

Syed Mohammad Hasan Vs. Syed Mohammad Hamid Hasan and ors.

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Court : Allahabad

Decided On : Sep-27-1945

Reported in : AIR1946All395

Appellant : Syed Mohammad Hasan

Respondent : Syed Mohammad Hamid Hasan and ors.

Advocate for Pet/Ap. : Mr. Mushtaq Ahmad

Judgement :

Malik, J.

1. Bibi Sughra, Begam, daughter of Baja Saiyed Mohammad Baqar Ali Khan, defendant 11 in the suit No. 22 of 1941, was the owner of considerable property. On 6th October 1928, she executed a deed of waqf. The waqf property was divided by her into three lots. Of the first lot she appointed her son Haji Saiyed Mahmudul Hasan, as the mutwalli, of the second lot she appointed her second son, Haji Saiyed Wasudul Hasan, as the mutwalli and of the third lot she was to be herself the mutwalli. Haji Saiyed Mahmudul Hasan died on 28th September 1939. Haji Saiyed Masudul Hasan is not a party to this litigation and we are informed that he is still alive. Bibi Sughra Begam, we are told, has died during the pendency of this appeal. Under Para. 18 of this deed of waqf she gave Saiyed Mahmudul Hasan the right to fix wazifa or lay down any conditions in his lifetime for the sake of his descendants, wives or other descendants and their descendants. This was

to be done either by executing a registered document or by a writing deposited with the District Judge. Haji Saiyed Mahmudul Hasan purporting, to act under the authority given to him in this paragraph executed, a will dated 2nd February 1938, by which he appointed his son, Saiyed Mohammad Hasan, who is defendant 1 in this litigation, as the mutwalli after him of the entire property. He further directed that a sum of Rs. 200 per mensem was to be paid to each of his four sons and Rs. 25 per mensem to each of his five daughters, who are defendants 6 to 10. His first wife, Bibi Akbari Begam, had died in the year 1932. He provided that in case he remarried a second wife, she would get Rs. 50 per mensem as maintenance allowance during her lifetime and if any male or female issue was born of the second wife he or she was to get maintenance allowance at the same rate as the sons and daughters by his first wife. Soon after this will Haji Saiyed Mahmudul Hasan married Bibi Siddiq Fatma, defendant 2. On 25th February 1936, Haji Saiyed Mahmudul Hasan executed another will by which he cancelled his former will. He had reserved to himself the right to cancel his first will by para. 17 of that will. Under this new will he maintained the rate at which allowances were to be paid to his sons and daughters but increased the allowance to his wife from Rs. 50 to Rs. 250 and provided that, if the mutwalli did not pay her the allowance for a period of six months, then she would be entitled to claim maintenance at the rate of Rs. 400 per mensem. In this will too the testator reserved to himself the right to modify or alter its terms, if he wished to do so (see Para. 16). On 17th June 1938, Haji Saiyed Mahmudul Hasan executed his last will under which he made substantial changes in the allowances to be given to his sons and daughters. The allowance of Mehdi Hasan and Ali Hasan, two of his sons, defendants 4 and 5, was fixed at Rs. 375 each per month. The allowance of Hamid Hasan, plaintiff in the suit, was reduced from Rs. 200 to Rs. 75. No allowance was fixed for Saiyed Mohammad Hasan, the mutwalli nominated by him. His wife, Bibi Siddiq Fatma, defendant 2, was to get an allowance of Rs. 375 per month. Abrar Fatma, his daughter by Bibi Siddiq Fatma, defendant 3, was to get an allowance of Rs. 100 per month. The other five daughters, defendants 6 to 10 were to get allowances, at the rate of Rs. 25 each as provided in the previous wills.

2. Haji Saiyed Mahmudul Hasan died, as we have said, on 28th September 1989, and Saiyed Mohammad. Hasan, defendant 1, became the mutwalli of the waqf

property. Saiyed Hamid Hasan on 20th August 1940, claiming Rs. 2146-11-6 as the maintenance allowance payable to him from 29th September 1939 to 20th August 1940, filed Suit No. 22 of 1941. This claim for the recovery of the money was filed against Saiyed Mohammad Hasan, defendant 1. According to the plaintiff, Saiyed Mahmudul Hasan after he executed his first will dated 2nd February 1933, exhausted the power given to him under para. 18 of wakf deed and had no right to execute the second and the third wills. He, therefore, brought the suit on the basis of the first will and claimed a declaration that the second and the third wills were invalid and inoperative and impleaded all those who were interested in the estate of Saiyed Mahmudul Hasan, i.e., his sons, his daughters, his widow and his mother.

3. The defendants filed a number of written statements. Three distinct defences were raised by separate sets of defendants to this action. The contention of one set was that the wakif had no right to delegate the authority, to nominate beneficiaries, to Saiyed Mahmudul Hasan who had, therefore, no right to execute any of the three wills. The second set supported the plaintiff and pleaded that para. 18 of the wakf deed de-legating the authority to Saiyed Mahmudul Hasan to nominate the beneficiaries was perfectly valid and he had, therefore, the right to execute his first will dated 2nd February 1933, but after having done that he had exhausted his powers and had no right to execute the second and third wills which were, therefore, invalid, the first will being the only operative will. The last set which consisted of Mehdi Hasan, defendant 4, Ali Hasan, defendant 5, Bibi Siddiq Fatma, defendant 2, and Abrar Fatma, defendant 3, urged that it was the third will which was effective, being the last will and testament of Saiyed Mahmudul Hasan, and the plain, tiff was entitled to get nothing more than Rs. 75 per menssm. The written statement of Saiyed Mehdi Hasan is at page 12. He urged that the plaintiff was not entitled to get a declaration that the second and third wills were invalid and if he was to be given a decree for maintenance, he could only be paid that sum at the rate of Rs. 75 per mensem as provided for in the third will dated 17th June 1938. During the pendency of this suit by Saiyed Hamid Hasan, which was filed on 20th August 1940, Saiyed Mehdi Hasan filed a suit, No. 27 of 1941, on 3rd May 1941, claiming a sum of Rs. 5925 being the maintenance allowance at the rate of Rs. 375 per mensem, from 28th September 1939 to 29th April 1941, as

provided for in the third will. These two suits were heard and decided together by the learned Civil Judge of Aligarh in a judgment dated 3rd September 1941.

4. The lower Court found that para. 18 of the wakf deed was valid and that Saiyed Mahmudul Hasan was duly authorised to nominate the beneficiaries. It further held that Saiyed Mahmudul Hasan having executed his first will dated 2nd February 1938, had no power to revoke or cancel any annuity fixed under the first will, but if there remained any surplus to be disposed of, the power granted in para. 18 was operative qua that surplus even after the execution of the first will and he had a right to give further directions as to how that surplus was to be distributed. The question of surplus became material because there was a possibility of there being additions to the trust property and to the income thereof. The wakif in para. 12 of the deed of wakf dated 6th October 1928, had made a provision that a 20-biswa share in Mauza Sira in Tahsil Anupshahr; District Bulandshahr, and Rs. 72 annually were to be given to Mt. Khurshed Bano, the widow of her deceased brother, Saiyed Asghar Ali Khan, for her maintenance during her lifetime. After the death of the widow, the income of the said village was to revert to the wakf and half of it was to be included in lot No. 1 and the other half in lot No. 2. On the death of the wakif lot No. 8 was to be divided into two lots and half of it was to come to lot No. 1 and half of it to lot No. 2 and in certain contingencies the whole of lot No. 3 was to come to lot No. 1. The learned Civil Judge held that; though the first will was valid and could not be revoked or cancelled, in case there was any surplus income to be disposed of, the third will would be operative qua the surplus income and the extra allowances provided for in the third will for Saiyed Mehdi Hasan, Ali Hasan, Bibi Siddiq Fatma and Abrar Fatma should be paid out of the surplus. The learned Judge decreed the suit of Saiyed Hamid Hasan, plaintiff, at the rate of Rs. 200 per mensem but refused to give a declaration that the second and third wills were invalid and ineffectual. In the suit filed by Saiyed Mehdi Hasan claiming maintenance allowance at Rs. 375 per mensem the learned Judge gave a decree at the rate of Rs. 200 only as the plaintiff had not established that there was any surplus income on the date when the suit was filed. After taking into account all payments made to the two plaintiffs and calculating maintenance allowance at the rate of Rs. 200 per month each, the suit of Saiyed Hamid Hasan was decreed for Rs. 800 and the suit of Mehdi Hasan for Rs. 1600 for the periods

up to the date of the suit.

5. In Suit No. 22 of 1941 filed on behalf of Saiyed Hamid Hasan Saiyed Mohammad Hasan, defendant 1, who was the mutwalli, filed First Appeal No. 404 of 1941. Two cross-objections were filed under Order 41, Rule 22, Civil P.C. One dated 18th March 1942 was filed by Ms. Panna Lal, -advocate for the plaintiff respondent, Saiyed Hamid Hasan, who claimed that the Court below should have granted a declaration that the second and third wills were 'invalid. The other cross, objection was filed by defendant 4, Mehdi Hasan, (plaintiff in the other suit) in which he pleaded that the last will of Saiyed Mahmudul Hasan, dated 5th May 1938, should have been treated as containing the final scheme of management of the wakf property and that was the only document that was operative and by it the first and second wills had been revoked. The appellant, Saiyed Mohammad Hasan, challenged all the three wills on the ground that the wakif had no right to delegate authority to Mahmudul Hasan to execute any of the three wills and all the three of them were invalid.

6. Mr. Mushtaq Ahmad, counsel for the appellant, has made a statement in this Court that his client, Saiyed Mohammad Hasan, withdraws the plea that para. 18 of the wakf deed, dated 6th October 1928, was invalid and accepts the position that the wakif, Mt. Sugra Begam, had the right to delegate the authority to Saiyed Mahmudul Hasan to provide a scheme for beneficiaries. Learned Counsel accepts the first will executed by Saiyed Mahmudul Hasan, dated 2nd February 1938, under which each of the sons of the testator was entitled to Rs. 200 per month and each daughter was entitled to Rs. 25 per month and his wife was entitled to Rs. 50 per month. On these admissions being made it must be held that he concedes that the decision of the Court below that the first will was valid was correct. On behalf of the plaintiff-respondent Dr. Katju contended that the will dated 2nd February 1933, after its execution must be deemed to have become a part of the wakf deed and, in the absence of any authority reserved in the wakf deed to modify or alter this will, it must be held that the second and third wills were invalid, and for this proposition he relied on a case reported in *Abdul Wahab v. Mt. Sughra Begam* : AIR1939 All248 , and drew our attention also to a case reported in *Mt. Rahman v. Mt. Baqridan* ('36) 23 A.I.R. 1936 Oudh 213. Even if this argument of Dr. Katju be

accepted that the first will must be deemed to be a part of the wakf deed, we cannot overlook the fact that the testator reserved to himself the right to revoke, amend or modify the first or the second will. The point, however, does not really arise in this appeal as the lower Court has held that the third will would only operate qua the excess income undisposed of under the first will. No cogent reasons were given to us why Saiyed Mahmudul Hasan could not leave directions under para. 18 of the wakf deed as to how the surplus income was to be divided amongst the beneficiaries. It could not be said that as regards the surplus income, if any, he had in any way exercised the powers conferred on him by para. 18 of the wakf deed. We are, therefore, not prepared to grant the plaintiff a declaration that the second and third wills were invalid and inoperative.

7. Saiyed Mehdi Hasan, defendant 4, had filed a written statement that the third will was the only operative will and the plaintiff, Saiyed Hamid Hasan, could not get any thing more than Rs. 75 per month as provided for in that will. The Court below did not accept this contention. It held that the first will was still valid and operative and that the allowances fixed by the first will could not be revoked or taken away in whole or in part by the subsequent wills. On this finding the lower Court gave Saiyed Hamid Hasan a decree at the rate of Rs. 200 per mensem. Mehdi Hasan, whose contentions were overruled, submitted to the decree and did not file an appeal. In the appeal filed by defendant 1, Saiyed Mohammad Hasan, he was impleaded as one of the defendants-respondents. This cross-objection of Saiyed Mehdi Hasan is not against the defendant-appellant, Saiyed Mohammad Hasan, but is a cross-objection really aimed at the plaintiff-respondent, Saiyed Hamid Hasan. So far as this Court is concerned, the law is now well settled that as a general rule a respondent can file a cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent. This point was considered as far back as the year 1863 by a Full Bench of this Court in Baboo Chote Lall v. Kishun Suhoy (1863) 2 S.D.A.N.W.P. 360 (F.B.). The Act in force on the date of that decision was Act 8 [VIII] of 1859. Section 348 of that Act provided that:

Upon the hearing of the appeal, the respondent may take any objection to the decision of the lower Court which he might have taken if he had preferred a separate appeal from such decision.

8. Under Order 41, Rule 22, Civil P.C. Act 5[V] of 1908:

Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal....

9. The language of Order 41, Rule 22, Civil P.C. is not exactly the same as the language of the old Section 348, but there is no material change in the language so far as it relates to the decision of the point now before us. That case was followed by this Court in *Kallu v. Manni* ('01) 23 All. 93 and in *Abdul Ghani v. Muhammad Fasih* ('06) 28 All. 95 under Act 14[XIV] of 1882, and again in *Sabiri Began v. Radha kishan* : AIR1935 All134 after Act 5[v] of 1908 had come into force. In a suit for dissolution for partnership and accounts, where a decree is passed declaring the amount due to each partner and one of them appeals, this Court has allowed a respondent to urge a cross-objection against a co-respondent on the ground that the rights of the parties are so intermixed that any modification in them would affect the rights of the others: see *Balgobind v. Ram Sarup* ('14) 1 A.I.R. 1914 All. 424. Similarly, where a decree proceeds on a ground which is common to two persons and one of them appeals, a cross-objection has been allowed to be urged against not only the appellant but also against the respondent who has not appealed: see *Abdul Ghani v. Muhammad Fasih* ('06) 28 All. 95 referred to above. It is true that Sub-rule (3) to Order 41, Rule 22, Civil P.C. now requires that notice of the cross-objection should be given to 'the party who may be affected by such objection,' while Section 561 of the Code of 1882 required only notice to 'the appellant.' But that alteration was necessary as there was no provision in the Code of 1882 for giving notice of the cross-objection to a co-respondent in those exceptional cases where a cross-objection could be urged against him. We think the change in the language cannot be considered to imply that the Legislature intended that in every case a respondent should have an

extended period of limitation for filing a cross-objection against a co-respondent which was in essence an appeal against him and had nothing to do with the appellant. It sometimes happens that a party may content himself with what he has got, even if the Court did not give him what he wanted, rather than take the trouble and incur the expense of going up to the Court of appeal. But where he is dragged there by the other side, the Legislature has given him an extended period within which to file a cross-objection. The failure to give this right might at times cause great injustice as the appellate Court might be precluded from adjusting the equities fully between the appellant and the respondent. There seems to be no sufficient reason, however, why a respondent should be given a second chance to file an independent appeal by way of cross-objection against another respondent when at the time the decree was passed both respondents were satisfied with the [decree and did not file an appeal against it, so that it had become final so far as they were concerned. In the case before us the cross-objection is not against the appellant at all. The respondent by this cross-objection wants to support the appeal on different grounds which the appellant does not wish to urge. The cross-objection filed on behalf of Saiyed Mehdi Hasan, which is really a belated attempt to appeal against the plaintiff-respondent, is thus beyond time. Mr. Peare Lal Banerji, appearing on behalf of Mehdi Hasan, during the arguments prayed for time to file an application under Section 5, Limitation Act. This appeal has been pending in this Court for about four years, and. we do not consider it proper to give time now for an application for condonation of delay. The result, therefore, is that the appeal filed by Saiyed Mohammad Hasan, defendant I, must fail on the admissions made by his counsel, and we dismiss it with costs. The cross-objection filed on behalf of the plaintiff-respondent has no force and it is dismissed with costs. The cross-objection filed by Saiyed Mehdi Hasan is misconceived and it is also dismissed with costs.