Kutub UddIn Vs. Waqf Alalaulad of Mt. Fatima Begam

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Court : Allahabad

Decided On : Mar-29-1940

Reported in : AIR1940All383

Appellant : Kutub Uddin

Respondent : Waqf Alalaulad of Mt. Fatima Begam

Judgement :

Collister, J.

1. This is a defendant's second appeal. Mt. Fatma Begam was the owner in her own right of certain zamindari property, which has an income of Rs. 121-5-3. On 22nd January 1927 she executed a waqf alal-aulad under Act 6 of 1913, in which she appointed herself as the first mutawali and after her death the plaintiff, whose name is Ghulam Jilani. The deed of waqf provides that after the death of Ghulam Jilani the office of mutawalli shall go to such of his male issue as may be fit to hold the post, and that in the event of no such issue surviving, it shall similarly pass to the-male issue of the plaintiff's brother, Inam Jilani; and if no male issue of Inam Jilani is alive, then the succession shall be transferred to the issue of Mehdi Hasan, the plaintiff's father in the female line. Para. 2 of the instrument goes on to provide as follows:

If, God forbid, none of the male or female issue-of Mehdi Hasan aforesaid is alive, that member of my father's family who shall be deserving shall be the mutawalli. In the absence of any such person: the District Judge shall have power to appoint any one of the mohalla or of another mohalla whom, he likes as mutawalli, but it shall be the duty of every other mutawalli of the mohalla, etc., to all along file accounts of the income and expenses' in the Court concerned.

2. In para. 8 it is provided that it shall be the duty of a mutawalli appointed by the District Judge to spend the whole income of the property upon the fateha of M. Fazal Rasul and the other ancestors of the settlor. On 26th July 1935 Mt. Fatma Begam died, but when the plaintiff applied for mutation in his favour, the defendant-who is a brother of the settlor objected and the plaintiff's application was disallowed. Hence this suit. The suit was contested on various grounds, but it has been decreed by both the Courts below. Three pleas have been taken before me by learned Counsel for the defendant-appellant. The first is that the plaintiff does not belong to the settlor's family within the meaning of Section 3(a) of Act 6 of 1913, and this plea is based on the fact that the plaintiff is the grandson of a sister of the settlor's deceased husband. But he is also the grandson of the settlor's maternal uncle, and it has been found by the learned Judge of the lower Appellate Court that he was brought up by the settlor and lived with her as her own child. In Ghazanfar Husain v. Ahmadi Bibi (1980) 17 AIR All 169 it was held that the word 'family' in Section 3(a) of the Act has been used

by the Legislature in its broad popular sense so as to include all persons descended from a common progenitor. The plaintiff and Mt. Fatma Begam were descended from a common progenitor, and learned Counsel for the defendant-appellant has ultimately conceded that the plaintiff must be regarded as a member of the settlor's family. There is therefore no force in this plea. The second point taken is that there is no ultimate reservation of any sort, as required by the provision to Section 3 of the Act. But this plea also fails, for it is clearly provided in para. 8 of the deed of wakf that, in the event of a mutawalli having to be appointed by the District Judge on account of the failure of the male and female line of Mehdi Hasan, it shall be the duty of such mutawalli to spend the entire income of the property on the fateha of M. Fazal Rasul and the other ancestors of the settlor. This is clearly an ultimate reservation as regards the income of the property. The third and most important plea taken in this appeal is that the performance of fatehas cannot be regarded as a 'religious, pious or charitable purpose' within the meaning of the proviso to Section 3 of the Act. In Phul Chand v. Akbar Yar Khan (1897) 19 All 211 it was held by a Bench of this Court that the dedication of property for the performance of Fateha and Kadam Sharif is valid. A contrary view was expressed by Karamat Husain J. in Fakhruddin Shah v. Kifayatullah (1910) 7 ALJ 1095. At p. 1097 the learned Judge says:

The fateha and urs ceremonies in their popular sense are neither religious nor charitable in the sense of a charity for the benefit of the poor which they may claim as a matter of right. It therefore follows that a wakf for the fateha or urs ceremonies in their popular sense cannot be a valid wakf.

3. In Mazhar Husain Khan v. Abdul Hadi Khan (1911) 33 All 400 one of the purposes of a wakf was the performance of the annual fateha of the settlor and of her husband and other members of her family. At p. 167 Stanley C.J. says:

Fateha ceremonies do not seem to fall within any definition of a charitable or religious use and tend to no public advantage. They closely resemble masses for the repose of the souls of deceased persons which have been held in Ireland to be contrary to public policy and invalid.

4. But Banerji J. who was the other member of the Bench, took a different view. At p. 172 he says:

Fateha...is 'the offering up of prayers to the Almighty for the remission of sins and the acceptance into heaven of the individual in whose name it is desired.' This undoubtedly is a religious act, and expenses for such an act cannot but be regarded as expenses for a religious purpose. The weight of authority is in favour of the view that a wakf for the performance of fateha ceremonies of the donor and of the members of his family is valid.

5. The learned Judge then refers to Phul Chand v. Akbar Yar Khan (1897) 19 All 211 and other authorities. In Ramanadhan Chettiar v. Vava Levvai Marakayar (1916) 3 AIR PC 86 their Lordships of the Privy Council at p. 146 say:

As far as the fateha is concerned, it is to be the 'customary' ceremony that the trustees are to perform without fail. Part of that ceremony is to feed the poor.

6. The next case is Mukarram Ali Khan v. Anjumanunnissa Bibi (1924) 11 AIR All 223. There a certain person had dedicated a portion of his property for purposes of charity,

including maintenance of his relatives and dependents, and for the reading of fateha for the salvation of his soul. A Bench of this Court, Rafiq and Stuart JJ., held that such a dedication was a valid waqf. At p. 925 the learned Judges say:

We think that the real object of Mardan Ali Khan was to dedicate a portion of this property for the reading of the fateha and forumur-i-khair, (charitable purposes) including the maintenance of his poor relatives and dependents. Such a dedication is, it is not denied, valid under the Mahomedan law.

7. Finally there is a case from Bombay. This is Mt. Azimunnisa Begum v. Sirdar Ali Khan (1927) 14 AIR Bom 387 At p. 390 Mirza J., observes:

The learned Judge admits that the recital of the fateha prayer is a religious ceremony. It confers a merit upon the person who recites it and bestows the benefit of that recital on the soul of the deceased. The fateha ceremony also involves the distribution of food to the persons assembled, primarily the poor and incidentally others who may be present. It certainly is considered to be more meritorious on such occasions to feed the poor than the well-to-do. There is nothing in the text writers, so far as I am aware, to warrant the assertion that they regard the fateha ceremony as superstitious or irreligious. On the contrary, there seems to be abundant proof that such ceremonies are regarded as being both religious and charitable.

8. Further on the learned Judge says:.in this country at least the anniversary fateha or urs ceremonies at the tombs of ordinary individuals and specially of saints form an integral part of the religious life of the general body of Mahomedans.

9. No other authorities have been brought to my notice. I agree with the learned Judge of the lower Appellate Court that the weight of authority supports the view that the performance of fateha ceremonies is a religious and charitable object; and that being so, it follows that the dedication in question is valid. This appeal therefore fails and is dismissed with costs. Permission to appeal under the Letters Patent is refused.