

(1964) 03 KL CK 0013

In the High Court Of Kerala

Case No : Second Appeal No. 1321 of 1960

Kuthukutty Kunhali's son Kunhalavi Musaliar and Others

APPELLANT

Vs

Pakkath Enu's son Abdulla and Others

RESPONDENT

Date of Decision : 17-03-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8

Citation : AIR 1965 Ker 200

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : Mathew Muricken and K.K. Abdul Rahiman, for the Appellant; K.A. Mohammed, (for Nos. 1 and 2), K.P. Abraham and K.K. Paulose, (for Nos. 3 and 4), for the Respondent

Final Decision : Allowed

Judgement

K.K. Mathew, J.—This is an appeal from a decree in a suit for a declaration that the Musalmans of Alanellur are entitled to conduct "Juma" Prayers in the Mosque scheduled to the plaintiff and to restrain the defendants from interfering with the plaintiffs in the exercise of the above right. The plaintiff allegations were that the plaintiff mosque was a Jumayath mosque, that the Muslims of Alanellur required this mosque for conducting Juma prayers as it has the amenities of a Jumayath mosque, that it was used as a public mosque for conducting juma prayers also for the last 40 years, that the defendants had no particular right over the mosque in question, that there was another mosque called "Mundath Mosque" near the plaintiff mosque that it was difficult to conduct Jumayath Prayers in that mosque because of the increase in population, that the defendants' action in approaching the executive 2nd Class Magistrate and obtaining an order restraining the plaintiffs from carrying on the Jama prayers in the plaintiff mosque was unauthorised, that the plaintiffs had the right to conduct the juma prayers in the plaintiff mosque and that the order passed by the Magistrate restraining them from conducting juma prayers was Illegal and ultra vires.

2. Defendants 1 and 3 to 21 contended that the suit was not maintainable, that the plaintiffs were wahabis who had no hold in the locality, that the plaintiff mosque was only a Niskarapalli, that no juma prayers were ever conducted there, that the property and the mosque which stood thereon belonged to the father of the 6th defendant, who constructed the mosque for the purpose of enabling the persons who resorted to the nearby market to offer their niskarams, that he never intended the mosque to be used as a place for conducting juma prayers, that the public of the locality did not acquire any right to conduct juma prayers contrary to the intentions of the founder of the mosque, and that neither the 6th defendant nor his predecessor-in-interest ever allowed juma prayers to be conducted in the mosque. It was also contended by them that there could be no juma prayers in the plaintiff mosque as there was already a mosque in Mundath where alone the Musalmans of the locality should meet for juma prayers, and that the religious texts forbade the conduct of juma prayers in the same mahal.

3. The trial court found that the plaintiff mosque was a public mosque, that it was founded by the father of the 6th defendant, that the 6th defendant had alienated the property and the mosque, that the plaintiffs had the right to conduct the juma prayers in the mosque and decreed the suit. The lower appellate court on appeal by the defendants confirmed the decree of the trial court and hence the present appeal.

4. The main submission on behalf of the appellants was that there is no finding by either the trial or the lower appellate court as to the Intention of the founder in establishing this mosque. Issue -No. 5 in the case runs as follows;

"Whether the father of the 6th defendant consented that Juma could be performed in the Mosque?"

The finding of the trial court on that issue is,

".... That the place is a public place is conceded by D. W. 1 and that settles the matter. That being so, it is unnecessary that the consent of the 6th defendant's father should be obtained for performing the worship in the plaintiff mosque. This issue is found accordingly."

The lower appellate court did not specifically consider this issue, but recorded a finding in para 13 of its Judgment to the following effect:

"The ownership of the plaintiff mosque vests in the public and the conditions for starting a new Juma mosque in it are also satisfied. It follows that the defendants are not entitled to resist the suit."

These findings do not answer the question posed by Issue No. 5. The finding of the courts below in effect is that Pokker, the father of the 6th defendant had dedicated this mosque to the public, and therefore it has become a public mosque. That is a concurrent finding of fact and, the appellants did not challenge that finding in this appeal. Therefore I proceed on the assumption that the plaintiff mosque is a public mosque and that the Muslims in the locality have got the right

to use the mosque. The defendants had another contention that the plaintiffs could not conduct juma prayers in the plaint mosque as the conditions necessary for that did not exist in the present case.

5. it was argued for the appellants that certain conditions have been laid down by writers of Shafei School of Muhammadan Law for conducting juma prayer in a mosque, and that as these conditions were not satisfied in the present case the lower courts were not Justified in granting the declaration prayed for by the plaintiffs.. My attention was drawn to certain books written by persons belonging to the Shafei School of Muhammadan Law, in which they have stated the conditions, for establishing a jumayath mosque. Ext-. B-9 contains some of the vial conditions necessary to be satisfied for carrying on juma prayers. Clauses 10 and 11 in Ext. B-9 were referred to in this connection for the purpose of showing the conditions which should be fulfilled before Juma prayers could be conducted in a mosque. While agreeing with the contentions of the appellants that there are certain conditions to be fulfilled for conducting Juma prayers in a mosque, 1 do not think that those conditions are mandatory- They are not imperative.) Those conditions are more directory in character1 think the conclusion arrived at by the lower courts that those conditions are not Imperative is correct.

6. Therefore the only surviving question for consideration in this appeal is whether the failure of he courts below to consider issue No. 5 in its proper perspective is a fatal defect affecting the merits of the case, it is the admitted case of both parties that this mosque was constructed by Pokker, the father of the 6th defendant in a property belonging to him. There are different versions as re-gards the reasons why he constructed the mosque. On the one side it is alleged that the Intention was to give facilities for "niskaram" to persons who resorted to the nearby market. On the other hand was contended that he did not intend to restrict the user of the mosque to the persons who resorted to the nearby market for "niskaram" but to the public of the locality.

Whatever that be there is a concurrent finding by the court below that the Intention of Pokker was to dedicate this mosque to the public generally. But the question which really arises for consideration is whether Pokker intended this mosque to be used as a place for conducting juma prayers. There is no finding by the courts below whether Pokker intended the user by the Public of the plaint mosque as a place for conducting juma prayers. The case of the defendants was that Pokker intended this mosque to be used only as a place for conducting "niskaram" and not for juma prayers. The failure of the plaintiffs to prove their case that juma prayers were conducted in this mosque for the last 40 years prohabilises the version of the defendants that Pokker never Intended this mosque to be used as a place for conducting juma prayers. The terms of the dedication are not Available as Pokker did not reduce them to writing.

Bo we have to infer from the evidence in this case what exactly was his intention. 1 think the real purport of issue No. 5 was whether Pokker intended the mosque to be a "niskarapalli" only of whether he intended, the mosque to be

used as a place for conducting Juma prayers also. The intention of the founder as to the object of the foundation must certainly be respected, and Muhammadan LAW does not lay down any principle to the contrary, I think that both the courts below failed to consider the crucial question in the case namely whether Pokker intended the mosque to be used as a place for conducting juma prayers. One looks in vain in the Judgments of the courts below for a finding on this important question.

7. in Amir Ali on Muhammadan Law, 4th Edn., vol. 1. page 426, it is stated:

"The wakif can reserve to himself, at the time of the dedication, the power to alter the beneficiaries of the trust by either adding to their number or excluding some, or to increase or reduce their interest in it. He cannot do so afterwards. "The Wakf, says the. Radd ul Muntar "has no power to alter or change the conditions (provisions) of a wakf, unless he has expressly reserved to himself the power of doing so." if he has reserved to himself the power of adding to the beneficiaries or removing any person from that category, or of removing the mutwalii from his office, it would be lawful for him to do so. No alteration, however, can be made in the nature or character of the wakf. similarly, it is not lawful for the mutwalii to go beyond the conditions laid down in the wakfnamah."

in "Muslim Law" by Kashi Prasad Saksena at page 006 it is stated:

"Another important principle is that no alteration can be made in the nature or character of the wakf, whether the power to this effect has been reserved or not. The mutwalii or the settlor himself, if he be the mutawaili, is to carry out the provisions of the wakf strictly. Solicitous regard must be paid to the intention of the consecrator as regards the provisions of the wakf. If there is any latent ambiguity, it may be cleared by evidence"

The fundamental idea of a wakf is that the property is vested in the Almighty and unless there is a power reserved to the settlor to change the character and object of the wakf, he has no power to do so. If at all there is any power in that behalf in any person it is in the Kazi whose place is now taken by the civil courts in the country. If it is more advantageous to the public to whom the mosque is dedicated that there should be a deviation from the object of the founder, there must be the sanction of the Kazi for the same. The civil Court having taken the place of the Kazi must take into consideration all the relevant circumstances and come to a conclusion whether the interest of the public to whom the mosque is dedicated requires that there should be a deviation from the original user which alone was in the contemplation of the founder. In *Md. Ismail Ariff v, Ahmed Moolla*, AIR 1916 PC 132 Ameer Ali J., speaking on behalf of the Judicial Committee of the Privy Council has stated that if at all it is only the Kazi who can sanction any change in the object of the wakf. It was held:

"Generally speaking, in the case of a wakf or trust created for specific individuals or a determinate body of individual, the Kazi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give

effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well known example, the Kazi's discretion is very wide. He may not depart from the Intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interest of the general body of the public for whose benefit the trust is created, We may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interest of the institution."

8. it is clear that one of the Important points to be considered in the case was whether the object of dedication was comprehensive enough to include the conduct of juma prayers in this mosque, and that if the only Intention of the founder was to establish a niskarapally, whether the change in the circumstances would Justify a change in the object or the foundation, The lower appellate court has to consider the matter afresh as it has not entered any finding on this rather important question.

It has to be ascertained whether Pokker intended the mosque to be used as a place for conducting Juma prayers, and if there was no such intention on the part of Pokker whether the Court which has taken" the place of Kazi should in the circumstances, of the present case, permit the plaintiffs to conduct the Juma prayers in the plaint mosque, if the settlor had no intention one way or other then also it is the duty of the Kazi to decide the question whether the conditions necessary for conducting the juma prayers exist. This, -it may he noted, is quite a different thing from recognising a right on the part of the plaintiffs to conduct juma prayers on the basis that it is a public mosque, and therefore a particular number of Muslims can insist upon juma prayers being conduct ed in the mosque. The finding of the courts below that the plaint mosque is a public mosque is not determinative of this question.

Merely because a mosque is a public mosque a number of persons cannot come to the court and ask that they have got the right to conduct the juma prayers. If the founder of the mosque did not intend it as a jumayath mosque the civil court which has taken the place of the Kazi has to decide on the evidence available whether the interests of the public require a change in the object of the foundation and whether the conditions necessary for making me plaint mosque a Jumayath mosque exist in this case and whether the object of the founder was comprehensive enough to include the conduct of juma prayers.

9. it was also argued for the appellants that the notice under Order 1, Rule 8 was not published after obtaining the permission of the court, and that that was a fatal defect. The lower appellate Court has considered this question and has come to the conclusion that the provisions of Order 1, Rule 3 have been substantially complied with. I agree with the view of the lower appellate court. in

this case what happened was that the plaintiffs filed two applications for allowing them to file the suit in a representative capacity and for suing the defendants in a representative capacity. The court ordered the publication of the notice in a local paper in March, 1956 i.e. soon after the suit was Instituted and notice was published in the local paper. It is seen that on the date when the judgment was pronounced there was an order passed by the court permitting the plaintiffs to sue in a representative capacity and allowing the defendants to defend the suit in representative capacity. On the basis of those facts the appellants argued that the provisions of Order I, Rule 8 have not been complied" with. Their argument was that the order for permission was invalid as it was passed subsequent to the publication of the notice in the paper.

In *Muthukaruppa v. Appavoo*, AIR 1943 Mad 101 this question was considered and their Lordships held that even if permission was given after the publication of the notice that would not vitiate the proceedings. The principle of that ruling was followed in *Chatrabhuj Keshavji v. Ghanshyamlalji Ratanji*, AIR 1952 Kutch 92. I think that the court must be deemed to have given its permission when it ordered the publication of the notice in the paper. The argument of the appellants that the Muslims of the locality had no opportunity to get themselves impleaded as there was no proper notice has to be overruled.

10. Mr. K. P. Abraham, appearing for the respondents submitted that the defendants have no right to resist the plaintiffs in carrying on the juma prayer in the plaint mosque, and in support of this proposition he cited before me AIR 1933 193 (Privy Council) . His argument was that this is a matter relating purely to the religious doctrines and therefore the defendants had no right to resist the plaintiffs" suit. In these circumstances, I am inclined to accede to the request of the appellants that the case must be remanded to the lower appellate court for a finding on the question referred to, I think a decision on this question was necessary for disposing of the appeal before the lower appellate court,

11. I would therefore set aside the decree and Judgment of the lower appellate court and remand the case to that court for a disposal of the appeal afresh in the light of the observations made in this judgment. The appeal is allowed in the manner indicated. The appellants will be entitled to a refund of the court-fee paid on the memorandum of appeal. The rest of the costs here and in the court below will abide the result of the decision of the lower appellate court, and will be provided for in the decree to be passed by that court.