.

25. Parties to act on the server copy of this order duly downloaded from the official website of this Court.

26. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

¹ *Commr. of Waqfs v. Golam Ahmed*, 1990 SCC OnLine Cal 168 : AIR 1991 Cal 24

² *Ramaswami Naidu v. Gopalakrishna Naidu*, 1977 SCC OnLine Mad 29

³ *P.K. Mohan Ram v. B.N. Ananthachary*, (2010) 4 SCC 161 : (2010) 2 SCC (Civ) 78

⁴ *Ahmed G.H. Ariff v. Commr. of Wealth Tax*, (1969) 2 SCC 471 : (1970) 76 ITR 471

⁵ *SK. Aftab Hossain v. Biswanath Chakraborty*, 2019 SCC OnLine Cal 2354

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