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BIBI AISHA & ORS.

v.

BIHAR SUBAI SUNNI MAJLIS AVAQAF & ORS.

July 24, 1968

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[R. S. BACHAWAT AND K. S. HEGDE, JJ.]

Evidence Act (1 of 1872), s. 65(a) and (f)—Whether cl. (f) controls cl. (a)—Case falling under both clauses—Whether certified copy should be produced as secondary evidence.

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The 1st respondent-waqf filed a suit against the appellants and the 3rd respondent, for setting aside a lease deed executed by the 3rd respondent in favour of the appellants, on the ground that the properties covered by the lease deed were waqf properties dedicated by a deed of waqf of the year 1827. The existence of the deed of waqf was proved by numerous admissions by the 3rd respondent and others who were its mutawallis. The 3rd respondent had produced the original deed along with the return filed by him before the Waqf Board under rr. 6 and 11 made under the Bihar Waqfs Act, 1948, and stated that the properties in dispute were waqf properties. He also produced a plain copy in Persian and an English translation of the original deed of waqf. He attested the English translation and made an endorsement on the Persian copy that it corresponded to the original. The original, after comparison, was returned to him, and the copy and translation were retained in the office of Waqf Board. At the trial, the 3rd respondent did not produce the original even though a notice was issued to him for its production. No copy of the deed was traceable in the registration office. The first respondent, therefore, relied upon the copy and the translation in the office of the Waqf Board. The trial Court decreed the suit and the High Court confirmed the decree.

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In the appeal to this Court, on the question whether the copy was admissible in evidence to show that the disputed properties were waqf properties,

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HELD : The case fell under s. 65(a) of the Evidence Act and so the copy was admissible, since any secondary evidence of the existence and contents of the original document was admissible. Though the case may also fall under s. 65(f), it is not necessary to produce a certified copy of the deed as cl. (a) is not controlled by cl. (f). The copy as well as other unimpeachable evidence established that the disputed properties were waqf properties. [419 D-E; 420 D]

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In the matter of a collision between the 'Ava' and the 'Brenhilda', (1879) I.L.R. 5 Cal. 568, approved.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 323 of 1965.

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Appeal by special leave from the judgment and decree dated February 16, 1961 of the Patna High Court in Appeal from Original Decree No. 500 of 1955.

S. C. Agarwal, K. N. K. Nair, Anil Kumar Gupta and S. P. Singh, for the appellants.

Sarjoo Prasad and U.P. Singh, for respondent No. 1.

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The Judgment of the Court was delivered by

Bachawat, J. The Bihar Subai Sunni Majlis-e-Awaqaf a body corporate established under the Bihar Wakfs Act, 1947 instituted a suit for setting aside a registered mokarrari lease deed dated November 18, 1949 executed by defendant No. 4 Sheikh Gholam Bari in favour of defendants 1 to 3 and for restoration of possession of the properties covered by the document, viz., the houses and shops being holdings Nos. 27 and 28 formerly known as holdings Nos. 22 and 23 in Ward No. 8 at Mohalla Muradpore P.S. Pirbahore in the city of Patna (Baakipur). The plaintiff's case is that the properties were dedicated by way of waqf by a waqfnama dated August 20, 1827 executed by Mst. Bibi Mannu Khanam Jan. The successive Mutawallis under this deed were Sheikh Azmatullah, Sheikh Ataullah, Sheikh Habibur Rahman, Bibi Zaibunissa and Sheikh Gholam Bari. The Trial Court decreed the suit and this decree was confirmed by the High Court. Both the courts concurrently found that Mst. Bibi Mannu Khanam Jan dedicated the properties by way of waqf by a deed dated August 20, 1827. The correctness of this finding is challenged in this appeal.

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In Mohalla Muradpore in the city of Patna (Baakipur) there is an ancient mosque known as the mosque of Mst. Bibi Mannu Khanam Jan. It is not disputed now that Mst. Bibi Mannu Khanam Jan established this mosque. There are shops, rooms, katra and other structures to the east, west and the south of the mosque. To the east of the mosque are the disputed holdings Nos. 27 and 28. On September 25, 1948 Gholam Bari filed before the Waqf Board a return in Form No. 1 under Rules 6 and 11 of the Bihar Waqfs Act, 1948. In this return he stated that the properties were given in waqf to the mosque by Mst. Bibi Mannu Khanam Jan under the deed of waqf dated August 20, 1827. With this return he filed an English translation of the wakf deed. The translation was attested by him. P.W. 5 Mehdi Hasan, the Nazir of the Waqf Board proved that Gholam Bari also filed the original waqfnama together with its copy in Persian. The copy bore the following endorsement signed by Gholam Bari : 'The copy corresponds to the original.' The original waqfnama was returned to Gholam Bari and the copy was retained in the office of the Waqf Board. At the trial Gholam Bari did not produce the original deed. Accordingly the copy of the deed and its translation were exhibited.

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The Trial Court and in the High Court Misra J. accepted the testimony of Mehdi Hasan and held that the copy of the original waqfnama was admissible in evidence. We agree with this finding. Tarkeshwarnath J. ruled that the copy was not admissible

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- A mainly on the ground that paragraph 7 of the plaint stated that the deed of waqf was in the plaintiff's custody. We agree with Misra J. that the averment in the plaint should be regarded as a general statement referring to the true copy which was left in the plaintiff's office. Under sec. 65(a) of the Evidence Act secondary evidence may be given of the existence, or contents of
- B a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, and when after the notice mentioned in sec. 66, such person does not produce it. Where the case falls under s. 65(a) any secondary evidence of the contents of the document is admissible. In the present case the conditions of s. 65(a) were satisfied. The plain copy of the waqf was therefore admissible. On behalf of the appellant it was argued that cl. (f) of s. 65 was applicable and that as the certified copy of the deed dated August 20, 1827 was permitted by the Evidence Act to be given in evidence, a certified copy alone was admissible in evidence. There is no substance in this contention. If the case falls under clause (a) any secondary evidence of the document is admissible, though the case may also fall under clause (f). Clause (a) is not controlled by clause (f). In the case of *A Collision Between The Ava*⁽¹⁾ a question arose as to whether secondary evidence could be given of the contents of a certificate granted by the Board of Trade. The loss of the document attracted cl. (c) of sec. 65 and the failure to produce it after notice attracted cl. (a) Cl. (f) of sec. 65 was also applicable. Wilson J. ruled that a certified copy need not be produced and any secondary evidence was admissible. We agree with this decision. Wilson J. said :

- F "By s. 65 in cases under cls. (a) and (c) any secondary evidence is admissible; in cases under cls. (e) and (f) only a certified copy. The present case falls under cl. (a) or (c) and also under (f). In such a case which rule applies? I think the words, 'In cases (a), (c) and (d) any secondary evidence is admissible,' are too clear and too strong to be controlled by anything that follows, and that, therefore, in this case any secondary evidence might be received."

- G The existence of the deed of waqf dated August 20, 1827 is proved by numerous admissions made by Gholam Bari and his predecessors-in-title. The existence of the deed was admitted in a petition filed by Bibi Zaibunnisa before the District Judge, Patna on January 13, 1928, in the return filed before the plaintiff by Gholam Bari on September 25, 1948, in the petition dated February 15, 1949 and a statement dated March 21, 1949 filed by him before the President of the Bihar Subai Sunni Majlis-e-Awaqaf.
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(1) I.L.R. 5 Cal. 568.

Other documents and admissions also clearly show that the disputed holdings are waqf properties. A

The copy of the waqf deed shows that Bibi Mannu Khanam Jan appeared before the Darulquazaya Azimabad for admitting the execution and making a declaration and the Quazi signed the deed and put the seal of the Registry office on 21st Rabiul Awal. 1233 A.H. The year 1233 is evidently a mistake for 1243. The deed was executed on 19th Muharram 1243 A.H. corresponding to 20th August 1827. No copy of this deed is now found in the records of the registration office. It appears that the document was presented for registration under Regulation XXXIX of 1793. Under that Regulation the Quazis were required to keep copies of all deeds and other papers which they might draw up or attest, to keep a list of such papers and to deliver the list and papers to their successors. The Regulation made no provision for the maintenance of a proper register book. The disputed waqf deed was registered in 1827. At this distance of time no copy of the deed is traceable in the registration office. But from other unimpeachable evidence, it is satisfactorily established that Mst. Bibi Mannu Khanam Jan executed the waqf deed dated August 20, 1827 and that the disputed holdings are waqf properties. In this view of the matter it is not disputed that the courts below rightly decreed the suit. B
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V.P.S.

Appeal dismissed.