
(1963) 10 MP CK 0011
In the Madhya Pradesh High Court
Case No : First Appeal No. 33 of 1959

Mohammad Kasam Abdul Rehman and Another	APPELLANT
Vs	
Abdul Gafoor Ahmedji and Others	RESPONDENT

Date of Decision : 09-10-1963

Acts Referred:

Mussalman Wakf Validating Act, 1913 — Section 3

Citation : AIR 1964 MP 227 : (1966) ILR (MP) 418

Hon'ble Judges : S.B. Sen, J;H.R. Krishnan, J

Bench : Division Bench

Advocate : S.L. Garg, for the Appellant; S.D. Sanghi, for the Respondent

Final Decision : Partly Allowed

Judgement

Sen, J.—This appeal arises out of a suit brought by representatives of the Muslim Community of Ujjain under Order 1 Rule 8, C. P. Code, after obtaining sanction of the Advocate-General.

2. The property in suit is a defunct grave-yard (Kabarstan) in Ujjain. The defendants are sons of one Abdulrahman. They used to live with one Karimshah Fakir who was appointed manager of the Kabarstan some time in Samvat Year 1974-1916 A.D. In 1916 a flour mill was set up by one Alimohammad who was alleged to be the purchaser from Mariambai. This Mariambai and Shahbajthan constructed residential house on a part of the graver yard about 15 or 16 years before. Another house was also constructed by Shahbajkhan. These constructions, it is alleged were with the permission of the Muslim Community in general. Mariambai Shahbajkhan and defendants were allowed to live in that house for looking after the management and affairs of Kabarstan.

3. About 4 years before the suit it is alleged that the defendants were neglecting the management of the grave-yard and were asserting their title as owners. On 15-7-47 Shahbajkhan obtained permission from the Municipality for construction of a house without sanction and knowledge of the Muslims. The defendants

demolished graves and let out certain pieces of land for fuel stalls. They also erected certain temporary huts and utilised the income for their own benefit. There were also transfers of certain portions of the house. The defendants who are the legal representatives of the said Shahbajkhan are in possession of the graveyard. They are using the graveyard and income therefrom for their personal benefits. The position of the defendants is that of trustees, the Kabarstan being a property for the benefit of the Muslim community as a whole.

4. The plaintiffs prayed for a declaration that the property, the graveyard is a Wakf property and the construction on that property belonged to the Muslims in general and never was nor is the personal property of the defendants. The plaintiffs also claim removal of the defendants as trustees and their ejectment from the property with a prayer for a settlement of a scheme for the protection of the wakf and for the improvement of the Muslims in general. They also claim accounts from the defendants for the income they received from the property in suit.

5. The defendants' case is that the grave-yard was never the property of the Muslims in general. It was, the private property of the defendants and their predecessors in title. The houses in question are their personal property, and they have a right to dispose of the same. The graveyard was never used as a public graveyard and it was in possession of Mariambai in her own rights after whom the defendants came in possession of the same.

6. The Court granted a preliminary decree. The reliefs granted are a declaration that the suit land is a Wakf property and not personal property of the defendants; that the defendants are to be removed from the office of the trusteeship and they shall be removed after the passing of a final decree and appointment of the trustees. The defendants should give charge of the trust property to the new trustees. The Court has also asked for suggestion of names of leading persons of the Muslim Community to be appointed as trustees.

7. In appeal two contentions have been raised, first, that the Court has erred in coming to the conclusion that the property graveyard was a Wakf property and even assuming that the graveyard is a Wakf property, the portion on which there are buildings and constructions, cannot be held to be a Wakf property as it was never used as a graveyard, private or otherwise.

8. Though a number of issues have been framed, the main questions in dispute are two involved in the above two contentions. The Court has found that the property is a Wakf property and the Kabarstan, a public Kabarstan; therefore the defendants who are trustees and have committed several acts of misconduct have made themselves liable for removal. The Court has however taken the property as a whole and therefore has not given any decision on the second contention of the appellants.

9. As regards the first, there is ample evidence on record, no doubt oral, indicating that the suit property was being used as a Kabarstan. The property

was commonly known as Chimtekabada. Haji Karim P. W. 1, Kanyadali P. W. 3, Mohammad P. W. 4, Kalekhan P. W. 6, Abdul Aziz P. W. 7, Pirmohammad P. W. 9, Abdul Gafoor, P. W. 11 and Bandeali P. W. 12 have stated that some time prior the property was being used as a Kabrasthan. Either father, grand father or some relations of these witnesses were buried in that Chimtekabada.

10. Coupled with this oral evidence there is an application Ex. P/I by Muslim community in general. The application was signed by quite a large number of villagers. In that application when the Municipal Committee wanted some other place to be used as a Kabrasthan objection was raised and they submitted that Chimekabada was being used as a Kabrasthan with convenience for a number of years and that should be retained. Though the request of the Muslim Community was not heeded to; it is clear that the application shows that the property was used as a Kabrasthan, as far back as 27-3-30, the date of the application.

11. Besides this a Civil Suit was filed by Ibrahim and others against Abdul Ahmad Bohra and Shahwazkhan, some time in 1918. Shahwazkhan is undoubtedly a person from whom the defendants have derived title. This position is also not disputed. Abdul Ahmad is a son of Shahwazkhan. The suit allegations indicated that a suit was filed against Shahwazkhan and Abdul Ahmad Bohra for removal of a flour mill that was set up in the Bada. The suit was decreed. The allegations in the plaint also indicated that the property was being used as a Kabrasthan for a very long time and the restoration of a flour mill was against the interest of the Muslim community.

Shahwazkhan in that suit has also made a statement This statement however has been challenged by the learned counsel for the appellants as to whether he had made it and whether such a statement existed or not. The original record is missing and that has made the matter complicated. To give a definite finding it will be necessary to examine some witnesses. As we do not think that the absence of such a statement would in any way prejudice the case of the plaintiffs, we do not think it necessary to go into those details. Even if we do not take the said statement into consideration there is ample evidence to indicate that the property in suit was being used as a public Kabrasthan.

12. The defence evidence in this connection is to the effect that for a number of years it has ceased to be used as a Kabrasthan. D. W. 3 Kuwarji, D. W. 4 Mohammad Ulla and D. W. 5 Allabeli say that the property in suit was also used as a Kabrasthan with a proviso that Shahwazkhan who was looking after the graves used to charge some remuneration and that the property being used as a Kabrasthan was stopped long back more than 20 years.

13. Apart from the oral testimony of the defendants indicating that the user of the premises as a Kabrasthan had stopped long back they have also attempted to show that the property was a private property by producing certain documentary evidence. The Municipal register Ex. D/6 and map Ex. D/7 are the main documents on which, the defendants rely.

14. But according to us these documents are not sufficient to establish the title. They can be explained on the basis of the property being used as a Kabarstan. In Ex. D/6 the owner of the suit property was been shown as Shahwazkhan son of Karimsha Fakir. This is a tax register and the name of the person from whom the tax has to be realised has been mentioned in it. There is a Mutwalli or a Fakir of Kabarstan from whom the tax has to be realised. Therefore nothing turns on the mention of Shahwazkhan as owner. D/7 is nothing but a map which was submitted for the construction. In Ex. P/3 which is a Khasra Mariambai has been shown to be in possession of the land in question, but there has been no mention of the name as the owner.

15. On the basis of the oral evidence which has not been found to be tainted in any way, a conclusion can be reached safely that the property has been used as a Kabarstan. The documentary evidence does not disprove or prove in any way that it was not a Kabarstan. Under these circumstances there is nothing wrong in the trial Court's conclusion that the property was a graveyard.

16. The next question is whether it was a public or private graveyard. On this point suffice it to say that we are of the view that a Kabarstan cannot be a private Kabarstan unless it is used for the family members exclusively. Once the public are allowed to bury their dead it ceases to be a private property. The evidence of the defendants even disclosed that the property was being used as a Kabarstan for a pretty long time. There was no discrimination about the user. It was being used by the predecessors of the defendants as well as by the public. This will indicate that it was not a private Kabarstan.

17. Under the 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. In *Lala Jhao Lal Vs. Ahmudullah and Others*, , it has been held :-

"Where a land has been used as a graveyard from the time immemorial, a dedication of the land as Wakf for this purpose is to be presumed and it is not necessary in such cases to prove dedication as Wakf."

18. 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 and in the instant case we have got a number of witnesses who testified the facts that the property was being used as a graveyard.

19. In *Quadir Baksh v. Saddullah* AIR 1938 Oudh 77 a Division Bench of that High Court have observed :-

"The question whether a plot of land is a graveyard or not is primarily a question of fact. In the case of a plot covered by recent graves, the burden is undoubtedly on the person who alleges that it is a graveyard to establish how the grant was made. But in cases where the graveyard has existed from time immemorial or for

a very long time, there can be a presumption of a lost grant. A considerable number of years when there is no evidence that prior to that number of years the plot of land was not used as a graveyard would be sufficient to justify a presumption of dedication or a lost grant. Where large number of persons have been buried on a plot of land for more than 30 years and there has never been any attempt by any one to use this land for any purpose than that of a graveyard, the land can be taken as a graveyard, even though it has not been entered as a graveyard in any of the village papers""

(underlining (here into " ") is ours).

20. In the instant case there is no evidence to indicate that this land was used for any other purpose than graveyard and whenever it was being so used the Muslim Community had taken exception and has succeeded before the Court.

21. In *Mazira v. Sukhdarshan* 1936 All LJ 651, It has been held that

"the presumption is that the part of the site where the dead body is buried is dedicated with the consent of the owner so that the grave is a Wakf and the Muslim Community have access to it."

22. It is therefore clear that the property was used as a graveyard for a number of years. It had ceased to be so used as will be clear from the documentary evidence viz. the application and oral evidence adduced by the defendants. But that stoppage will not convert the Kabrastan which was once a Wakf property into a private property. A public graveyard continues to be so whether it is so used or not. A graveyard will always vest in public and it cannot be divested by nonuser. Such an idea is inherent in a Wakf. A public property can only be transferred by public and therefore, in the absence of anything to show that the public in general has transferred their right to a private individual, a fact which is not possible to establish, and has not been established in this case, the property continues to be a public Wakf.

23. A number of cases support the above proposition. In AIR 1930 245 (Oudh) it is held :

"Once land has been dedicated for the purpose of a cemetery it must always be regarded as a cemetery, unless for any reason the land turns out to be unfit for use as a cemetery and consequently is incapable of alienation."

In *Ehsanbeg v. Rahmatali* AIR 1935 Oudh 47, it has been held :

"It is immaterial that the cemetery has been closed for use as such by the Municipality because it is quite within the range of possibility that the cemetery may at some future time be again used for the purpose of burial."

25. In *Dost Mahomed v. Chainrai* AIR 1940 Sind 43 it has been observed that

"a private ownership of a plot is incompatible with dedication of it under a Wakf as a graveyard for Mohammedans in general."

26. The learned counsel for the appellants wanted to submit as already said that the property is a private Kabarstan. There cannot be any private Wakf. The Wakf Validating Act of 1913 makes only lawful a Wakf for following purposes (a) for the maintenance and support wholly or partially of his family, children etc. and (b) where a person creating a Wakf is a Hanafi Musalman also for his maintenance and support during his life time or for the payment of his debts. Therefore even Wakf Validating Act 1913 cannot validate such a private Wakf.

26A. As we have seen the evidence was led that some time or the other there was a mortgage of the property in dispute. Ex. D/12 and D/13 are the two mortgage deeds. According to these deeds it is clear what was mortgaged was the house and not the Kabarstan. These documents are relevant for the purpose of deciding the second question of the counsel. Suffice to say that the Mutwallis have no power without the permission of the Court to mortgage, sale or exchange Wakf property or a part thereof unless he is expressly empowered by the deed of Wakf to do so. The learned counsel submitted that this mortgaging would show that this was a private property and not subject to Wakf. But it will be clear by reading the mortgage deeds that these related to a certain house and not the actual Kabarstan.

27. We are therefore of the view that the portion of the land which was! being used actually for Kabarstan must continue to be the Wakf property and must be dealt with accordingly, whereas the buildings and constructions have to be left out.

28. We have come to the above conclusion as we do not find any document indicating actually the area which was dedicated. When the factum of a Wakf has to be established by long user, the portion of the land which has actually been used can only be taken into consideration.

29. In Mohammad Shah Vs. Fasihuddin Ansari and Others, it has been observed that a stranger to the trust can encroach on the trust estate and will in course of time acquire a title by adverse possession. But a Mutawalli cannot take up such a position. If the Mutawalli chose to build on the part of the mosque in such a way as to integrate the whole into one unit then the Court is bound to regard this as an accretion to the estate of which they are trustees, and they will be estopped from adopting any other attitude because no trustees can be allowed to set up a title adverse to the trust or be allowed to make a benefit, out of the trust for his own personal ends.

30. The above observations of the Supreme Court clearly contemplate that Mutwalli can also build and make his own property; but if he builds in such a way that it formed an integral part of the whole, then he cannot be allowed to take advantage. In the instant case the built portion is quite separate and distinct appearing in the Khasaras. It will appear that a distinct piece of land has been mentioned as Kabarstan.

31. In AIR 1933 115 (Nagpur) following the Privy Council case reported in Court

of Wards for the Property of Makhdum Hassan Baksh v. Hahi Bakhsh ILR 40 Cal 297 (PC), it was held that a mere fact that the Mutawallis are entered in the settlement papers does not show that they were private owners and not Mutawalis of the trust property. That is true, but what we are concerned with is not the land with graves under it. We are speaking of a portion of land where no grave has been dug and nobody has been buried. It is that portion with which we are concerned. If long user have proved that it was a graveyard then alone it can be considered to be a Wakf property. The portion where there is a construction is distinct from the rest. Distinct marks show which piece of land is a burial ground and which is not. Therefore the whole portion cannot be said to be a graveyard. A person in occupation of the property must be allowed to remain there unless a better claim is shown by others. Better claim has been shown in respect of portion not in actual occupation. Simply because a land is contiguous to other land, it cannot be said that both the lands are parts of a whole.

32. In AIR 1931 293 (Oudh) , a Division Bench of that High Court has held that even if a portion of a continuous plot of a land where the entire plot is shown in the settlement Khasra as Kabarstan is covered with graves the entire plot must be deemed to bear the same character. That is actually where lies the difference. In the instant case the entire plot has not been shown in the Khasara as Kabarstan as will appear from Ex. D/3; therefore the presumption contemplated was of no use.

33. In Abdul Gafoor Vs. Hakim Ali and Others, , their Lordships have observed that when a graveyard is not a public graveyard and consists of the graves of members of the family alone, it is not to be presumed that the entire plot had been dedicated for the purpose of a graveyard.

34. It is not very clear what their Lordships mean about the private graveyard, but it is clear that it is possible to separate a portion of the land as a public graveyard and the other portion if never used as a burial ground, as a private property.

35. In Abdul Rahim v. Fakir Mohammad AIR 1946 Nag 401, a Division Bench of the Nagpur High Court were discussing a property which was Wakf. Their Lordships have observed that the ancient history may not be available but even then the decision can be based on such evidence as can be gathered from how the public regarded the property, its environment and the conduct of the parties. In the instant case the evidence led speaks of burial on a particular portion.

36. In Khasra Ex. D/3 the portion at serial No. 954 has been clearly mentioned as Abadi and in possession of Mariambi. The rest of the property has been shown as Kabarstan. This would show a clear cut distinction showing the portion at serial No. 954 as private property and the rest as Kabarstan. When the proof of Wakf depends on user, it is that portion which has been shown to have been used exclusively for burial, can only be held to be a Wakf property. In the absence of any record or documentary evidence about the area, it will be unsafe to declare

a property Wakf and deprive the person in actual possession from time immemorial through his predecessors of the property. The evidence of user can only lead to the portion actually used and not the surroundings.

37. There is no evidence that in the portion where exists certain buildings there was any time any burial. There is also no evidence that the constructions and erections were at the cost of the Muslim Community. We are therefore unable to agree with the trial Judge that the whole of the portion which has been shown in the map Ex. P/5 to be a Kabarstan.

38. We therefore hold that the suit property excluding the built area as indicated above is a Kabarstan. But this is admittedly a defunct Kabarstan and the local body has already fixed a different place for burial. Though the Kabarstan is a Wakf property it is not such as would yield any income. If at any time it can be used as Kabarstan, which of course depends on the Muslim Community and the local body, there is no possibility of any income from the said Wakf. The defendants and their successors in interest therefore will be in a better position to look after the Kabarstan. The defendants are however prevented from making any private use of this Kabarstan. They also will not be entitled to alienate the property in a manner adverse to the interest of the Muslim Community.

39. The result will be that the decree of the trial Court is set aside. The defendants-appellants are removed from the possession of the Kabarstan excepting the portion where there is a construction. In Ex. P/5 the portion in the South East corner where the construction of building as shown will remain in possession of the defendant-appellants. A decree which will be drawn will accompany a map to the scale showing actual portion where there is construction and which will remain in possession of the appellants. The rest of the portion will be treated as a Wakf and the defendants are prevented from using the burial ground for any private purpose. So long the Kabarstan is not used as such, the appellants and their successors in interest will be allowed to continue as Mutawalli of this burial ground and they will render accounts whenever demanded by the Muslim Community. The costs hitherto incurred will be borne by the parties. Counsel fee, according to scale, if certified.