Munshi Busoid and Others Vs Munshi Newaz Ahmed Khan

Court: Calcutta High Court

Date of Decision: Sept. 3, 1928

Citation: 119 Ind. Cas. 116

Hon'ble Judges: George Claus Rankin, C.J; Mukerji, J

Bench: Division Bench

Judgement

Mukerji, J.
This appeal has arisen out of a suit which was instituted by three persons as plaintiffs under the provisions of Order I, Rule 9 of

the CPC as members of, and for and on behalf of, the local Muhammadan Community.

2. The subject-matter of the suit is described in the plaint as a plot of land about 3 bighas 10 cottas in area. On this land stands a mosque, close to

which there is a large tank with some sort of masonry structures and steps leading up to it, and the rest of the land is said to be a quantity of garden

land with some fruit trees standing thereon, and it is also said that there are pucca godowns, etc., erected on a portion. The entire area is, or rather

was, enclosed on all sides by a compound wall with an opening for gates. The wall is now more or less in ruins and on the east side has been

completely demolished. There is some sort of an out-house standing near about the opening. The defendant Munshi Newaz Ahmed Khan is,

according to the plaintiffs, the Khatib of the mosque. The entire property is alleged, on behalf of the plaintiffs, to have been made a wakf by one

Misri Begum, a lady of the Mysore family, long ago. A strip of land, out of the premises, on the side of the road on the east having been acquired

by the corporation of Calcutta for the purpose of ""set back"" in connection with the said adjoining road a sum of Rs. 1,200 was awarded as

compensation and was still in deposit. The defendant had claimed the money as his own personal property and had also been of late setting up a

title hostile to the endowment in respect of the remainder of the lands. The plaintiffs accordingly instituted this suit for a declaration that the entire

property including the sum of Rs. 1,200 belongs to the wakf of Misri Begum.

3. The defence, in substance, was that the lands belonged not to Misri Begum but to the defendant''s ancestor, one Faizulli Jamadar. that the

mosque was constructed by the said Faizulla Jamadar with the aid of contributions received from the public including Misri Begum, and that the

said Faizulla Jamadar and after him one Ghasi Khan (a brother of the defendant) and after him the defendant himself were mutwallis of the mosque,

but that the lands and tank, etc., were never used as wakf and on the other hand continued to be secular property and have ultimately devolved on

the defendant in his personal right.

4. The suit was decreed by the Subordinate Judge. He declared the entire property in suit including the amount of Rs. 1,200 deposited with the

Calcutta Corporation, as wakf property. The District Judge has, on appeal, reversed this decision and dismissed the suit. Hence this second appeal

by the plaintiffs.

5. One of the grounds on which the District Judge has dismissed the suit is that the suit being for a mere declaration when consequential reliefs

were available was not maintainable. On the facts of the case this ground is not well-founded and indeed the respondent has not sought to support

the decree on this ground.

6. From the pleadings already set forth it would appear that the parties were at variance upon the following points. The plaintiffs'' case was to the

effect that the lands belonged to Misri Begum, that she erected the mosque, excavated the tank, planted the trees, built the compound-wall and

created the wakf, that Ghasi Khan was appointed Khatib of the mosque and that after Ghasi Khan the defendant succeeded to the office. The

defendant''s case on the other hand was that the lands belonged to Faizulla Jamadar and not to Misri Begum, that Misri Begum as well as the

Muhammadan public helped Faizulla Jamadar with contributions to build the mosque, that after the mosque had been built the remaining lands

continued to be secular and remained the personal property of Faizulla Jamadar and that the compound-wall was built partly by Faizulla Jamadar

and partly by Ghasi Khan. The defendant claimed that he and his ancestors had rights higher than that of a mere Khatib and asserted that they

were all mutwallis, which presupposes that there was a wakf. It is an admitted fact in the case that the Muhammadan public of the vicinity have a

right to go to and say their prayers in the mosque. That some lands were dedicated for the purposes of the mosque or of a wakf is, therefore, an

admitted fact in the case. Even if the plaintiffs fail to prove that the lands belonged to Misri Begum and even if the defendant succeeds in proving

the lands belonged to his ancestor Faizulla Khan, the plaintiffs would still be entitled to a declaration that the property is wakf property, provided a

dedication thereof for the purposes of a wakf is established. The mosque was erected, and wakf was created, whatever the exact nature thereof

may have been, and whatever the quantity of lands it may have comprised, close upon 80 years ago or perhaps even earlier. There was no deed.

Not much direct evidence of the creation is available: What little has been produced, is, in the opinion of the District Judge, of not much worth. His

view is final on this question. He has held ""that it is very probable that the lady contributed largely towards the cost of the erection of the mosque,

but that it is not proved, nor likely that the mosque was erected or dedicated by any member of the Mysore family, nor that the lady was the owner

of the surrounding lands or had dedicated them to the service of the mosque."" These findings need not be disputed, but the real question that

remains, and has still to be considered is whether the property in suit is wakf property. The issue that was framed on this point--and that, in my

opinion, is the right form in which the issue should have been framed--was ""Is the property in suit or any portion of the same, or the money in the

hands of the Calcutta Municipality wakf property? (Issue No. 9). The Subordinate Judge was able to find that Misri Begum created the wakf. The

District Judge has held otherwise but has not gone into the broader question which the issue involves. This question evidently has to be determined

before the suit can be disposed of. I cannot see my way to agree in the contention urged on behalf of the respondent that for the determination of

this issue a further opportunity should be given to him to adduce further evidence.

7. The plaintiff has mainly relied upon a number of facts and circumstances as establishing, by what is alleged in the plaint as ""user and reputation,

that the property in suit is wakf property. Direct evidence of user in a property of this nature, e.g., using the water of the tank or plucking and

appropriating the fruits of the trees is necessarily of very little value as being equally consistent with user by permission or license as with user by

right on the part of members of the Muhammadan public in property forming an adjunct to a mosque and a part of the endowment itself. On the

question of user, therefore, what must be of greater value is not direct evidence, but evidence of facts and circumstances as leading to the

inference, one way or the other, whether and to what extent the property has been treated as wakf property during the long period that has

elapsed.

8. The evidence which the plaintiffs adduced, excluding that which is no longer of any importance, may be conveniently grouped under six heads:

1st, deeds relating to transactions in respect of neighbouring lands; 2nd, documents relating to the property itself showing how the lands in suit have

been treated; 3rd, evidence afforded by a certain tablet which is said to have been on the wall near the main door of the mosque and of the

existence of four metal guns which were on the premises: 4th, direct evidence of user of the lands; 5th, admission made by the defendant No. 1

himself; and 6th, the physical features of the lands.

9. First item.--The documents under this head are Exs. 6, 5, 7, 8, 9 and 10. These documents relate to plots of land lying on the boundary of the

lands in suit. In Ex. 6, dated 1845 the lands are described as the ""land of Misri Begum"" and in Ex. 5 dated 1878 and Ex. 7, dated 1883 the

premises are described as the ""Musjidbari of Shahjadi Misri Begum,"" and in the former of these two documents the compound-wall is described as

the ""wall of Shahjadi Misri Begum''s Musjidbari,"" Exhibits 8, 9 and 10 are of more recent dates and perhaps not ante litem motam, but the older

documents contain declarations made ante litem motam by persons who are dead (vide the judgment of the Subordinate Judge as regards the ages

of the executants of Ex. 5 and Ex, 7 at the dates of these documents). The learned District Judge has disposed of these documents in these words:

These deeds are sought to be made relevant on the ground that they contain expressions of opinion regarding a matter of public interest by

persons having knowledge of the matter. It is impossible to say what knowledge the executants of these deeds had. The mosque was undoubtedly

known as Misri Begum''s mosque; and by speaking of the lands surrounding the mosque, and enclosed within a wall, as Misri Begum''s mosque,

the executants of these deeds were not necessarily expressing their belief that the lands were part of the dedicated property. The description was

intelligible and that was all that was needed."" He has thus treated the documents as more or less irrelevant. Now whatever may be said as regards

Ex. 6 and the knowledge of the executant thereof as regards the rights of Misri Begum to the lands there can be no question that Ex. 5 and Ex. 7

contain declarations made ante litem motam by persons who are now dead in respect of a question relating to a matter of general or public interest

and that such declarations even if they be no more than evidence of reputation or hearsay evidence are admissible (Halsbury''s Laws of England,

Vol. Ill ""Boundaries"" para. 284) It is urged on behalf of the respondent that the documents merely say that the premises were the Musjidbari of an

individual and therefore the statement does not relate to a matter of general or public interest. With this contention I am unable to agree as it is the

common case of both the parties that the Muhammadan public of the vicinity have the right to use the mosque. It is said in the passage above

referred to that such evidence is admissible on the question of boundaries between a reputed manor and land belonging to a private individual Woe

v. Sleeman (1846) 9 Q.B. 298 : 15 L.J.Q.B. 338 : 10 Jur. 568 : 115 E.R. 1287 : 72 R.R. 255or between old and new land in a manor Barnes v.

Mawson (1813) 1 M. & S. 77 : 105 B.R. 30 : 14 R.R. 397 per Lord Ellenborough, C.J. at page 81 Page of (1813) 1 M. & S.--[Ed.]. The

reason of this exception in favour of hearsay evidence is partly necessity since without such evidence ancient rights could rarely be established and

partly that the public nature of the rights, minimises the risk of mis statement. As Mr. Taylor has put it in his Law of Evidence where the matter is of

public concernment all the Queen''s subjects are presumed to have knowledge of it (Taylor, Sections 546 and 811). The Indian Evidence Act

follows the English rule of evidence in this respect and has enacted it in Section 32, Sub-section (4). In treating these documents as irrelevant the

learned District Judge has been in error and the statements contained in these documents and referred to above must, in my judgment, be taken

into consideration in dealing with the case.

10. Second item.--In the Municipal assessment Registers for 26 years from. 1880 to 1906 the lands were recorded under one entry, viz.,

Premises No. 11, Mayarpur Road, which described the property as mosque, tank and garden, the recorded owner being Misri Bagum and as

property exempted from Municipal rates and taxes. In 1906, the holding was divided into 2 parts--No. 12 was the number given to a part which

was described as mosque, tank and garden with an annual value of Ra. 514 and remained exempted, while a part was numbered as 12-1 and

described as bustee land and made into a separate holding with an annual value of Rs. 28 and was assessed to rates and taxes. The defendant was

recorded as owner in the Municipal assessment Registers as regards No. 12-1 in 1908 and as regards No. 12 in 1908. The annual values

aforesaid were increased in 1914, to Rs. 557 and 43 respectively. The property was thus divided into 2 parts one consisting of the mosque, tank

and garden, and the other a piece of bustee land bearing a small annual value. This division, as far as maybe gathered, has continued upto the

present. The District Judge seems to have mis-apprehended the situation. He does not seem to have appreciated that what was exempted from

Municipal rates and taxes in 190a, 1908 or 1914 was not merely the mosque but the mosque with tank and garden, and what was assessed was

not the tank and garden but only a small piece of bustee land constituted into a separate holding with a fresh number 12-1 and carved out of No.

12 which was formerly No. 11. The District Judge evidently was under the impression that all that the Assessment Register proved was that though

exempted till 1906 the entire property with the exception of the mosque was assessed in that year. It is this misconception which made him feel

disinclined to draw an inference adverse to the defendant.

11. The defendant has succeeded in proving that he and his ancestors have been paying rent to certain landlords in respect of a plot of about 3

bighas of land in the vicinity of these premises. The document that he has filed, notably the thokas dating from 1275 and the rent receipts dating

from 1297 establish this fact. The important question, however, is whether this plot of land constitutes or at least forms a part of these premises.

On this point there are only three items of evidence besides, of course, the oral testimony of the defendant himself. One such piece of evidence is

to the effect that the defendant has only one plot of land in the locality. This may be accepted as true. The other two pieces of evidence are Ex. G

and Ex. M. Exhibit-G shows that during the survey of the added area which began in 1903 and was completed in 1907 in premises bearing

Municipal number 12, Mayerpur Road, the defendant was a maurashi tenant in respect of a quantity of rented land about 3 bighas in area. Exhibit

M is the decision of the Superintendent of Survey of the added area in a case of 1905 relating to premises No. 12, Mayerpur Road, which in the

opinion of the District Judge showed that a strip of land lying to the north of a culvert and by the side of premises No. 12 formed a part of the

defendant''s maurashi tenancy. Now we have no evidence when No. 11 was altered to No. 12; all that we know is in the assessment register what

was shown as No. 11 in 1880 appeared as No. 12 in 1906. Moreover, we have no evidence where the culvert was in those days. In this state of

the evidence I am far from satisfied that the premises we are concerned with in this suit have been proved to be a part of the defendant''s maurashi

tenancy. Assuming, however, that the finding of the District Judge on this point is correct, namely, that some part of the tenancy was within the wall

the finding does not assist the defendant in the matter of the issue as to whether or not the premises in suit are waqf property. I am not at all

impressed with the argument that no waqf may be made of rent-paying lands or that a musjid may not be built thereon because even upon the

defendant''s case the mosque stands upon Faizulla''s land which was a part of this tenancy.

12. Third item--The plaintiff''s case was that there was a tablet near the main door of the mosque bearing an inscription showing that the property

was the waqf of Misri Begum and that it had been removed after the institution of the suit. Evidence was also given of the fact that there were four

guns on the premises which would indicate that the property was waqf as such guns are invariably placed in the more important waqf mosque of

the Mysore family. The learned District Judge has not considered this item of evidence at all, though upon it the trial Court had come to a finding in

plaintiff''s favour.

13. Fourth item--This evidence ordinarily as I have already said, is not likely to be of much value and if the learned District Judge was not

impressed with it the appellant can hardly complain in second appeal

14. Fifth item--This item of evidence has not been referred to at all by the learned District Judge while the Subordinate Judge appears to have

relied upon it. The evidence relating as it does to an admission made by the defendant against his own interest is important and, if true, certainly

deserves consideration.

15. Sixth item.--This item of evidence appears to have been specially brought to the notice of the learned District Judge because he has observed

thus: ""The plaintiffs also rely on the fact that the lands in dispute including the mosque are surrounded by a wall. They argue from that that the entire

property must be dedicated property. He, however, does not appear to have given any consideration to the matter at all. The plaintiffs'' argument

was that it was exceedingly unlikely that a whole area surrounded by a compound-wall on all four sides and one gate should be the subject of two

conflicting interests and that a tank with a pucca ghat adjoining the mosque and a paved way between the ghat and the steps of the mosque are

necessary adjuncts of a mosque, that out-houses of the description that there are on the premises are also the usual appurtenances for the

accommodation of the Khatib etc., and that the ornamental work on the back of the mosque pointed to the lands situate on that side as being

appurtenant thereto. The argument was dealt with very fully by and found favour with the learned Subordinate Judge. The District Judge, it is true,

was entitled to take a different view but not ignore it altogether as he has done. The real question is one of boundary of the dedicated property.

That in such cases physical features may be taken into consideration in order to determine whether different parcels may be deemed parts of one

waste or common so as to make evidence of user of one part evidence of title to the whole is a proposition that cannot be disputed. Lord Denman,

C.J., in Doe v. Kemp (1835) 2 B N.C. 102 : 2 Scott. 9 : 1 Hodges 231 : 4 L.J. Ex. 331 : 132 B.R. 40 : 33 R.R. 492 said: ""But the case is very

different with respect to those parcels which from their local situation may be deemed parts of one waste or common; acts of ownership in one

part of the same field, are evidence of title to the whole."" Whether a large tract of land where there is no safe guide to determine the boundaries

should or should not be recognised as a whole for inferring existence of unity of title would depend upon circumstances, for instance, in Stanley v.

White (1811) 11 East 332 : 104 E.R. 630 : 12 R.R. 544 this recognizable whole consisted of the woody belt surrounding a large tract.

16. There is no evidence in the present case of distinct enjoyment of the different parts except within recent times by acts which are challenged in

this suit as being in violation of the wakf. In Jones v. Williams W. 326 at p. 331 : H. 51 : 6 L.J. Ex. 107 : 150 E.R. 781 : 46 R.R. 611 Parke, B.

said: ""In ordinary cases, to prove his title to a close the claimant may give in evidence acts of ownership in any part of the same enclosure for the

ownership of one part causes a reasonable inference that the other belongs to the same person though it by no means follows as a necessary

consequence for different persons may have bulks of land in the same enclosure but this is a fact to be submitted to the Jury"". Moreover, if the

entire premises can, upon its various physical features, be regarded as one whole lying within the compound-wall and if the evidence suggests the

inference that the members of the Muhammadan public have exercised acts on parts of it in assertion of their right to the whole as forming the

endowment the defendant''s original rights whatever they may have been must be held to have been extinguished. This principle will be found

discussed in the case of Sivasubramanya v. Secretary of State for India 9 M. 285 which was affirmed on appeal by the Judicial Committee in the

case of Secretary of State for India v. Nellakutti Siva Subarmaniya 15 M. 101 : 181. A. 149 : 6 Sar. P.C.J. 74 . As I have already said this aspect

of the case has not at all been considered. The aspect is all the more important as upon the defendant''s case it was his predecessor Ghasi Khan a

mutwalli who had enclosed the whole premises by the compound-wall.

17. On the whole I am clearly of opinion that in dealing with this case the learned District Judge apart from the other errors that I have attempted to

point out has taken each fact separated from the rest of the facts and has proceeded to demonstrate that it is consistent with the position that the

property was not Misri Begum''s or with this position that it was not dedicated by her and has arrived at his conclusion by this process of

reasoning. This being a case depending largely on the inference to be drawn from circumstances the method adopted was in my judgment

erroneous and in such a case to quote the dictum of the Judicial Committee, ""It is essentially necessary that the facts should be considered in

relation to each other and weighed as a whole"".

18. The defects pointed out above have rendered it necessary for us to go into the facts which are on the record as bearing upon Issue No. 9.

Having heard the parties fully upon the evidence I have come to the conclusion that the plaintiffs have succeeded in making out that the property

involved in this suit is a wakf and not the personal property of the defendant and that though some of the findings recorded by the Subordinate

Judge especially the finding that it was Misri Begum who created the wakf are not fit to be upheld, there was no good reason for the learned

District Judge to reverse the decree passed by the trial Court.

19. I would allow the appeal and reversing the decree of the lower Appellate Court restore that of the trial Court with costs in this Court and in the

lower Appellate Court.

Rankin, C.J.

20. I agree.