

(1924) 01 PRI CK 0002

In the Privy Council

Case No : Privy Council Appeal No. 54 of 1920

Mahomed Raza

APPELLANT

Vs

Syed Yadgar Hussain and others

RESPONDENT

Date of Decision : 28-01-1924

Acts Referred:

Citation : (1924) AIR(PC) 109

Hon'ble Judges : Lawrence Jenkins, Ameer Ali, John Edge, Carson, Shaw, JJ.

Advocate : Frances and Harker, A. Majid, De Gruyther, for the Appearing Parties.

Judgement

Lord Shaw

This is an appeal from a decree of the Court of the Judicial Commissioner of the Central Provinces dated 10th January, 1920, reversing a decree of the Court of the Additional District Judge of Nagpur dated 18th December, 1918. The case was argued before the Board ex parte.

The point of the appeal as presented was whether in the year 1840 Raja Raghoji Bhonsla, a Hindu ruler, created a wakf of three villages, namely, Goreware, Sokham and Nankapar, to Hakim Yadgar Hussain, the royal physician. The document so said to create a wakf is as follows :-

"From

"Raghoji Bhonsle, Sena Saheb Bubba.

"The village of Mouza Gorewada in this pergana is given as mokasa in the Arabic year 1241/1840 (Fasli year 1250) to Hakim Yadgar Hossein for the Imambara of Pir Hussein, with all income of land Revenue, Pandhari extra income, Kalali and mango groves, for ever from the commencement of the current year. It is assessed to a rental of Rs. 401-12-0. You may therefore continue the mokasa from year to year and generation to generation. Don't expect a fresh Sanad every year. Keep a copy of this Sanad and return the original to the grantee, dated 16th Jamadilawal.

16th July, 1840.

The argument is that this grant constituted a wakf for the Imambara of Pir Hussain. It was maintained that the use of the words "for ever" - manifestly applicable to the income of land revenue, etc.- together with the further use of the words " you may therefore continue the mokasa from year to year and generation to generation," signifies the creation of a wakf, although a wakf was not stated by name, nor is there any nomination of the grantee as mutwalli. The case was supported in argument by various decisions, the leading one of which is *Jewan Doss Sahoo v. Kubeer-ood-deen* 1841 2 M. I. A. 390 - 6 W. R. 3. (P. C). It can hardly be denied that according to the Mahommedan Law it is not necessary, in order to constitute a wakf, that the term " wakf " be used, " if from the general nature of the grant itself that tenure can be inferred."

This state of the law makes the present case one of difficulty on the facts and history elicited in these proceedings. In all such cases the actings or statements of the grantee or his successor may be relevantly taken into account as to their interpretation of the original grant : while the method in which the property has been treated on the administrative records may also throw light on the same problem. These things are not conclusive, but are circumstances worthy of consideration. The following narrative is accordingly given:-

The grantee Yadgar Hussain continued in possession of the temple until 1850, when he died. The mokasa village was then resumed. On 15 May, 1852, a grant was continued in name of his son Hakim Bunyad Hussain.

In the view of the Board what happened in 1867 and the two preceding years, as after-mentioned, is important. It appears from the proceedings that on 25th February a revenue case was tried, and three orders, one applicable to each village, were signed by Mr. Ross, the Settlement Officer. They were headed :-

Claim to Proprietary right in Mauza Sonkham late Purnah Kotwal, Thuseelee Nagpur.

and it was narrated :-

"This village has been held in Mokasa tenure since 1840 A. D. and the Mokasdar has all along held it in his own management as appears from the entries in the old record as follows :-

1234 Fs. to 1236 Amrun Gond.

1237 ,, 1241 Amrun Gond.

1242 ,, Prubalad Poree.

1243 ,, 1260 Hukeem Yadgar Hussain.

1261 ,, 1263 Mokasa ,,

1264 ,, ,, ,,

1265 ,, 1267 Mokasa Meer Hussain Emambara through Hukeemjee.

1268 ,, 1270 Peer Hussain thro" Boonyad Hussain.

1271 ,, 1271 Meer Boonyad Husain.

"Yadgar Husain was the grantee and was succeeded by his son Boonyad Husain. The female members of the family have laid claim to share, but they have no title. Boonyad Hussain has a younger brother named" Thoofeyl Husain

"Proprietary right in Mouza Sonkham is hereby conferred on Bunyad Husain and Thoofeyl Husain."

On the 4th May of the same year (1867), however, an order was passed by the Settlement Officer of Nagpur, Mr. Ross, in these terms :-

"Claim by Bunyad Hussain to hold in Mokasa village of Sonkham. This village together with the village of Gorewara, and Nankepar were granted by Takeed (issued in 1840 A. D.) to Yadgar Hussain Hakim (physician to the Royal Family) for expenses of the Imambara of Peer Hussain (Husan and Hussain) at Nagpur. The grant was made in perpetuity and inclusive of Abkaree, Pandhree; Sayer and demands of every other kind. The revised jama of these villages has been fixed respectively, at Rs. 300, 500 and 120. Yadgar Hussain died in 1261 Fasli (1851 A. D.) and the grant was, continued by a Takeed dated 24th, Rajab of that year to his son Bunyad Hussain.

"The expenses of the Imambara are defrayed by the holder during the Mohurram and Ramzan festivals. I recommend that the grant be continued while its object is maintained."

While on the 19th May the Chief Commissioner passed an order, the terms of which are of great importance. They are as follows :-

"The Mouza of Gorewara may remain revenue free as long as the Imambara is in existence, on this condition that the income arising from the maufi is properly spent and a report submitted to Government for sanction."

The three orders, one applicable to each village, are in the same terms:-

At appears to their Lordships difficult to predicate that these transactions of 1867 establish that a wakf with Yadgar Hussain as its mutawalli is established as having been instituted or continued as such.

If a statement made by Hakim Bunyad Hussain in the Court of the Settlement Officer on the 27th October, 1865, be referred to their difficulty grows greater. He is asked the question. "Have you got a co-sharer?" to which the answer is "There is no co-sharer. My real younger brother Syed Tufail Husain has got an equal share. We both live together." And in a further stage in his evidence he declares "I myself and my brother are in possession."

From a consideration of these documents and the evidence it appears to the

Board to be fairly plain that Bunyad Hussain's own position was not that of an exclusive claim to the mutwalliship of this property and endowment as a wakf, but an allegation of joint ownership and possession with his brother, subject, it may be, to respecting the conditions of the grant.

Hakim Bunyad Hussain died on 3rd April, 1913, and the recent settlement known as Mr. Dyer's settlement was made. From the papers it appears that a careful examination of the history of the property and its ownership and possession was then made. The decision of the Settlement Officer was to enter the defendant No. 1's name with other defendants 2 and 4 as co-sharers along with the plaintiff of the remaining 8 annas share. This administrative action was also of course quite inconsistent with the idea of a wakf having been constituted or there being any right in the deceased to have nominated his successor as mutwalli.

Their Lordships have carefully considered all the relevant documents and evidence in this case and they are of opinion that the judgment reached by the Judicial Commissioner is correct.

There are one or two matters, however, which the Board wishes to make clear. In the first place, in their Lordships' judgment the nature of the grant in this case, whether that term be applied to the document issuing from the Raja in 1840 or to the orders and records issuing from the Settlement Officer in 1867 was not a wakf but was a grant sub conditione. That condition was two-fold. In the first place the expenses of the temple should be defrayed from the revenue. The grant was for that purpose express, namely, "that the income arising from the manufi is properly spent," and secondly that a report was to be submitted to the Government for sanction, or to use the language of the Chief Commissioner's order of 10th July, 1867, with Regard to Sonkham:- "The village of Mouza Sonkham may remain revenue free for ever on this condition that the object for which it was given maufi should be properly maintained and the Imambara be kept in good repairs and a report submitted to Government for sanction.

In the next place the Board desires to make it clear that the interests of the Imambara are paramount and that no administration by the persons claiming either under the title of grantee, or of mutawalli or of manager could be legally sanctioned which was in violation or betrayal of the interests of the Imambara as safeguarded by the imposition of the condition which attached throughout to the grant.

The rights which would emerge or the course of procedure which would have to be followed in the event of such maladministration are not before the Board. The sole question arising is that defined by the plaint itself and is to the following effect :-

"That a decree be passed under S. 83 of the Central Provinces Land Revenue Act for setting aside the decisions of the Settlement Officer and cancelling the entries showing defendant No. 1's name as an 8 annas co-sharer and those of defendants 2 to 4 as co-sharers along with plaintiff of the remaining 8 annas

share in the record of rights and other papers relating to the new settlement of the mouzas:-

1. Gorewara

2. Sonkham More fully described in the schedule here with attached and by substituting the name of plaintiff alone, as the full 16 annas mokasdar and mutwalli of the said villages."

The true point of the proceeding is that the plaintiff in the present case, Muhammad Kaza, desires these entries to be deleted by substituting his name alone "as the full 16 annas mokasdar and mutwalli." His averment is that he.

"In pursuance of the wishes of his father succeeded him in the office of mutwalli of the aforesaid Imambara, and has since been managing the aforesaid wakf property exclusively in his own sole and exclusive right as such mutwalli and is in possession of the same in that capacity."

His object of course cannot be accomplished unless he can establish his position as mutwalli, and that position cannot be established unless the grant sub conditione as before described can be considered to be a wakf. An additional negative distinction must be made. The Board makes no pronouncement whatsoever on a question mooted, namely, whether a grant by a Hindu to a Mahomedan community was incompetent as the foundation of a wakf. The grant in the present instance has been dealt with on its own terms and conditions, and the issue has been settled against it being the constitution of a wakf. Further questions mooted only confuse that issue.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The petition for further documents will also be dismissed.

The appellant will pay to the first respondent such costs as he has incurred.