

(1947) 05 CAL CK 0021
In the Calcutta High Court

Md. Bedial Alam

APPELLANT

Vs

Shah Shamsuddin Ahmad

RESPONDENT

Date of Decision : 22-05-1947

Acts Referred:

Citation : AIR 1948 Cal 139

Hon'ble Judges : Gopendranath Das, J;Gopendra Nath Das, J

Bench : Division Bench

Judgement

Gopendra Nath Das, J.—This is an appeal by defendant 3. The plaintiff brought the suit on the allegation that the disputed land and other lands were dedicated by the Emperor Aurangzeb for the upkeep of a Darga, a mosque and a Takia of Darbesh Shah Jahed. The Sanad which is marked Ex. 1 was signed on behalf of the Emperor by Maha Singh, the then Subedar of the Province of Bengal. The grantee was Nurulla Shah. In 1842 proceedings were taken by the East India Company for the resumption of the lands covered by the Sanad and after enquiry they were released from assessment of revenue. In 1881 a suit was instituted in the Court of the Munsif at Sitakund by Ahmadulla, predecessor-in-interest of defendants 3 to 13 against Abdul Jabbar. That suit ended in a compromise. Abdul Jabbar died thereafter and was succeeded by his two sons, Ismail and Kobed. Kobed is defendant 2 in this" suit, Ismail, died on 4-2-1936. Kobed thereafter acted as mutwalli for some time. It appears that Najumal, defendant 1, who was the Am-mukhtar of Ismail and defendant 2 got their names recorded in the collectorate. Defendants 1 and 2 subsequently executed a deed of release in favour of defendants 3 to 13. In 1937 the plaintiff instituted a suit, being Suit No. 3/2 of 1937/1938 against defendants 1 and 2. In that suit the District Judge appointed the plaintiff as the mufcwalli of the wakf estate. Defendants 14 to 35 were made parties as lessees of the wakf estate. The plaintiff alleged that defendants 1 and 2 were trespassers having no sort of interest in the wakf properties. It was further alleged that defendants 14 to 35 had no interest under the lease, the wakf property being inalienable. On these allegations, the plaintiff brought the present suit for declaration of title to the disputed property, a wakf

property and for possession. The suit was contested by defendant 3. The material defence was that this was the personal property of Nurulla Shah which had devolved in course of time on the contesting defendants 3 to 13. It was further alleged that by the decree in the suit of 1881 the personal right of defendant's predecessor Ahmadulla was recognised. The trial Court decreed the plaintiff's suit and on appeal that judgment has been affirmed. Defendant 3 has preferred this appeal.

2. Mr. Sen appearing on behalf of the appellant has contended in the first instance that on a true construction of the Sanad, Ex. 1, it must be held that the grant was a personal one subject to the obligation of maintaining the Takia. In the second place it was contended that even assuming that the Sanad created a wakf, the plaintiff cannot recover possession in view of the terms of the compromise decree in the suit of 1881. I shall deal with these contentions seriatim.

3. As regards the first contention, a perusal of the Sanad would indicate that it was addressed to Nurulla Shaha who was described as a Fakir and a Khadin of the Takia. The grant was made on an application made by him for endowing certain properties for the upkeep of the Takia. An enquiry is said to have been made and thereafter the Sanad was granted to Nurulla and, it was stated in the Sanad that the properties were to be set apart for the maintenance and upkeep of the Takia. The grant was a Bench Sahi Lekhera] and Niskar. It is apparent, therefore, that the primary object of the grant Was to(maintain the Takia. In Mohiuddin v. Saviuddin (?93) 20 Gal. 810, Amir Ali J. traced the origin of a Takia and its subsequent development into a Khankah. It is observed in that case as follows:

Those Khankahs exist in all parts of India and so far as can be gathered from the works relating to them, have come into existence under the following circumstances: A derrish or a sufi of a particular community has settled in some locality; so long as he has not attained sufficient importance his place of abode is called a takia or astana, according to his position in-public estimation. His pious life and teachings attract public notice, disciples gather round him, and a place is constructed for their lodgment, and the humble takia. grows into a Khankah. After his death, his grave becomes a shrine and an object of pilgrimage, not only for his disciples but for people of distant parts, both Hindus and Mahomedans.

4. In AIR 1938 202 (Privy Council) , to which my attention was drawn by Mr. Chakravarti, it is pointed out that "a Takia is recognised in law as a religious institution and a grant or endowment to it is a valid wakf or a public trust for a religious purpose." The conclusion, therefore, is that the Sanad created a public trust (wakfh This view is supported by the resumption proceedings of 1842. Exhibits 4 (a) and 4 (b) would show that due enquiry as provided for by the Regulations was made and thereafter the properties covered" by the Sanad were released from, assessment of revenue. It cannot be said that the Sanad was a personal grant made to Nurulla. The first contention raised by Mr. Sen

accordingly fails.

5. As regards the second contention, Mr. Chakravarty appearing on behalf of the plaintiff respondent placed before me the written statement filed in this case and he contended that the case sought to be made by Mr. Sen in this Court was not to be found within the four corners of the written statement, and that no issue was joined on this point. Mr. Sen in his reply suggested that the point is involved in Issue 3, which is to the effect: "Is the suit barred by res judicator?" On a perusal of the written statement, I think the defendant did not make out the case which is now sought to be raised on his behalf. On the other hand, the written statement proceeds on a repudiation of the public character of the disputed land. The defendant asserted that the disputed properties were the personal properties of Nurulla. Issue 3 was raised for an entirely different purpose. It appears from the judgment of the trial Court that the defendant wanted to say that the plaintiff's title as mutually was not supported by the compromise decree of the year 1881. I think, therefore, that it is too late for the appellant to contend that the plaintiff should be deprived of possession of the suit land because of the terms of compromise in the suit of 1881. Moreover, the plaintiff was appointed a mutwalli by the District Judge in Suit No. 2/3 of 1937/8. It is extremely doubtful whether the terms of the compromise which were entered into between Ahmadulla and Abdul Jabbar in their personal capacity, would be binding on the plaintiff. The second contention also fails. The result, therefore, is that this appeal is dismissed with costs.

6. It appears that a notice was issued on the Commissioner of wakfs to appear in this case. It does not appear from the order sheet in the second appeal why such a notice was issued. It is apparent that this notice must have been issued at the instance of the appellant. The appellant must, therefore, pay the costs of the Commissioner of Wakfs which I assess at one gold mohur.