Din Mohammad and others Vs Secretary of State in Council

Court: Allahabad High Court

Date of Decision: April 10, 1942

Hon'ble Judges: Verma, J; Allsop, J

Bench: Division Bench

Advocate: A.M. Khwaja and Kalim Jafris, for the Appellant; N.P. Asthana for Respondent, for the Respondent

Final Decision: Dismissed

Judgement

Allsop, J.
The Plaintiffs in the suit which has given rise to this appeal were three Hanafi or Sunni Mussalmans, one of whom has since died.

The Plaintiffs stated in the second paragraph of their plaint.

that the land bearing Settlement No. 9130, measuring 1 bigha, 9 biswas, 6 dhurs, situate in mauza Shahar Khas, pargana Dehat Amanat, district

Benares, containing one mosque known as Gyan Ban together with pucca courtyard at the back and a graveyard enclosure towards the north and

a pucca staircase in front of the gate together with a pucca enclosure all round and a pipal tree and two hair trees and a pucca well of brackish

water and two pipal trees on the platform near the boundary wall appertaining to the mosque dedicated land is in the possession of the Plaintiffs

and other Muslim.

2. The reliefs they claimed were--

(a) It may be declared that the land bearing No. 9130, situate at mauza Shahar khas, pargana Dehat Amanat, Zila Benares, measuring 1 bigha, 9

biswas, 6 dhurs together with the enclosure all round and the platforms and trees and the pucca well, the graveyard, the steps, etc., described in

paragraph 2 of the plaint is waqf in the possession of the Plaintiffs and other Musalmans and the Plaintiffs have a right to say their prayers specially

the Alvida prayers and to exercise their religious and legal rights as the need and occasion arise;

(b) If in the opinion of the Court the Plaintiffs are not held to be entitled to the whole or any part of the relief (a), then it may be declared that the

Plaintiffs are entitled to exercise the said rights by way of custom.

3. It appears from the plan and the photographs on the record and the evidence which has been produced that this mosque is built upon a high

plinth in a square or enclosure surrounded on all sides by houses or possibly in some parts by a wall. To the south of the mosque in the same

enclosure there are a Hindu temple, a well which is considered sacred by the Hindus and some trees under or near which there are some Hindu

idols To the south, east and north, between the mosque or temple, as the case may be and the surrounding houses or the wall, there is a space

more or less wide paved with bricks. To the west there seem to be some ruins and an open space. There are gateways leading into the enclosure

on the east and the north. The paved space between these gates is used as a public road or lane and from the gate on the east towards the temple

and other sacred Hindu places to the south there is also a public way.

4. According to the plaint the cause of action arose in the year 1935 when the District Magistrate of Benares decided that the Musalmans should

not, in any case, be permitted to congregate outside the upper platform of the mosque and to say their prayers within the Gyan Bafi mosque

enclosure anywhere except within the building of the mosque or upon it and the Superintendent of Police, consequently, purporting to act u/s 31 of

Act V of 1861, prohibited the Musalmans from saying their prayers or from sitting for that purpose within the compound or the platform of the

mosque. The Plaintiffs mentioned in paragraph 4 of their plaint that the Musalmans were in the habit of saying funeral prayers in congregation to

wards the west of the mosque and that they also gathered there in order to celebrate the birth of the Prophet and for other religious purposes, but it

appears that the main dispute has arisen because the Plaintiffs consider that they are entitled as if right to use the paved portions of the enclosure

outside the mosque for the purpose of prayers on the last Friday of Ramzan, that is, Alvida, if the congregation is too large to be accommodated in

the mosque itself or on the unenclosed part of the plinth. The Defendants were the Secretary of State for India in Council through the District

Magistrate and Collector of Benares and the Anjuman Intizamia Masajid through its Secretary. The Anjuman was apparently impleaded because it

had entered into some agreement with the District Magistrate upon the question in dispute.

5. From the reliefs which have been quoted above it seems that the Plaintiffs based their claim firstly upon the allegation that the whole of the

enclosure was waqf property and secondly, if that allegation was considered not to be established, then upon the further allegation that they had in

some way acquired a right by custom to use the whole of the enclosure for the purpose of saying their Friday prayers or for any other ceremonies

which they were in the habit of performing.

6. The learned Civil Judge found that the land under the mosque and its plinth was waqf land. He also found that some houses over and near the

northern gate of the mosque had been in the possession of the mutawallis for over twelve years and might be considered as waqf. It was further

established in his opinion that the Musalmans had been in the habit of celebrating an urs or memorial service once a year near two graves to the

west of the mosque and of using the part of the open occupied by ruins as a passage for going over the roof of the mosque (whatever that may

mean). He gave the Plaintiffs a declaration to the effect that they could use the waqf property for the purpose of their religious ceremonies and that

they could use the land near the graves to the west in order to celebrate the urs once a year and that they could use the land covered with ruins as

a passage but also declared that they had no right to offer ordinary, funeral or Alvida prayers on any portion of the land marked red in the plaint

map which would be part of the decree, but they might, if they liked, offer prayers on the roof of the mosque and of a certain house occupied by a

dhobi or washerman and in the house over the northern gate and the house to the east of the gate and over the plinth to the north of the mosque

over which there existed many graves. I may mention that the portion marked red in the plaint map is that part of the enclosure between the

mosque itself and the surrounding houses or wall.

7. The Plaintiffs appealed.

8. The first question which naturally arises is whether the whole of the enclosure is waqf or dedicated land. The learned Civil Judge has gone into

the history or this mosque and has come to the conclusion that it was built on the site of a Hindu temple which was demolished by the Emperor

Aurangzeb in the seventeenth century, I do not think that it is necessary to go into the question of the origin of the mosque. It is sufficient to go

back to the year 1809 when there was a serious riot between Hindus and Musalmans in that part of Benares where the mosque is situated. It

appears from a letter from a Secretary to Government to the acting Magistrate of Benares written on March 23, 1810, that the previous

Magistrate, Mr. Watson, had suggested that the Musalmans should be absolutely excluded from the mosque and that the Vice-President in Council

disapproved of this suggestion. The Vice-President based his opinion upon the obvious expediency of uniformly manifesting the strictest impartiality

on the occurrence of any dispute between the Hindus and Musalmans. He pointed out that a departure from that principle would be productive of

the utmost jealousy and discontent on the part of those who were excluded and would give rise to the most extravagant pretensions on the part of

the other party. He asserted that the authorities must depend for the maintenance of public tranquility on a firm and just confidence in the known

intentions of Government to afford both parties equal protection in the exercise of their religious opinions and on the conviction that any violence or

outrage on either side would infallibly meet its merited punishment. The Vice-President approved of the proposal of the acting Magistrate for re-

establishing the exercise of the Hindu and Mohammadan religion respectively at the place mentioned in his letter which seems to suggest that both

parties were to be allowed to perform their legitimate ceremonies in the enclosure of this mosque. Further light is thrown upon the occurrences of

that time by a letter addressed to a Secretary to Government by the officiating Commissioner of the Benares Division on December 20, 1853. It is

said in this letter that there were some shops within the enclosure of this mosque which were burnt down by the Hindus in the riots of 1809 and

that the officiating Magistrate of the time objected to their restoration and suggested to Government that a small monthly stipend of Rs. 10 a month

should be paid from the public treasury to the mutwallis of the mosque by way of compensation for the loss of income derived from the shops. The

letter goes on to say that the suggestion was accepted and that the money had been paid ever since. The suggestion of the officiating Commissioner

was that the stipend should cease and that the Government should purchase 4 per cent Government paper of the value of Rs. 3,000 and deliver it

over to the mutawallis so that they might obtain the same income from the interest. There is a further letter which shows that this suggestion was

accepted by the Government. Then from the year 1854 there are a series of orders by various Courts and officials which show that Hindus and

Musalmans were making attempts to encroach upon each other''s rights. On June 21, 1854, an order was passed by the criminal Court at Benares

from'' which it appears that some Hindus had sought permission to set up an idol and that permission had been refused because this was an

innovation. It also appears from the order that there had been a dispute between the Hindus and Musalmans which had been settled on the

agreement that a platform round the Gyan Bafi wall should remain in the possession and occupation of the Hindus who in their turn would throw

into the Ganges certain broken idols which were lying about somewhere in the enclosure. In 1858 there was another attempt to set up an idol. This

gave rise to a dispute and the Magistrate eventually directed that a new idol should be set up in place of an old broken idol to the south of the

Gyan Bafi wall. In 1885 there was another dispute because some Hindus had put a lantern in the eastern gate of the Gyan Bafi enclosure and had

put up a permanent staircase in place of a ladder in some part of the enclosure. The lantern and the ladder were both removed. In 1886 there was

a further dispute about various constructions made by the Hindus and Musalmans. The District Magistrate by an order dated February 8, 1886,

(sic) with the disputes. In the course of this order he mentioned that the copies of former orders passed regarding the Gyan Bafi showed that it had

been held throughout the ever recurring disputes between the Hindus and Musalmans that the Musalmans were in sole possession of the, mosque

and its plinth while the enclosure was open to the use of both Hindus and Musalmans. In the year 1887 another order was passed on December

11, by the District Magistrate. In the course of that order he said that there could be no doubt that the land and the enclosure belonged to the

State, although certain portions of it, for instance, those on which the mosque and the pipal tree stood, were in the possession of one party or the

other. He reiterated that the rest of the enclosure was open to the use of both Hindus and Musalmans subject to the condition that neither party

should make any new use of it which might inconvenience the other. The direction was that an application by two Musalmans to construct shops on

the boundary of the mosque should be rejected and that the construction of the shops should be stayed and the enclosure restored to its former

condition. In the year 1889 there was a dispute about a stone bench which the Magistrate refused to remove because he thought that it would be

used by everybody who went into the enclosure. In the year 1898 the Magistrate forbade the construction of a wall and later on in the same year

the District Magistrate passed an order that the Musalmans should remove some earth and stones which they had stacked in the enclosure. In this

order he again said that the enclosure was open to the use of both Hindus and Musalmans subject to the condition that neither party should make

any new use of the lane which might inconvenience the other. After that in the year 1904 the District Magistrate passed an order u/s 82 of the

Municipal Act directing the removal of a heap of mortar which had been stacked at the foot of the stairs leading on to the platform of the mosque,

the removal of a trough for feeding cattle which had (sic) en erected by some Hindus and the removal of a wall which had been recently built on the

east, south-east and south of the mosque. The orders were all passed under the Municipal Act and the Magistrate specifically stated that the heap

of mortar (sic) structed the public road. Another attempt was made to build or rebuild a wall and to instal a new idol in the year 1904. The wall

and the idol were removed and an application for permission to build the wall and instal the idol was rejected. In the year 1906 the Municipality of

Benares proposed to pave a part of enclosure and the Musalmans objected. The Magistrate, who was also the Chairman of the Board, did not go

into the merits of the dispute but allowed the paving to be put down on the ground that there was no question of the Municipality wishing to

interfere with any rights which might be in existence. In the year 1917 the District Magistrate allowed a Musalman described as Chairman of the

Gyan Bafi mosque to put up a railing to the staircase, but he mentioned in his order that this gentleman had re-affirmed his knowledge of the fact

that nothing whatever, small or big, was to be altered in the Gyan Bafi enclosure without permission. In the year 1923 there was another dispute

between the Hindus and Musalmans each side raising certain objections to the conduct of the other in making constructions or using the enclosure

for keeping poultry and so forth. The Magistrate passed an order settling the disputes. In 1924 there was another similar dispute when the Joint

Magistrate of Benares inspected the place and found that the Musalmans had erected a barricade of stones and broken pieces of masonry which

they had no right to do. The District Magistrate had to pass an order directing the removal of certain constructions. In 1930 the District Magistrate

of Benares issued a letter to the Secretary, Anjuman Intizamia Masajid (that is, the society for the management of mosques) in which he said that

the congregation from the Gyan Ban mosque had overflowed into the enclosure on Alvida day in 1929 and 1930. He said that he had recorded an

order in 1929 when the Hindus had complained and had remarked in it that it seemed clear to him that the object of the Muhammadans had not

been to wound the feelings of the Hindus, as the petition at that time had alleged, but that at the same time this overflowing on to the enclosure must

not be allowed to constitute a precedent. He said that he had made it clear to the Muhammadans in 1929 that these overflows would not be

allowed as they interfered with the pedestrain traffic in the enclosure. He then pointed out that an overflow had again occurred in 1930 in spite of

his directions and that he had, therefore, issued an order that overflows would not be allowed to occur in (sic). He suggested to the Secretary of

the Anjuman Intizamia Masajid that he should post men to divert Muhammadans to other mosques when the Gyan Bafi mosque was full. On

January 21, 1935, an application was made by the Anjuman Intizamia Masajid to the District Magistrate in which they said that the Gyan Bafi

mosque was a central place of worship, that a large congregation assembled there, that people from outside Benares came there to offer their

prayers under the impression that the bigger the congregation the more the merit of the prayers, that they had attempted to prevent an overflow on

the occasion of Alvida but the order forbidding the overflow had been received too late and it had not been possible absolutely to prevent it and

finally that they might be allowed to overflow on to the enclosure on such occasions, when the congregation was too large for the mosque, the

ground being that they had always been in the habit of doing so. The District Magistrate replied to this application and said that he would post

police at the mosque on future occasions to assist the committee in preventing an overflow and that the officer in charge of the police would have

discretion to permit a limited number to say their prayers in the passage way to the north and north-east of the mosque if there was an overflow at

a time when it was too late for intending worshippers to proceed to another mosque. In October, 1935, the Anjuman Intizamia Masajid again

made an application that the Musalmans should be allowed to use the enclosure round the mosque for the purposes of their prayers. They

purported to set forth the history of the use of the mosque, but they made at least one incorrect statement in that they said that the Magistrate of

Benares in 1810 had suggested that the Muhammadans should be excluded from the Gyan Bafi compound and that the Vice-President in Council

had not agreed. As I have already shown, the suggestion of the Magistrate at that time was to exclude the Muhammadans from the mosque

altogether and there was no question of excluding them only from the enclosure round the mosque It was to the exclusion from the mosque that the

Vice-President in Council expressed disagreement. He clearly intended that both parties should use the enclosure round the mosque. In his reply

the District Magistrate pointed out other inaccuracies and referred to the fact that the Anjuman Intizamia Masajid had not assisted in keeping the

enclosure round the mosque clear of worshippers. He then definitely stated that he would not allow any further overflow into the enclosure. Finally,

in the year 1936, the District Magistrate recorded an order that he would allow the Musalmans to use the enclosure on the occasion of Alvida

provided that the way was kept open for the use of other communities. He said in that order that it was not admitted that the Musalmans had any

right to do this but that he was under the impression that they would make an attempt to consider the feelings of others and that they would restrict

the overflow within reasonable limits.

9. It seems to me that the history of official action in the matter of the enclosure shows quite positively, whatever the original circumstances may

have been, that the enclosure round the mosque has never been in the exclusive possession of the Musalman community as a waqf during a period

of well over a hundred years next before the institution of the suit. This enclosure has been treated as a public place to be used alike by all

communities including Hindus and Musalmans and that in these circumstances it is impossible now to say that it is waqf property in the possession

of the Plaintiffs and other Musalmans of the Sunni sect.

10. Learned Counsel for the Appellants has argued strenuously that it is established that this land was originally waqf and that nothing which has

happened since can change its character. That being so, it is necessary to consider what evidence there is to establish the allegation which has been

made. Learned Counsel has referred, in the first place, to a settlement khasra of the year 1291 F., that is, the year 1883 or 1884 A.D.A khasra is

normally a field book containing a list of the tenants in occupation of agricultural land and it is not one of the registers which are included in the

record of rights which carries with it a presumption that the statements made in it are true. Normally this register, at least in the year 1883 or 1888,

would have dealt only with tenants of agricultural land because it would have been prepared for the purpose of assessing revenue which was not

payable on urban sites. We, therefore, examined the settlement report of the Benares district of that year and discovered that certain urban areas

were included in the khasra because they had been built over since the last settlement or revision of records and rents were till paid upon them. We

presume that the khasra which has been produced was prepared in these circumstances, but it is not conclusive evidence of the facts stated therein.

Learned Counsel has based his argument upon the fact that the whole enclosure has been given one number in the map and that the entry in the

register against that number shows that it is a mosque with its enclosure. The person who prepared the map and the person who made the entry

were not concerned with the question whether the whole enclosure appertained to the mosque and they may naturally have supposed as there was

an enclosure round the mosque that the plot could best be described as a mosque with its enclosure. In my judgment the entry does not prove that

the Plaintiffs'' allegation is true.

11. Learned Counsel has then referred to some legal proceedings which were held in year 1823. It appears tint at that time there was a house in

the enclosure to the west of the mosque. The Government under Regulation XIX of 1810 had directed the Board of Revenue to supervise the

expenditure of money held in trust for religious institutions and this supervision was exercised by local agents under the control of the Board of

Revenue. The house in the enclosure was leased to a tenant and the question was whether the rent should be recovered by the local agent on

behalf of the Board of Revenue so that the income should be expended for the general purposes of the mosque or whether it should be recovered

by the mutawalli of the mosque for the time being. It appears from the records which have been placed before us that the mutawalli clamed that the

house had been given to him for his personal use as mutawalli and that it was no part of the general endowment of the mosque. His contention was

upheld by the Court which directed that the house should not be included in the list of waqf properties belonging to the mosque. It does not seem

to me that this decision in any way helps the Plaintiffs-Appellants. It would go to show, if anything, that the enclosure was not part of the waqf

property belonging to the mosque, although the plot of land on which the house stood might be considered as dedicated to the use of the mutawalli,

that is, might be treated as a separate waqf. There are records which indicate that this house was knocked down on one occasion in order to

enable some exalted personage to obtain a better view of the mosque as a whole and that in its place another house was erected which still is in the

possession of the mutawallis.

12. Learned Counsel has further referred to various exhibits in which the enclosure has been described as the compound of the mosque, but these

are neither applications by Musalmans made in their own interests or orders by District Magistrates or officials who have clearly said at the same

time that the enclosure is a public place. Learned Counsel has drawn our attention to the letter of March 23, 1810, from a Secretary to

Government to the acting Magistrate of Benares and has urged that the decision of the Vice President in Council amounted to an admission that the

whole enclosure was waqf property, but I do not find that this is so. I have already explained that the Vice-President merely stated that the

Musalmans should not be excluded from the mosque itself and that his direction was that Hindus and Muhammadans should each be allowed to

exercise their religious rights provided they did not interfere with the rights of others.

13. Learned Counsel has also suggested that the learned Judge of the Court below has himself found that the northern gate is part of the waqf

property, but the finding merely is that this gate or house above it may be treated as waqf property because it has been in the possession of the

mutawallis for more than twelve years. There is no finding that it was originally dedicated at the same time as the mosque.

14. There is a general argument that the mosque stands within an enclosure which was at one time surrounded with a wall and that it must be

assumed that the whole enclosure was dedicated when the mosque was built. There does not seem to me to be any force in this contention. The

learned Judge has found on the historic evidence which was produced before him that the wall with the enclosure originally appertained to a temple

and the outer wall was not erected at the time when the mosque was built. It is unnecessary to go into the question whether the finding is right or

wrong. This much at least is certain that it has not been established that the wall was erected at the same time as the mosque and consequently one

cannot presume that the whole enclosure was dedicated when the mosque was built.

15. Learned Counsel has argued that there were shops appertaining to the mosque in the southern part of the enclosure before the year 1809. No

doubt that is true as it appears that the houses were burnt down and compensation was paid to the mutawallis because they were not allowed to

re-erect them, but we do not know exactly where these shops were and even if the land upon which they stood was part of the waqf, it is not

established that that land is part of the subject-matter of the dispute. However, even if it were, it is obvious that the land has not been in the

possession of the mutawallis since 1809 and it would be too late for any person now to claim it as waqf property.

16. The only other evidence which has been produced before us is the statements of eighteen witnesses who have said generally that the

Musalmans have on I occasions overflowed on to this enclosure on the last Friday of Ramzan for the purpose of saying their Friday prayers The

evidence does not seem to me to establish in any way that this enclosure is waqf property The mere fact that a certain number of people

overflowed on to the public land on certain occasions when they found it convenient so to do would not prove that that land belonged to those

people.

17. I am quite satisfied that the learned Judge of the Court below was right in his conclusion that it was not established that any part of the

enclosure about which he has refused to give a declaration to the Plaintiffs was waqf property.

18. The result of this finding is that we must consider the second claim made by the Plaintiffs-Appellants. Learned Counsel, in the first instance,

suggested that the Musalmans had acquired a customary easement over the land but he admitted later that there was no dominant heritage for the

better enjoyment in which this right could be claimed. He, therefore, fell back upon the contention that this was a customary right such as that

mentioned in certain cases, as for instance, the cases of Ashraf Ali v. Jagan Nath (1884) 6 All. 497. The Taluk Board, Dindigul v. Venkatarama

Aiyar (1923) 46 Mad. 866 : AIR 1924 Mad. 197 and Lakhmi Chand v. Moti Lal 1939 AWR (HC) 4 : 1938 ALJ 1243. It seems clear to me that

a customary right of this nature is not a right acquired by prescription or user. It is a right acquired by custom or, in other words, there must be

evidence to show that the existence of the right has been so long generally recognised that its existence has become a part of the law applicable to

the place in which the right is claimed. Long user may be evidence of the existence of the custom, but it does not in itself create a custom. A

custom which amounts to law is one which has obtained general recognition by those concerned or, in other words, a customary rule becomes law

when it is generally recognised that the rule should be applied to certain sets of circumstances. In the same way a customary right comes into

existence when by the custom of the neighbourhood the right is recognised, or, in other words, when over a reasonable period of time an enquiry

from any disinterested person in the neighbourhood would elicit that the right existed. The question of law however is perhaps in this case of no

great importance because in my judgment the decision can rest entirely upon an examination of the evidence as to the facts. There is nothing except

the evidence of eighteen witnesses to show that the Musalmans have over any period of time overflowed over this public enclosure on the occasion

of the Alvida prayers. Some of the witnesses are persons of some respectability but, on the other hand, they are undoubtedly interested and they

give no definite evidence about the many occasions when the overflow took place. They all say generally that there has been an overflow when

they have been to the mosque over various periods according to their age. There is nothing in the evidence to suggest that it was always regarded

as the right of the Musalmans to pray upon this enclosure. I very much doubt whether in the past there was an overflow. I am inclined to agree with

the learned Judge of the Court below that the overflow was intentional in the sense that it was intended in recent years to establish some kind of

claim over this land and that it was only about the year 1929 or 1930 that the overflow became so serious as to cause inconvenience to others,

Even if a customary right could be acquired by user alone, there is not, in my judgment, any reliable evidence of continuous user over a long period

to justify the conclusion that a right had accrued Whether such a right could be obtained over a public lane or public way is a matter which I do not

think it is necessary to discuss.

19. I am satisfied that there is no force in this appeal and I would dismiss it with costs

Verma, J.

20. I agree.

21. The appeal is dismissed with costs.