
(1967) 01 PAT CK 0008
In the Patna High Court
Case No : A.F.A.D. No. 735 of 1964

Skh. Bashir Ahmad and Others

APPELLANT

Vs

Skh. Abdul Jabbar and Others

RESPONDENT

Date of Decision : 25-01-1967

Acts Referred:

Citation : AIR 1968 Patna 29

Hon'ble Judges : S.C. Mishra, J

Bench : Single Bench

Advocate : K.D. Chatterji, S. Akbar Hussain and Chunni Lal, for the Appellant;
S. Nazir and Manzar Ahsan Rizvi, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mishra, J.—This appeal arises out of a representative suit under Order 1, Rule 8, CPC by the Mahomedan residents of throe villages, namely, Saraiya, Hathaura and Kharsanda, in the district of Saran. The case of the plaintiffs was that revisional survey plot. No. 296, measuring 2 bighas 1 katha and 3 dhurs, under Khata No. 468, originally was a public graveyard and the Muslim residents of these villages had the right to use It as a public graveyard for these villages. The mango trees standing on this land also were the properties of the Mahomedans in general. There was also a prayer for permanent injunction restraining the defendants from going to the Sand and cultivating it or appropriating the fruits of the trees standing on that land. It was alleged further that the mango trees were planted in the graveyard by the Muslim community for the purpose of providing shade and utilising the wood for the purpose of planks to be used in the graves. Defendant No. 8 who belonged to the family of Fakirs of village Kharsanda, and his family were the care-takers of the graveyard which was standing thereon. They had also a right to get certain shares in the fruits of the mango trees by way of wages. Defendants Nos. 1, 6, 7 and 8 were in collusion with one another and objected to the right of the plaintiffs to use that plot of land as burial ground, which led to a proceeding u/s 1-14, Code of

Criminal Procedure, in 1957. In course of the proceeding u/s 144, Code of Criminal Procedure, the plaintiffs learnt that defendant No. 8 got his name recorded fraudulently as bataidar in respect of the graveyard land. During the cadastral survey proceedings, Hussaini Darzi, and during the revisional survey proceedings, defendant No. 7, were recorded as Kastkars at the instance of defendant No. 8 and his ancestors. In fact, however, neither defendant No. 7 nor defendant No. 8, nor their ancestors were the kastkars of the land. The plaintiffs were completely ignorant of the entries in the cadastral as well as revisional survey khatians. The entries, both in the cadastral and revisional survey khatians were incorrect. The plaintiffs learnt further that during the pendency of the 144 proceedings, defendant No. 7 executed a sale deed without any consideration in favour of defendants Nos. 1 to 6, transferring this plot with a view to create evidence of his title and possession. The purchasers, defendants Nos. 1 to 6, were trying to raise the crop on the land after demolishing the graves. The purchasers, however, acquired no title as it was a public graveyard. The proceedings u/s 144, Code of Criminal Procedure, were dropped and defendants Nos. 1 to 6 feeling encouraged began to object to the burial of the dead bodies of Mahomedans in that plot.

2. Defendants Nos. 1 to 6 filed one set of written statement and defendant No. 7 filed another, but, in substance, the written statements were along the same line, challenging the right of the plaintiffs to have this plot of land treated as public graveyard. According to their case, plot No. 296 was not a common graveyard of the Mahomedans and it never became the wakf properly by user. They also challenged the right of the Muslim public of the locality to claim any interest in the trees standing on the land as public property of the Mahomedans. The entries in the khatians were correct and defendant No. 8 was the britdar of the plot. The father of defendant No. 7 was in cultivating possession of this land and, as such, was entitled to receive half the produce. The other half was deliverable to defendant No. 8. The other statements in the written statement need not be set out as they are not of material importance. The State of Bihar (defendant No. 9) also supported the stand of defendants Nos. 1 to 6 who claim to have acquired a valid title under the sale deed in question. Defendant No. 8, however, in substance, supported the claim of the plaintiffs and averred that he had been unnecessarily dragged into this litigation and that he had no concern with that land.

3. It may be stated that the finding of fact recorded by the trial Court is that although the plaintiffs failed to prove that it was a public graveyard from time immemorial but nevertheless plot No. 296 was a public graveyard meant for burying the dead bodies of Muslims of the aforesaid three villages by virtue of dedication of the plot for the purpose and it became a wakf property. The plot was no doubt, recorded in the revisional survey proceedings, which took place in 1919, duly in the name of Subhan but the evidence of the plaintiffs' witnesses as also the report of the pleader commissioner indicated that a large number of graves were found in this plot. According to the same pleader commissioner,

there were as many as forty five graves which were visible and the structure on them was conspicuous, but there were other sunk graves which obviously meant that they were kutcha graves having only earth work which might have gone down on account of rain or other factors in course of time, but they were nevertheless visible. They were 126 in number, so that altogether there were 171 graves visible on the plot. The trial Court, taking into consideration the evidence of the pleader commissioner as also the evidence of the plaintiffs' witnesses including that of the grave digger (P. W. 7), held that there was sufficient evidence of dedication of this plot by conduct to be used as a graveyard and thus it became a wakf property. On appeal, the findings of fact recorded by the trial Court were substantially affirmed and the decree passed in favour of the plaintiffs was upheld.

4. Mr. K. D. Chatterji, who appears in support of the appeal by the contesting defendants, has contended that the finding recorded by the Court of appeal below cannot be sustained. The trial Court, no doubt held that plot No. 290 came to be the property of wakf by user and the Mahomedans of the three villages acquired the right to bury the dead bodies. The frees standing on the land also came to be wakf properties and the original tenant Subhan ceased to have any right. The learned Munsif pointedly considered that the plaintiffs acquired the right to bury their dead bodies of these villages in plot No. 296 not by virtue of customary right which would have arisen only if the parties were of different persuasions, but since both the parties were Muslims at the time when the plot in dispute was used as a graveyard and as such the user of the land as graveyard would render the land to be the property of the wakf by virtue of dedication for religious purposes by implied conduct. The proprietary right in the property, therefore, came to be vested in God according to Muslim law. It is true, no doubt, that the Court of appeal below has not gone into such a specific consideration of the matter, but the oral evidence of the witnesses of either party has been scrutinised and the learned Additional Subordinate Judge has held that it was clear from the evidence beyond doubt that the land in dispute was nothing but a graveyard with some mango trees standing thereon and it was being utilised by the Muslims of the locality especially by those of the three villages in question. The right was not confined to the family of Subhan. It was also held that the graveyard in question was in existence for a long time. From this, it was clear that the plaintiffs' case was proved beyond doubt and the defendants failed to establish their case that the plot in fact belonged to the family of defendant No. 7 and that the graves were only of members of that family, and the Muslim public of the adjoining areas had no right to use it as their graveyard. Mr. Chatterji has contended that the finding recorded by the learned Additional Subordinate Judge is not sufficient to support the case of creation of wakf by implied conduct His argument is that after the concurrent finding of the two Courts below that in 1920 the land was rightly recorded in the revisional survey papers and that the area was converted into A graveyard subsequent to that, it could not be held that it became a wakf property because this would carry the

sense of use from time immemorial. It is true that the finding of the learned Additional Subordinate Judge on this matter is not very clear, but to this extent it is definite that it was used as a public graveyard as a matter of right, even if his finding be not correct that it was being so used from time immemorial.

5. Learned Counsel for the respondents has drawn my attention in this connection to a number of decisions of the various High Courts as well as the Privy Council and the Supreme Court. They are: *Motishah v. Abdul Gaffar Khan*, AIR 1956 Nag 38; *Abdul Rahim Khan v. Fakir Mohammad Shah*, AIR 1946 Nag 401; *Ramzan Momin and Others Vs. Dasrath Raut and Others*, ; *Mohammad Shah Vs. Fasihuddin Ansari and Others*, ; and *Ballabli Das v. Nur Mohammad* AIR 1936 PC 53. It is not necessary to refer in detail to the principle laid down in all these decisions. It is sufficient to refer to the case of *Motishah*, AIR 1956 Nag 38 which in terms is based upon the decision of the Privy Council in AIR 1936 83 (Privy Council) . At page 87 of the report occurs the following passages: --

"The owner who permits one or two burials to take place in his orchard would not describe his orchard as qabristan. 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. The observation of the Division Bench of this Court in *Ramzan Momin and Others Vs. Dasrath Raut and Others*, which has proceeded upon user from time immemorial in order to impress the character of the wakf upon a certain property is really independent of the above observation of the Privy Council, which makes it clear beyond doubt that apart from time immemorial user if it appears to the Court that any property is claimed to be graveyard, the party concerned will have to lead evidence in regard to the number of instances, the character of the burial and the extent of it. From which the Court can infer that the plot of land in question was necessarily used as a public burial ground. In this view of the matter, the question of the period for which the land has been put to such use would not be such as to take it back to time immemorial. If from the evidence on the record the Court can infer that the number of instances of burial is such, and the way in which burial have been permitted by the owner of the property also is such, that the Court can infer dedication of it by the owner to public use, that may justify the inference of its dedication as a wakf property. This principle has been approved by the Nagpur High Court in the case referred to above AIR 1956 Nag 38. In any view of the matter, the finding of the learned Additional Subordinate Judge is at least clear and specific to this extent that the presence of a large number of graves on this plot, which were noticed and reported by the pleader commissioner, indicated that the land did not serve the purpose only of the family graveyard of contesting defendant No. 7. Accordingly, the finding recorded by the Court of appeal below, affirming that of the learned Munsif, must be taken to be sufficient to uphold the decree passed in favour of the plaintiffs.

6. Mr. Chatterji has further contended that there was yet another issue in the suit in regard to the mango trees. According to the plaintiffs, the mango trees were planted by the Muslim public and according to defendant No. 7, they were planted by the family of defendant No. 7; and even if there was dedication of the land for the purpose of burial, it would not mean that the mango trees also were dedicated. The learned Munsif recorded a clear finding on this issue to the effect that the trees were planted on behalf of the Muslim public for the purpose of providing shade to the graves and using the timber for the purpose of making planks in the graves. The learned Additional Subordinate Judge, however, on appeal, has approached the same question from another point of view which is that since the entire plot in dispute was dedicated to public use and became wakf property the trees standing thereon also must be taken to embrace the character of wakf property and, as such the plaintiffs were entitled to the declaration that the trees also belonged to the Muslim public of the three villages referred to above. In either view of the matter it must be held that the finding on this point also cannot be called in question.

7. The appeal, therefore, fails and must be dismissed. Parties will bear their own costs of this Court.