Marathwada Wakf Board Vs. Shazadi Bi Haseem

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Court : Mumbai

Decided On : Dec-02-1977

Reported in : (1979)81BOMLR257

Judge : Vaidya and ;Pratap, JJ.

Appeal No. : First Appeal No. 268 of 1970

Appellant : Marathwada Wakf Board

Respondent : Shazadi Bi Haseem

Disposition : Appeal allowed

Judgement :

Vaidya, J.

1. [His Lordship after narrating facts proceeded.]

2. The Principles of Mahomedan Law relating to the burial ground or Kabarstan;

3. Ameer Ali has stated the principles at pp. 406 and 407 of vol. I of Mahommedan Law, on the basis of Fatawai Alamgiri as follows;

'Auzjundi being asked with regard to a masjid for which there no longer remained a congregation and all around it had gone to decay, whether it was lawful to convert it into a cemetery, answered 'No' and being asked with regard to a cometery, in a village, where it had gone to decay, and there remained in it no traces of the dead, not even bones, whether it was lawful to sow the land and take its produce, answered 'No' for in legal effect it is still a cemetery. 'A man makes his land a cemetery or an inn the kharaj abates, if the land were kharaji, and this is correct.

when a woman has made a cemetery of part of her land, divesting herself of the property and has buried her son in it, but the piece of land is unfit for a cemetery by reason of an overflow of water upon it and she wishes to sell the land, if it be still in such a state that people desire to bury their dead in it, she cannot sell it, but if they have no such desire the may.

A cemetery or graveyard is consecrated ground and cannot be sold or partitioned. Even lands which are not expressly dedicated but are covered by graves are regarded as consecrated and consequently inalienable and non-heritable. But when a place is found not to be a makbara (a burial ground), but only one or two bodies are buried there, the actual spot where the bodies lie buried is consecrated, whether a place is a

makbara or not depends on the number of persons buried there, or evidence of dedication derived from the testimony of witnesses or reputation.

4. The same principles are more or less reiterated in Mulla's Principles of Mahomedan Law, eighteenth edn. 1977 at pp. 205 to 207 and A.A.A. Fyzee in Outlines of Muhammadan Law, fourth edn. 1974 at pp. 325 to 326.

5. In the Court of Wards v. Ilahi Bakhsh ILR(1912) Cal. 297, 15 Bom. L.R. 436, the Privy Council had to deal with the question, in respect of a graveyard, which was entered in the settlement record, under the Panjab Land Revenue Act, as in the possession of Mahomedans and was described as kabristan or ghairmumkin kabristan i.e. graveyard or unculturable land forming portion of a graveyard. The only substantial ground of appeal urged before the Privy Council was that the area known; as the Pak Daman graveyard was not one continuous burial ground, but merely as area of uncultivated ground in which here and there there were to be found graves or clusters of graves, and the defence set up was that vacant ground unoccupied by graves remained the private property of Makdum Hassan Bakhsh which was under the Court of Wards.

6. Lord Macnaghten rejected this contention saying (p, 307):

Their Lordships agree with the Chief Court in thinking that the land in suit forms part of a graveyard set apart for the Mussalman community, and that by user, if not by dedication, the land is wakf. The entry in the record-of-rights seems conclusive on the point. It is obvious that if it were held that within the area of the graveyard land unoccupied or apparently unoccupied by graves was private property and at the disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government in setting aside land as an open graveyard for the Mahomedan community in Multan would be frustrated.

7. In Motishah v. Abdul Gaffar AIR[1956] Nag. 38 it was said (p. 42): .A cemetery or graveyard is a consecrated ground and is not a private property. Whether a place is a 'makbara' (burial ground) or not depends on the number of persons buried there of evidence of dedication derived from the testimony of witnesses of reputation.

8. In Mohd. Kasam v. Abdul Gajoor : AIR1964MP227 , it was laid down (p. 229):

Under Mohammadan Law if a land has been used from time immemorial for burial ground then the same may be called a Wakf although there is no express dedication...

No doubt in order to prove dedication by evidence of burials in a land and to justify the inference that the land is a cemetery it is necessary to prove a number of instances adequate in number and extent.

9. In Bashir Ahmad v. Abdul Jabbar : AIR1968Pat29 it was said;

Apart from immemorial user if it appears to the Court that if any property is claimed to be graveyard, the party concerned will have to lead evidence in regard to the number of instances, the character of the burial and the extent of it, from which the Court can infer that the plot of land in question was necessarily used as a public burial ground. In this view of the matter, the question of the period for which the land has been put to such use would not be such as to take it back to time immemorial. If

from the evidence on the record the Court can infer that the number of instances of burial is such, and the way in which burial have been permitted by the owner of the property also is such, that the Court can infer dedication of it by the owner to public use, that may justify the inference of its dedication as a wakf property.

10. It appears to be well-settled that where a certain land was used as a Mahomedan graveyard and it is amply supported by the entries in the revenue records, the mere fact that in recent years it was not so used does not deprive it of its character as a wakf; and the Muslim community concerned has a right to require the demolition of a house built on the disused graveyard in contravention of the original purposes of the wakf. See Ehsan Beg v. Rahmat Ali AIR(1934) Luc 547. Private ownership of a plot is incompatible with the plot having been dedicated as a wakf for graveyards.

11. It also appears to be well-settled that if any person is in possession adversely to the wakf, (although it may be difficult to say in respect of a graveyard against whom the possession would be adverse), the person in adverse possession for more than twelve years, prior to a suit for possession, may acquire title by adverse possession.

12. Thus, in Masjid Shahid Ganj Mosque v. Shiromani Gurdwara Prabandhak Committee, Amritsar (1940) L.R. 67 IndAp 251 : 42 Bom. L.R. 1100 the Privy Council observed (p. 263):.It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of a mosque, whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. While their Lordships have every sympathy with a religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the wakf, or that it is not so possessed so long as it is referred to as 'mosque' or unless the building is razed to the ground or loses the appearance which reveals its original purpose.

13. It is also said, at p. 262 relying on Abdur Rahim v. Narayan Das Aurora , that it cannot be doubted that the Indian Limitation Act of 1908 applies to immovables made wakf notwithstanding that the ownership in such property is said, in accordance with the doctrine of the two disciples, to be in God.

14. In the aforesaid Abdur Rahim v. Narayan Das Aurora Lord Sumner observed (p. 90):.The property in respect of which a wakf is created by the settlor, is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in very deed 'God's acre', and this is the basis of the settled rule that such property as is held in wakf is inalienable, except for the purposes of the wakf.

15. We, however, do not find anything in the case to support the conclusion arrived at by Sir George Rankin in respect of Mosque in the case of Masjid Shahid Ganj Mosque v. Shiromani Gurdwara Prabandhak Committee, Amritsar, at page 262, that in Abdur Rahim v. Narayan Das Aurora's case it was taken as plain that if Article 134 of the Limitation Act did not apply to wakf the claim to recover possession of wakf property was governed either by Article 142 or Article 144.

16. However, even the Supreme Court has observed in Mohammad Shah v. Fasihuddin Ansari AIR [1936] S.C. 713 :

Now it is evident that the space on which the pushas and the minarets stood was part of the mosque property. The defendant has, therefore built on a part of the mosque estate and as he has not demarcated those portions from the rest we are bound to treat them as accretions to the mosque estate. It is true that a stranger to the trust could have encroached on the trust estate and would in course of time have acquired a title by adverse possession. But a Mutwalli cannot take up such a position.

The Wakf Act, 1954:

17. The legislation regarding wakfs, culminating in Wakf Act, 1954, which is now in force had a chequered history. The management of a wakf immediately vests in Mutawalli but the pre-British rulers as well as the British rulers and Free Indian Government at the Centre and the States have felt the necessity for enacting the provisions for the proper management of the wakf and to provide for better administration without interfering with the principles of Mahomedan Law governing wakfs.

18. Hence in addition to various enactments dealing with the subject of charitable endowment Muslim wakf Act, 1923 was introduced in the British India. This Act however, merely provided for the submission of audited accounts of the Mutawalli to the District Magistrate. The Act did not bring about any change of much practical value. Mohammedan Wakfs Bombay Amendment Act, 1935 amended Muslim Wakf Act, 1923. The Punjab Wakf Act, 1934 was enacted to provide for supervision of wakfs in the Punjab. Uttar Pradesh followed with a suitable Act. Bihar passed legislation almost on similar lines. All these Acts brought the necessity of many amendments. Many of the other States had got no Act for the purpose.

19. It was, therefore, thought necessary by the Indian parliament that one uniform and consolidated legislation may be passed by the Centre which could be adopted as a model Act by the various States. That is why the Wakf Act, 1954 was enacted to provide for better administration and supervision of wakfs. It was brought into force in the Hyderabad State where the district Bhir was situate on January 4, 1955, as already stated above.

20. Briefly, Section 3 of the Act provided for definitions and Section 3(1) defines 'wakf as meaning the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim Law as pious, religious or charitable and includes-(i) a wakf by user; (ii) grants (including mashrut-ul-khidmat) for any purpose recognised by the Muslim law as pious, religious or charitable; and (iii) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable; and 'wakif means any person making such dedication. We are not concerned with the other definitions in Section 3, chap. II Section 4 and 5 empower the State Government to make a survey of wakfs. It may be noted that in the Bhir district Gazetteer it is stated that the Act had been in force. It is also to be noted that the Boharas are admittedly Shiahs and not Sunnis.

21. Chapter IIA of the Wakf Act, 1954, Sections 8A to 8D deal with the constitution and sanction of the Central Wakf Council. Chapter III deals with the constitution and functioning of the Boards under the State Governments. It is necessary to note that the Board is required, under Section 10, to consist of eleven members in case of a State like Maharashtra State and the Union Territory of Delhi and must belong to one

of the categories (1) members of the State Legislature and members of Parliament representing the State; (2) persons having knowledge of Muslim law and representing associations such as State Jamiat-ul-Ulama-i-Hind (whether such persons are Hanafi, Ahle-Hadis or Shefai) or State Shia Conference; (3) persons having knowledge of administration, finance or law and (4) Mutawallis of wakfs situate within the state, provided that in no case more than one Mutawalli shall be appointed to the Board; and it is further provided that in determining the number of Sunni members or Shia members in the Board, the State Government shall have regard to the number and value of Sunni wakfs and Shia wakfs to be administered by the Board. The plaintiff No. 1 as already stated above is a member of the Board under chap. III.

22. The provisions of the Act, with which we are concerned, in the present case, are Sections 25 to 30 of chap. IV. Section 25(1) requires that every wakf whether created before or after the commencement of this Act shall be registered at the office of the Board. Sections 25(2) to (8) regulate the procedure for making an application and lays down the period within which the application should be made.

23. Clause 7 of Section 25 is very important and lays down as follows:

On receipt of an application for registration, the Board may, before the registration of the wakf, make such inquiries as it thinks fit in respect of the genuineness and validity of the application and the correctness of any particulars therein and when the application is made by any person other than the person administering the wakf property, the Board shall, before registering the wakf, give notice of the application to the person administering the wakf property and shall hear him if he desires to be heard.

24. It may be noted in this connection that notice to trespassers of the wakf property is not germane to this procedure although, if they appear before the Board or the Officers sent by the Board for making an inquiry, they may be heard as the inquiry is within the discretion of the Board. It is necessary to refer, in this connection, to one of the arguments made by Mr. Kurdukar in this connection, viz. that the suit Kabarstan was registered as the wakf without hearing the defendants and without giving opportunity to the defendants to plead their title by adverse possession.

25. The argument has to be rejected because there is no such requirement laid down in the procedure laid down by Section 25 of the Wakf Act, 1954. Section 26 lays down how the Board shall maintain the register of wakfs in which the various particulars mentioned therein shall be entered.

26. Section 27 is significant as it is the one section with which we are vitally concerned with in the present case. It runs as follows:

27. (1) The Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf, it may, after making such inquiry as it may deem fit, decide the question. (2) The decision of the Board on any question under Sub-section (1) shall, unless revoked or modified by a civil court of competent jurisdiction, be final.

27. In other words, the Act makes the decision of the Board final subject to the

revocation or modification by the civil Court. Hence in a suit like the present one where the Board has relied on its decision for obtaining a decree for possession, the burden of proof that the decision was wrong rests on the party who would, fail if no evidence is led as laid down in Section 102 of the Indian Evidence Act.

28. It is unfortunate that the attention of the learned Civil Judge was not drawn, in the lower Court, to the effect of Section 27 of the Wakf Act, 1954 and Section 102 of the Indian Evidence Act, which runs as follows:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

It is necessary to emphasise this aspect in this case because the learned Civil Judge dismissed the plaintiffs' suit on the ground that the plaintiffs were not able to produce any record from the Dasturual Amal Awakaff record and the defendants proved that they were in possession for more than twelve years prior to the suit.

29. The other sections of chap. IV need not be referred to as they are not relevant. Similarly, chap. V, dealing with Mutawallis and Wakf Accounts; chap. VI, dealing with finance of the Board; chap. VII, dealing with judicial proceedings; and chap. VIII, dealing with miscellaneous provisions need not be discussed in detail as the provisions are not relevant to the points to be decided in the present case in which as already stated above the most important and vital section is the aforesaid Section 27. The Law of Limitation:

30. The present suit having been filed on August 14, 1967, the article of Limitation Act regulating adverse possession is Article 65, which lays down a period of limitation of twelve years for filing a suit for possession immovable property or any interest therein commencing from the period when the possession of the defendants become adverse to the plaintiffs.

31. The words 'adverse to the plaintiffs' require to be emphasised. Section 2(a) (ii) and OH) of the Limitation Act, 1963 define the plaintiff as including (i) any person from or through whom the plaintiff derives his right to sue and (ii) any person whose estate is represented by the defendant as executor, administrator or other representative.

32. The trial Court appears to have assumed that the plaintiff No. 1 Marathwada Wakf Board derives its right to sue from the Bohara community or someone who is managing the Kabarstan or in whom the Kabarstan vested, although the judgment does not show anywhere that the learned Judge had applied his mind to this aspect of the matter.

33. As already stated above, the present plaintiff No. 1 came into the picture, as a result of the appointment made on March 1,1961 under Section 9 of the Wakf Act, 1954. The plaintiff No. 2 came into the picture only when some of the members appointed him as Mutawalli for the purpose of making application for registration in the year 1962. The suit which was filed by the plaintiff is a suit in exercise of the powers conferred on the Board, plaintiff No, 1 under Section 15(1) and (2)(i) read with Section 55 of that Act.

34. It cannot, therefore, he said that the defendants were in possession of the

portions of the suit-property, in their possession, adversely to the plaintiffs, for more than twelve years. When the suit was filed on August 14, 1967, neither the plaintiff No. 1 nor the plaintiff No. 2 were concerned with the wakf property or anybody else concerned with that property prior to twelve years before the suit.

35. We are, therefore, of the 'opinion that the learned Civil Judge illegally upheld the contention of the contesting defendants that they were in possession of the property adversely to the plaintiffs in the present case. He has recorded a finding without referring to Article 65.

36. There is nothing on record to show that the defendants held adversely to the present 'plaintiffs or the present plaintiffs were included in the definition of the word 'plaintiff' as defined in Section 2(j) of the Limitation Act, 1963. Neither the plaintiff No. 1 nor the plaintiff No. 2 derived their right to sue from any person. The right to sue is based on the statutory provisions contained in the Wakf Act, 1954.

37. In our opinion, therefore, the finding of the learned Civil Judge regarding adverse possession of the defendants is wholly misconceived and illegal.

38. The Public Wakf (Extension of Limitation) Act, 1959:

39. Moreover, perhaps in view of some of the decisions of the Privy Council and the Supreme Court referred to above and with a view to see that the public wakf property was not misused by private persons, the Parliament enacted the Public Wakfs (Extension of Limitation) Act, 1959, Act No, 29 of 1959, which came into force on September 1, 1959, to extend the period of limitation in certain cases for suits to recover possession of immovable property forming part of public wakfs,

40. Section 2 of that Act defines 'public Wakf as follows:

'public wakf means the permanent dedication by a person professing Islam of any immovable property for any purpose recognised by Muslim Law as a public purpose of a pious, religious or charitable nature.

41. Section 3 runs as follows:

where a person entitled to institute a suit of the description referred to in Article 142 or Article 1.44 of the First Schedule to the Indian Limitation Act, 1908 (9 of 1908), for possession of any immovable property forming part of a public wakf or any interest therein has been dispossessed, or has discontinued the possession, at any time after the 14th day of August, 1947, and before the 7th day of May, 1954, or as the case may be, the possession of the defendant in such a suit has become adverse to such person at any time during the said period, then, not withstanding anything contained in the said Act, the period of limitation in respect of such a suit shall extend up to the 15th day of August, 1967.

42. In fact, having regard to the grave miscarriage of justice resulting from dismissing suit on behalf of the public wakf, in such a way as barred by limitation, as in this case, the government was compelled to pass an earlier Ordinance in this connection. The anxiety of the Government to safeguard the public wakf compelled the Government further to extend the period of limitation by passing an ordinance, Ordinance No. 13 of 1968, whereby for the words, figures and letters 'the 31st day of

December 1968' the words, figures and letters 'the 31st day of December, 1970,' were substituted.

43. By a further amendment of Act before Public Wakfs (Extension of Limitation) Amendment Act, 1967, Act No. 22 of 1967, which came into force on August 14, 1967, under which for the words, figures and letters 'the 15th day of August 1967' the words, figures and letters 'the 31st day of December 1968' were substituted.

44. This was followed by a further ordinance by Ordinance No. 13 of 1968 which substituted for the words, figures and letters 'the 31st day of December, 1968' the words, figures and letters 'the 31st day of December, 1970.'

45. This was further followed by a further amendment (Act No. 9 of 1969) which came into force with retrospective effect. The net result of the Public Wakfs (Extension, of Limitation) Act, 1959 as amended from time to time, till Act No. 9 of 1969, was passed, may be summarised as under:

46. In respect of the suits for possession which may fall within Article 142 or Article 144 of the First Schedule to the Indian Limitation Act, 1908, corresponding to Article 65 of the Limitation Act, 1963 of any immovable property forming part of the public wakf or any interest therein, the period of limitation of such suits, notwithstanding anything contained in Limitation Act was extended, upto December 31, 1970 and this was subject to the proviso that the person suing was dispossessed or discontinued to possess at any time after August .14, 1947 and before May 7, 1954.

47. The learned Civil Judge although he referred to this Act, did not bear in mind the amendments and the dates mentioned in Section 3; and without applying his mind to the case set up by the defendants individually, wrongly held that the Public Wakfs (Extension of Limitation), Act, 1959 did not apply to the facts of the present case.

48. As already discussed above, it was only defendant No. 4 and defendant No, 3D who were contending that they were in possession of the portions, on which they had residential houses, from the time of their forefathers. Defendant No. 4 was the brother of defendant No. 3, father of defendant No. 3D. The defendant No. 4 himself filed a written-statement admitting the claim of the wakf and had his advocate rightly said that the written-statement was fully explained to the defendant No. 4.

49. It was wrong on the part of the learned Civil Judge to have allowed him to set up the plea of adverse possession by resiling from the original written-statement and by filing the fresh statement. In any event, the conduct of the defendant No. 4 showed that he was dishonest and he should not be relied upon when he said that he was in possession from the time of his forefathers. In fact, neither he nor his friends should be believed.

50. Similarly, the only witness examined by defendant 3D was Sugrabai the mother, who was bound to support the claim of adverse possession. But she admitted that she came on the scene only after 1954 and she could not have, therefore, known of any adverse possession prior to 1954.

51. Again turning to the case of defendant No. 1, as already stated above, he was not in position to prove adverse possession or any possession prior to November 3, 1950; and even defendant No. 10 failed to prove any possession prior to January 23, 1962.

52. In the circumstances, the finding of the learned Civil Judge that defendants No. 3D, 4, 10 and 11 perfected their title by adverse possession was wholly wrong. It was contrary to the evidence on record which is already discussed at length and it was also in contravention of the provisions of the Public Wakfs (Extension of Limitation) Act, 1959 as amended from time to time which enabled the suit in respect of a public wakf to be filed upto December 31, 1970.

53. It is well-settled that the special law must over-ride the general law like the law of limitation and what is contained in the Public Wakfs (Extension of Limitation) Act, 1959, as amended from time to time, therefore, applied to the case. The present suit filed by the plaintiffs on August 14, 1967 was very much within time,

54. Mr. Hussein has further submitted that because Section 3 of the Public Wakfs (Extension of Limitation) Act, 1959 refers to Article '142 or 144 of the First: Schedule to the Indian Limitation Act, 1908', the lower Court forgot to apply the provisions of Article 65 of the new Limitation Act. As already stated above, there is nothing in the judgment to show as to which article was applied by the learned Civil Judge.

55. Moreover, under Section 8 of the General Clauses Act, 1897, it is provided that where that Act, or any Central Act or Regulation made after the commencement of that Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

56. It is, therefore, clear that what, if at all, applied to the present case is Article 65 of the Limitation Act, 1963, and the present suit is not barred under that article. That provision of law, however, was overridden by the provisions contained in Section 3 of the Public Wakfs (Extension of Limitation) Act, 1959 as stated above.

57. The only argument which Mr. Kurdukar made to repel this conclusion was that the Kabarstan is not a public wakf as defined in Section 2 of the Public Wakfs (Extension of Limitation) Act, 1959. The definition has already been referred to above. Even some of the defendants, apart from the defendants, who did not contest the claim of the plaintiffs and particularly the oldest contesting party in the present case, defendant No. 11, has admitted that there are about fifty tombs in the suit-property, in addition to a mosque and Takiya; and the Boharas were using it as a cemetery.

58. There can be no doubt that the suit cemetery is a public wakf as defined in Section 2 as there has been a permanent dedication by the Boharas professing Islam of the property for mosque and for burial which are recognised by Mahomedan law for a public purpose of a pious, religious or charitable nature. The 'contention of Mr. Kurdukar must, therefore, be rejected.

Conclusion:

59. The very fact that defendants Nos. 1, 2, 3A, 3B, 3C, 5 to 9 did not contest the claim of the plaintiffs is an indication that what the plaintiffs stated in the plaint was absolutely correct. The contentions raised by the defendants Nos. 4, 3D, 10 and 11 were false and illegal and hence the plaintiffs' suit should be decreed.

60. We, therefore, set aside the judgment and decree, passed by the learned Civil

Judge, Senior Division, Bhir, on December 24, 1969 and decree the plaintiffs' suit by ordering all the defendants to restore possession of the portions of the suit-property in their respective or joint possessions by removing the houses built on it. If the defendants fail to remove the houses and restore peaceful, quiet and vacant possession, the plaintiffs shall get the structures removed through Court at the costs and expenses of the defendants concerned and recover peaceful and vacant possession of the portions of the suit-property occupied by the defendants respectively and it is further declared that the suit property is and was the Bohara Kabarstan property; and the defendants are one and all trespassers thereon.

61. The defendants appear to be poor Muslims from the village; and as they have somehow built houses and stayed there for all these years; and as the property was only a Kabarstan, which is also not very much in use, we order the parties to bear their own costs throughout.

62. Appeal allowed with no order as to costs.