Gulam Mohideen Khan and Others Vs Abdul Majid Khan

Court: Andhra Pradesh High Court

Date of Decision: April 10, 1956

Hon'ble Judges: Subba Rao, C.J; Viswanatha Sastri, J

Bench: Division Bench

Advocate: Alladi Kuppuswami, for the Appellant; Konda Kotayya, for the Respondent

Judgement

Viswanatha Sastri, J.
The Defendants are the Appellants in this Second Appeal against the decree of the Subordinate Judge of Nellore

reversing the decree of the District Munsif and declaring that 35 anka-nams of site and structures in Nellore town described in the) plaint were

wakf property of the family of the Plaintiff and Defendants 1 and 2 and restraining Defendants 1 and 2 by a permanent injunction from, disposing of

the property as their private property. One Suleman Khan died in 1911 leaving two sons, the elder of whom Abdul Hameed died in 1946 and the

younger is the Plaintiff. Suleman Khan had a brother Mustafa Khan whose sons were Ghulam Ghouse and Gulam Mohideen. Ghulam Mohideen

and Abdul Khader, the son of Ghulam Ghouse are Defendants 1 and 2 respectively. The 3rd Defendant is a tenant .under Defendant 1 and 2 of a

house situated, on the site described in the plaintiff

The Plaintiff"s case was that the suit site was. a family cemetery and was being used as such by his ancestors, having been dedicated as a wakf,

andr that it was therefore inalienable. The Defendants:denied the dedication of the site or its user as a graveyard by the members of the family and

pleaded that.it was private property that had descended to them by heirship from their ancestors; The, District Munsif decided that thesite had, not

been proved to be wakf property, and finding that the Plaintiff had neither title; to nor possession of the property, he dismissed the suit on appeal

the learned" Subordinate; Judge came to the conclusion that the suit property was a wakf dedicated;and used as a graveyard, that the Defendants

had not acquired a titie by adverse possession and that the Plaintiff was entitled to a decree in. the terms set out above.

2. The following; facts emetrge from tha evidence and the finding of the lower appeal-late Court. The site, has not been used as a graveyard for

half a century preceding the suit. It is possible that municipal regulations prohi biting burial of the dead in places not specifical. ly set apart for that

purpose, might have been responsible to some extent for the absence of burials in the site in recent years. In the town Survey Record of Nellore

prepared in 1919, the site stood registered in the name of Suleman Khan, the Plaintiffs father, as owner and there is no reference to this property

as a burkl ground.

The property had been leased from time ta time, the Plaintiff himself admitting a lease by him to a non-muslim in Exhibit B-l.Defendant 1 and 2,

leased the site to one Ghulam Ghouse who built a house thereon and subsequently sold the house to the lessors. Exhibits B-2, B-3 and B-4 of the

year 1932-33 show that the house was registered in the Municipal House Property Registers as Municipal Door No. 334 is the home of the

second Defendant''s father as owner. The municipal door number of the house was subsequently changed to No. 557/1 in 1936.

If the property had been a grave-yard, municipal house-tax would not have been levied or paid but the Municipal Tax Register, Exhibit B-3 and

the tax receipts Exhibits B-3 to B-ll show payment of municipal tax. Exhibit B-5 dated 10th February, 1944, was lease of the property by

Defendants 1 and 2 to the 3rd Defendant for a period of 5 years. Exhibit B-12, dated 30th August, 1949, was another lease to him. As regards

the use to which the suit site has been'' put, there are no tombs found on the site. P. W. 2 and old man of 75 years, stated that there were one or

two burials in the site within his knowledge. P. W. 4 also a man of 73 years, started by saying that the Pathan brothers (evidently referring to the

fathers of the Plaintiff and the first Defendant) were living in the locality and burying their dead in the site but later on admitted in cross-examination

that he could not say whether he had seen any burial in the suit land. In re-examination he stated that he witnessed two burials. This is all th(c)

evidence about the user of the site as a place of burial. Even .the Plaintiff states that the place is a family, graveyard, the public having no right of

burials therein.

3. The fact that a Mohamedan chose to bury the body of one or two members of hi3 family in his garden or compound in the last century - and

that is the utmost that could be said to have been established in the case would not make the property wakf property inalienable for all time. The

evidence relating to the user and enjoyment of the property to which reference has been made above tells the other way.

4. There is no evidence, documentary or oral, of the dedication of the site as a graveyard. In AIR 1950 56 (Privy Council) , the Judicial

Committee, dealing with a right of cremation claimed by the inhabitants of a village over the land of another observed:

But dedication is only known to English law as something equivalent to an irrevocable licence granted by the owner of the soil to the use of the

public. Dedication of a piece of land to a limited section of the public such as the inhabitants of a village, is a claim unknown to law.

Therefore" there is no possibility of a dedication in the present case. The Judicial Committee also negatived the possibility of a lost grant in cases

like the present on the ground that the persons claiming to be grantees, whe-. ther original or by devolution, were not such as were capable of

being the recipients of a grant. These principles were followed by the Supreme Court in Raja Braja Sundar Deb Vs. Moni Behara and Others,

,an& by one. of us in Muhammad Alikhan Sahib Vs. S.K. Venkataramanayyar and Another, at p 457 : AIR 1954 Mad 132 at pp. 133-134) (C).

In Court of Wards v. IlahiBaksh ILR Cal 18 (PC) CD), the Judicial Committee held that though there is no public dedication, the uses of the land,

as a, Mohamedan burial ground for a long time would itself make the land wakf land. In that case there was a considerable body of evidence

including entries in the record of rights that the land had- been used, from time immemorial by the Mohamedan community, for the purpose of

burying their dead and on that evidence, it was held that it formed part of a graveyard set apart for Mahomedans and by user, if not by dedication

the land was wakf. The entry in the record of rights was treated as conclusive on the point.

That a wakf may be proved by long user has been recognised in subsequent decisions ol the High Courts. Mehraj Din v. Ghulam Muhammad ILR

Lah 540 : AIR 1931 Lah 607) 05)r Mehar Din v. Hakim Ali AIR 1935 Lah 912 (F) Abdul Rahim v. Fakir Mahomed AIR 1946 Nag 401 (G), In

Ashutosh and Another Vs. R.C. Dey and Others, it was recognised that if -land had been used from time immemorial as a-Moslem burial ground

the land is constituted wakf thdugh there may be no evidence of express-dedication. In AIR 1948 42 (Privy Council) (I), the Judicial Committee

while holding that there was no waqfnama or any evidence of oral dedication observed.

But if the proper inference from the history of the matter, the dealings with the properties, the litigation that has affected it, the admissions and

assertions made by the Respondent"s predecessors-in-titile is that Haider Bak?h purchased the villages in the names of Mankw Lai and Bahadur

Lai on the expressed footing that they were to be an endowment of an exists having wakf..... all the requirements oi -Shia Law necessary to the

valid creation e\ wakf attaching to the villages were satisfied.

Though a wakf may in the absence of direct evidence of dedication, be established by evidence of user, the user from which dedication, can be

implied must be clearly established and must be of such a character as to be consistent only with dedication of the land as a graveyard. As

dedication involves the extinguishment of the rights of the original owner of the lands, the evidence if user must satisfy the requirements laid down

by the Judicial Committee and the High Court in cases to which reference with presently be. mad(c). In the present case thes Plaintiff claims the

site as a family graveyax and the evidence even taking it at its face value! shows no more than that two persons were buriJ-ed in the plot in the last

century. There is no evidence of public user, On the other hand thS site has been held and enjoyed as private property by the family1 of the parties

and was buufc upon in 1932 or earlier. It is not the law that: land would become wakf necessarily and hit? mediately upon the burial therein of one

or two Muslims and it was so held by the Judicial Committee in Ballabb, Das v. Nur Mohammad, 70 6,-87) (J), where it was observed:

It is one thing to say that as a gift may be complete without delivery so a mere oral indication as a graveyard would not take clloct til one burial had

taken place. It is another ing to say that one burial on a plot of land ""es -the land wakf. If a land-owner were to ow one or two of his relatives to

be buried in orchard, he would not necessarily be held to ave dedicated the land as a cemetery.....the Plaintiffs had to make out dedication enely

by direct evidence or burials being made the ground and without any record such as Khasra of 1868 to help them, they would un-oubtedly have to

prove a number of instances ""equate in character, number and extent to ustify the inference that the plot of land in was a cemetery.

To the same effect are the decisions in Madras, Allahabad, Lahore and Oudh. Abdul Rahiman Sahib Chowdry and Others Vs. Murugappa

Naicker and Others, , Siraj Ahmad Khan and Others Vs. Gaya Prasad and Others, , K. Raushan Din v. Mohammad Sarif, AIR 1936 Lah 87

(M), Qadir Baksha "v. Saddu Llah AIR 1938 Oudh 77 (N). In Mulla"s Mohammedan Law, 14th Edition, page 174, it is stated correctly enough

that ""the burials must be adequate in number, character and extent to justify the inference"" of a waqf though the decision cited as authority for the

statement AIR 1937 174 (Privy Council) , has no bearing on the point.

5. It is true as pointed out by the Respondent, that land once dedicated as a Mahomedan graveyard does not lose its character as was by the mere

fact that in recent years it was not so used. Arur Singh v. Badar Din AIR 1940 Lah 119 (P), AIR 1930 245 (Oudh) , Ehsan Beg v. Rahmat Ali

ILR Luck 547 : AIR 1935 Oudh 47) (R), Lala Jhao Lal Vs. Ahmudullah and Others, , and AIR 1931 45 (Oudh) . II dedication is proved or

admitted, then mere non-user for some years may not detract from the character of the graveyard as a waqf. But when the question is whether a

land has become waqf by user without a dedication, the evidence of user importance, for it is on continued user "", for a: 4-ong time and in many

cases that the inference of a waqf has to be drawn.

It was pointed out for the Respondent that the waqf cannot be deemed to be invalid in this case merely because the right of burial was continued to

the members of one family. Reliance] was placed on decisions of the Oudh Court which """"held that there was no real distinction between a public

and a private graveyard in Mahomedan Law and that, in either case the land would be wakf property. AIR 1931 45 (Oudh); AIR 1931 293

(Oudh) which went upon appeal to the Judicial Committee in 70 MLJ 455 : AIR 1936 PC (J).

Under the Mahomedan Law a waqf can be reated by an oral declaration of endownment the owner of property and this view has been accepted

by all the High Courts. (Sec Mulla''s Mahomedan Law, 14th edition, page 170). If ,tljere is a deed by which immovable property of the value of

Rs. 100 or upwards is endowed by way of was it must be registered. In that absence of proof of such a declaration of endowment or trust, either

oral or documentary, that Character of the land as waif has to be establish-ed by satisfactory evidence of user ""adequate to continuity, character

and extent"" to use the language of the Judicial''Committee.

The Lower Appellate Court has not kept;. these principles in view iii arriving at a decision on the character of the land. One swallow does not

make a summer and a burial of one or two half a century ago in a portion of a plot, of land will not stamp the land for ever as agraveyard,

especially when thd Town Survey Registers and the municipal records treat it as property privately owned and not as a graveyard.

6. It is not possible) to regard the finding of; the lower appellate Court as one of fact binding on us in second appeal. In this case, the question-

whether the suit property is wakf or not is a question, of legal inference to be drawn from the proved facts and the proper legal effect of a proved

fact is a question of law, AIR 1927 102 (Privy Council) . For the reasons stated above we reverse the decision, of the lower appellate Court

declaring the suit property to be waqf and dismiss the suit with costs throughout.