

(1980) 10 AHC CK 0031

In the Allahabad High Court

Case No : Second Appeal No's. 867 and 868 of 1972

Ram Prasad

APPELLANT

Vs

Magan Singh and Others

RESPONDENT

Date of Decision : 01-10-1980

Acts Referred:

Constitution of India, 1950 — Article 14

Evidence Act, 1872 — Section 32, 35

Public Wakfs (Extension of Limitation) Act, 1959 — Section 3

Citation : AIR 1981 All 52

Hon'ble Judges : V.K. Mehrotra, J

Bench : Single Bench

Advocate : G.P. Bhargava and A.N. Bhargava, for the Appellant; R.N. Zaidi, for the Respondent

Final Decision : Allowed

Judgement

V.K. Mehrotra, J.—The dispute in these appeals relates to a portion of plot No. 1622 situate in Mohalla Balkhandi Naka, opposite Government Girls Inter College in the city of Banda. In the eastern portion of this plot there is a mosque and graveyard. In the western portion, there are two kothas and a khaprail.

2. Syed Mukhtar Imam was the mulawalli of waqf Shia Masjid and Qabristan Qazi Nooruddin relating to the mosque aforesaid and graveyard adjoining it. On Aug. 3, 1953 a lease (Ext. 10) was executed by Mukhtar Imam in favour of appellant Ram Prasad in regard to the western portion of plot No. 1622. This lease deed was duly registered and was for consideration of a premium of Rupees 100/- and an annual rent of Rs. 3/-.

3. On Aug. 20, 1964 Ram Prasad sent a notice (Ext. 20) to respondent Magan Singh which was served upon him on Aug. 22, 1964, alleging that Magan Singh was his tenant of a kotha and khaprail which Ram Prasad got constructed in the year 1955 on a monthly rent of Rs. 6/-. Rent having fallen due since July, 1956, which Magan Singh had failed to pay he was called upon to pay the arrears

within thirty days. Ram Prasad also terminated Magan Singh's tenancy with effect from the expiry of thirty days from the receipt of the notice. On Sept. 14, 1964 Magan Singh sent a reply (Ext. 3) to Ram Prasad denying the allegations contained in the aforesaid notice and asserting that he was himself owner in possession of the property.

In view of this denial of title Ravn Prasad sent a notice (Ext. 30) in Jan. 1966 to Magan Singh asking him to hand over possession of the property. Upon failure of Magan Singh to do so, Ram Prasad filed suit No. 126 of 1966 on Mar. 16, 1966 out of which the first Second Appeal arises. Magan Singh, inter alia, took the defence that the land belonged to Qazi Nooruddin" a relation of a local Zamindar with whom his father was employed, fn lieu of services rendered by him Nooruddin and his descendents gave the laud to his father. He claimed to have built a kotha and the khaprail and further that he was in possession over the suit property for more than twelve years.

4. Meanwhile on Aug. 3, 1960, the waqf was registered with the Shin Board, Uttar Pradesh which issued "Sanad Tauliat" appointing Syed Shamshal Imam as Mutwalli on Sept. 2, 1966. The lease deed (Ext 10) was filed by Ram Prasad on Sept. 27, 1966 whereafter Magan Singh put in additional written statement wherein he ,also pleaded that the lease deed showed that Ram Prasad was not owner of the land and that the suit was otherwise also not maintainable for non-compliance with the provisions of Muslims Waqf Act, 1960. The Shia Board and Syed Shamshad Imam were then impleaded as defendants in the suit. Shamshad Imam, in his written statement, denied Ram Prasad's title over the land and asserted that the land in suit belonged to the Waqf which had also constructed the kotha and the khaprail. It was further alleged that the lease deed had been obtained by Ram Prasad by fraud and misrepresentation from Mukhtar Imam who was on his death bed and was suffering from T. B. The mutawalli, it was stated, had no tight to grant the lease without necessary sanction for more than one year.

5. A large number of issues were framed in the case.

6. On Apr. 18, 1969, Izstaba Hussain who had been appointed Mutwalli of the Waqf in the year 1968 filed suit No. 628 of 1969 against Ram Prasad and Magan Singh wherein the waqf claimed declaration that it was the owner of the two kothas and the Khaprail and neither Ram Prasad nor Magan Singh had any concern with the same. It also alleged that the lease deed of the year 1953 was contrary to the statutory provisions and the waqf was not bound by the same. The whole plot No. 1622 was claimed to be waqf property as Kabristan and possession was sought over the suit property. The stand of Ram Prasad and Magan Singh in their separate written statements was similar to the one in the earlier suit No. 126 of 1966. Several issues were framed in this suit as well. Both the suits were consolidated and suit No. 126 of 1966 was treated to be the leading case and the evidence were recorded therein.

7. The trial Court, in substance, took the view that the land in suit belonged to the mosque and was kabristan that Ram Prasad got the western portion of plot No. 1622 under the lease (Ext. 10) and constructed the Kotha and the Khaprail; that Magan was a tenant of Ram Prasad on a monthly rent of Rs. 6/-and that he was not in possession, as claimed for more than 12 years: that the property belonged to the waqf and that the lease deed of the year 1953 was illegal and void. Decreeing original suit No. 126 of 1966 in favour of Ram Prasad. it directed recovery of a sum of Rs. 262/- from Magan Singh on account of arrears of rent and damages and further granted pendente lite damages to Ram Prasad till Apr. 17, 1969 on payment of appropriate court fee. Original suit No. 628 of 1969 was also decreed against Ram Prasad and Magan Singh and on the declaration that the deed of lease was void and inoperative, they were directed to remove their constructions within a month and deliver possession over the land to the waqf failing which the waqf was held entitled to recover possession through Court.

8. The waqf felt satisfied with the decree passed. It did not appeal against it. Ram Prasad and Magan Singh assailed the decree in the two suits by filing appeals. The lower appellate court, however upheld the decree in both the suits. Second Appeal No. 867 of 1972 Has been filed by Ram Prasad against the decree in suit No. 126 of 1966 while Second Appeal No. 868 of 1972 has been filed by him against the decree in suit No. 628 of 1969.

9. The findings which have been recorded by the lower appellate court are these; No specific written or oral dedication of plot No. 1622 was pleaded by the parties the waqf set up a case of dedication by long user; settlement khasra (Ext. A-15) of the year 1905-06 corresponding to 1312-13 Fasli mentioned the area of this plot to be 18 bighas 7 biswansis and in Col. 4 it contained an entry of Qabristan and one masjid; in Col. No. 7 the entry was "Qazi Nooruddin Naib Qazir, Riasat Bhopal, Sakin Kasba, Zila Lucknow" while in the remarks column the entry was about one jauli, one chilla and one neem tree. In the settlement map (Ext. B-3) relating to the same Years graves and mosque are shown, in the eastern portion of plot No. 1622 while in the western portion, no grave or mosque are shown but only couple of trees were shown. No demarcation line is drawn up in the map dividing the eastern and western portions.

The settlement papers, therefore, made it clear that before the settlement year 1905-06, there was a public mosque and a graveyard for sufficiently long time over the plot of which the western portion was not treated us a separate entity. The aforesaid plot, therefore, was "wqar" property. The oral evidence indicated that the graves existed in the eastern portion and that in the recent past also burials took place in that portion. Further, that western portion was not treated to be a separate entity. As such, the entire plot No. 1622 including the western strip has been waqf property. There is no documentary evidence in favour of the waqf regarding construction of the kotha and the khaprail, in the western strip, From the evidence led by the waqf itself, it is clear that it did not get the khaprail and the kotha constructed, The plea of Magan Singh regarding the lease of land

to him was not correct.

The lease deed (Ext. 10) in favour of Ram Prasad (the appellant) executed in the year 1958 by Syed Mukhtar Imam was duly proved and is a genuine document. Since the lease had been executed without any prior sanction of the court or the Waqf Board it was not valid as it was a permanent lease and permitted the lessee to raise construction. Ram Prasad entered into possession of the land in pursuance of the lease, though invalid, and would be treated to be in permissive possession thereof on the part of the waqf. He got the kothas and the khaprail constructed and let out one of the kothas to Magan Singh. The waqf could not be said to have lost the western strip of land by adverse possession of Ram Prasad or of Magan Singh. The Suit (No. 628 of 1969) filed on Apr. 18, 1969 by Syed Shamshad Imam for possession of the land in suit on behalf of the waqf was within limitation as extended under the Public Waqf (Extension of Limitation) Act, 1959 (Parliament Act No. 29 of 1959) as amended by the Public Waqfs (Extension of Limitation) Amendment Act, 1969 (Parliament Act No. 9 of 1969).

10. Sri G.P. Bhargava, appearing for appellant Ram Prasad, has argued, firstly, that the view that the suit filed by Samshad Imam for recovery of possession over the western strip of land was within limitation is erroneous and, secondly, that, in any case, the courts below were not justified in decreeing the suit for possession without ascertainment of the exact extent of land which could be treated to be graveyard. These submissions have been countered by Sri R.H. Zaidi, appearing for the Waqf.

11. The argument that the suit for recovery of possession filed on behalf of the waqf was barred by limitation does not appear to be correct. The period of limitation for recovery of possession of an immovable property forming part of public waqfs was, in the first instance, extended up to Aug., 15, 1967 by Section 3 of Parliament Act No. 29 of 1959 in the following terms:

"3. Extension of period of limitation in certain cases for suits to recover possession of immovable property forming part of public waqfs--Where a person entitled to institute a suit of the description referred to in Article 142 or Article 144 of the First Sch. to the Indian Limitation Act, 1906, for possession of any immovable property forming part of a public waqf or any interest therein has been dispossessed, or has discontinued the possession, at any time after the 14th August 1947 and before the 7th 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, notwithstanding anything contained in the said Act, the period of limitation in respect of such shall extend up to the 15th Aug., 1967".

The date was extended up to 31st Dec., 1970 by Section 2 of Parliament Act IX of 1969.

12. Public waqf has been defined in this Act in Section 2 to mean "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." The preamble described the Act to be "an Act to extend the period of limitation in certain cases for suits to recover possession of immovable property forming part of public waqfs." The Statement of Objects and Reasons for the enactment of the Bill leading to the Act, as published in the Gazette of India, 1959 (extraordinary) Part II, Section 2 at page 583, is as follows:

"Following the partition of the country in Aug. 1947, a number of waqf properties passed into unauthorised hands. Many of the mutwallis who were in charge of these properties had migrated to Pakistan and the few who stayed behind could not for various reasons institute civil proceedings for the recovery of possession of these properties. The result is, that ever since the partition, a large number of these waqf properties has been in the possession of unauthorised occupants. Under the law as it stands at present the title of the true owners would be extinguished if the properties are in adverse possession for twelve years or more. It is, therefore, proposed to extend the period of limitation up to the 15th Aug. 1967, in respect of suits for the recovery of possession of any immovable property forming part of a public waqf in any case where the dispossession has taken place at any time between the 15th Aug. 1947 (the date of partition) and the 7th May 1954 (the date from which power to declare any property as evacuee property under the Administration of Evacuee Property Act, 1950, ceased). This would enable the Waqf Boards constituted under the Waqf Act and other interested persons to institute such suits."

13. With reference to the aforesaid objects and reasons, it was contended by Sri Bhargava that the aid of the Act for extending limitation for a suit covered by Section 3 could only be taken in those cases where the Mutwallis had migrated to Pakistan and that, inasmuch as, the present was not a case of that kind, the suit had to be brought within a period of twelve years from Aug. 3. 1958 when Ram Prasad entered into possession of the western portion of the land under the lease executed by the then Mutwalli Syed Mukhtar Imam in his favour. The argument further is that unless it was held that the Act contemplated extension of limitation only in cases where the Mutwallis had migrated to Pakistan, the provisions thereof would be hit by Article 14 of the Constitution for want of a valid classification for treating the property of a muslim waqf differently from that of other religious endowments.

14. Learned counsel for the parties have joined issue on the question as to whether the Statement of Objects and Reasons could be looked into for the purpose for which it was attempted to be referred to by Sri Bhargava. The submission of Sri Zaidi is that the statement of objects and reasons could not be looked into at all for interpreting the words of a statute, particularly, when they were clear. Reliance has been placed by him upon a number of decisions of the Supreme Court in this respect. The decisions to which he invited my attention are those in *Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another*, , *The State of West Bengal Vs. Subodh Gopal Bose and Others*, . M.K.

Ranganathan and Another Vs. Government of Madras and Others, ; Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others, . The Central Bank of India Vs. Their Workmen, ; Sanghvi Jeevraj Ghewar Chand and Others Vs. Secretary, Madras Chillies, Grains and Kirana Merchants Workers Union and Another, : and A.C. Sharma Vs. Delhi Administration, .

15. Sri Bhargava placed reliance upon the decision of this court in G.S. Chooramani and Others Vs. State of U.P. and Another, ; and of the Supreme Court in Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another, and Diwan Bros. Vs. Central Bank of India, Bombay and Others, . The question, however, loses importance for even on the assumption that the objects and reasons could be looked into, it is clear from the perusal thereof, in the instant case, that the Act contemplated extension of limitation not only in cases where the Mutwalli in charge of the waqf property had migrated to Pakistan but also in those cases where they had stayed behind. Parliament intended to extend the limitation in respect of suits for the recovery of possession of any immovable property forming part of public waqfs in every case where the dispossession had taken place, as in this case, at any time between Aug. 15, 1947 and May, 7, 1953.

The submission of Sri Bhargava based upon Article 14 of the Constitution can be of no avail to him for the Act applied equally to all the public waqfs as defined in the Act. The classification made by the Parliament in this respect was a valid one having regard to the peculiar conditions prevailing in the country between Aug. 15, 1947 (the date of partition) and May 7, 1953 (the date on which power to declare any property as evacuee property under the Administration of Evacuee Property Act, 1950 ceased). The choice of immovable property permanently dedicated by a person professing Islam, for extension of limitation for suits for the recovery of possession in respect of dispossession during the aforesaid period, for special treatment in the matter of limitation was clearly proper and had rational relationship with the object sought to be achieved by the Act. The conclusion that the suit was within limitation arrived at by the courts below was plainly correct.

16. The second submission of Sri Bhargava may now be examined. The finding of the court below is that there are no graves in the western portion of plot no. 1622 on which, in the settlement papers, is recorded Masjid and qabristan and that there is no demarcation between the eastern and western portions. The submission of Sri Bhargava is that even on this finding the entire plot could not be treated to be dedicated by long user, particularly, when on the finding of the lower appellate court itself it is clear that no specific written or oral dedication was pleaded by the waqf. The submission further is that the western portion, which is bereft of graves, cannot be treated to be dedicated as a graveyard and that the decree for possession passed in favour of the waqf in regard to the entire plot, without demarcating the exact extent of the area which could be held

to be dedicated by long user is unsustainable. Reliance has been placed by Sri Bhargava upon unreported decisions of K.B. Asthana, J. in the case of Lakhpat Singh v. Abdul Hamid (Second Appeal No. 1033 of 1961 decided on Sept, 8, 1904) and of K.M. Dayal, J. in the case of Haji Liaqat Hussain v. Girdhari Lal (Second Appeal No. 1490 of 1970 decided on November 19, 1979).

In those cases, the view taken was to the effect that there could be no finding about a piece of land being a graveyard on the basis of long user by ignoring the circumstance that no graves whatsoever existed over some portion thereof and without getting a proper demarcation made between the two portions. The submission of Sri Zaidi is that the finding that the entire plot No. 1622 was a graveyard is one of fact which could not be challenged in the present second appeal. The submission further is that where a plot of land is recorded as a graveyard in the settlement papers, it is conclusive evidence of that fact and the lower appellate court was, therefore, fully justified in taking the view that the entire plot was waqf property on account of being a graveyard in spite of the factual position that the western strip was bereft of graves or that there was no evidence of any person being buried at any time in that portion. Reliance has been placed by Sri Zaidi in this regard on the decision of the Supreme Court in Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, wherein S. Murtaza Fazl Ali, J. speaking for the court, observed, (in para. 28 of the report) that:

".....It is also well settled that a conclusive proof of the public graveyard is the description of the burial ground in the revenue records as a public graveyard. In AIR 1930 83 (Privy Council) the Privy Council observed as follows:

""If the plaintiffs had to make out dedication entirely by direct evidence of burials being made in the ground and without any record such as the khasra of 1868, to help them, they would undoubtedly have to prove a number of instances adequate in character, number and extent to justify the inference that the plot of land in suit was a cemetery. xx xx x The entry "qabristan" in the khasra of 1868 has to be taken together with the map which shows the whole of plot 108 to be a grave-yard."

and in para. 30 of the report that:

"There is a decision of the Allahabad High Court in Sheo Raj Chamar and Another Vs. Mudeer Khan and Others, where Sulaiman. C.J., observed as follows---

""But in cases where a graveyard has existed from time immemorial or for a very long time, there can be a presumption of a lost grant. It is open to a court to infer from circumstances that a plot of land covered by graves, which has been used as a graveyard, is in fact a graveyard and had been set apart as such by the original owners and made a consecrated ground even though a registered document is not now forthcoming."

This case was followed by the Oudh Chief Court in Qadir Bakhsh v. Saddullah

(AIR 1938 Oudh 77).

17. The controversy before the Supreme Court, in the context whereof these observations were made, was whether the burial ground was public graveyard as is apparent from the observations made by it (in para. 27 of the report) that:

"These judgments, therefore, in the first place operated as *res judicata* so far as the graveyard is concerned, and secondly they constituted conclusive evidence to prove that the burial ground had been used as public graveyard from time immemorial and thus became a public graveyard by dedication. The Labbais, however, bring the descendants of the founder had established a right by usage to charge pit fees and other charges. In these circumstances, therefore, the issue relating to the burial ground being a public graveyard does not present much difficulty and we would like to deal with this issue first."

and then follows a discussion about the question as to whether the graveyard was a public graveyard or a private one. It may be noticed that later (in para. 34 of the report) the Supreme Court observed that,

"..... It was, however, faintly suggested by learned counsel for the appellants that it would appear from the sketch map that the burial ground consisted of two parts the eastern part and the western part and as the western part is adjacent to the Dargah it should be held to be a private burial ground belonging to the family of the defendants. There is, however, no legal evidence on the record to prove this fact. Both the parts constitute one single burial ground and there is nothing to show that in burying the dead any distinction has been made between the eastern part and the western part. In fact this aspect of the matter had been referred to in one of the judgments discussed above. In these circumstances it is not possible for us to accept the contention raised by learned counsel for the appellants."

From the observations of the Supreme Court, extracted above, it is clear that the principal question which was being determined by it was whether the land in suit was a private graveyard of the defendant or was a public graveyard. The nature of the land being a public graveyard was, *inter alia*, held to have been established by the record to that effect in the revenue papers. The Supreme Court also noticed that no distinction was proved to have been made between eastern part and the western part of the land in the matter of burying the dead while negating the claim that the western part being adjacent to the Dargah should be held to be a private burial ground belonging to the family of the defendants.

18. In the present case, as has been seen earlier, there is a finding by the lower appellate court about the western strip of land being bereft of graves. There is also a mention in the judgment of the lower appellate court that the oral evidence in the case also was to the effect that in the recent past as well burials had been made in the eastern portion. The entry of Qabristan over the entire plot in the settlement papers and the absence of any demarcation line between the

two portions led the lower appellate court to the view that the entire plot was dedicated property. The finding of the lower appellate court, in this respect, can, however, not be upheld for neither from the settlement map (Ext. B-3) nor in the oral evidence noticed by the court below, can the exact extent of land forming part of plot No. 1622 which can be treated to be dedicated by long user as graveyard, be ascertained. The mere entry in the settlement Khasra (Ext. A-15) of qabristan and masjid in column 4 cannot lead to the conclusion that the entire area of plot No. 1622 was in use since time immemorial as graveyard.

The observations of the Supreme Court in *Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others*, relied upon by the respondent Waqf have to be read in the context of the real issue which was being decided by it when the said observations were made. That, as noticed earlier, was whether the graveyard was a public graveyard in its entirety or whether part of it was private graveyard. The Privy Council in the case of AIR 1936 83 (Privy Council) treated the whole plot 108 to be a graveyard because the map showed the whole of it to be a graveyard apart from the entry of qabristan contained in the khasra of 1968. Sulaiman, C.J. in *Sheo Raj Chamar and Another Vs. Mudeer Khan and Others*, only ruled that it was open to a court to infer from circumstances that a plot of land covered by graves which had been used as a graveyard was in fact a graveyard and had been set apart as such by the original owners even though a registered document was not forthcoming to establish such setting apart. None of these decisions is an authority for the proposition canvassed by Sri Zaidi that the entry of Masjid and Qabristan in the khasra (Ext. A-15) was a conclusive proof in itself of the entire plot No. 1622 being a graveyard.

19. In considering the question whether the entire plot 1622 could be deemed to be a graveyard, the lower appellate court has failed to appreciate the evidence on record with reference to the correct legal principle, namely, that in the absence of any evidence of dedication a presumption of lost grant can be made in respect of a plot of land covered by graves where a graveyard has existed for a very long time as held by Sulaiman, C. J. in the case of *Sheoraj Chamar*. As such, its finding that the entire plot was a graveyard cannot be upheld. The matter requires to be gone into by the lower appellate court afresh in accordance with law.

20. In the result, the judgment and decree of the lower appellate court is set aside and the matter sent back to it for determining the exact extent of the graveyard afresh in accordance with law, and getting it demarcated. The question of the relief to which Ram Prasad or the waqf may be entitled in the suits filed by them would have to be gone into again by the lower appellate court after it has arrived at the finding aforesaid. The appeals are allowed. Costs shall abide the result.