
(1936) 07 CAL CK 0025
In the Calcutta High Court

Soofi Munshi Azahar Hossain and Another	APPELLANT
Vs	
Amir Ahmed and Others	RESPONDENT

Date of Decision : 07-07-1936

Acts Referred:

Evidence Act, 1872 — Section 13

Citation : AIR 1937 Cal 261

Hon'ble Judges : Ameer Ali, J

Bench : Division Bench

Judgement

Ameer Ali, J.—This suit relates to premises Nos. 5, 7 and 7/1, McLeod Street. No. 3/1 is a mosque standing on approximately one cotta of land. No. 3/1, McLeod Street, is comparatively recent. No. 5, McLeod Street, was formerly No. 4, Goristhan Lane. Nos. 7 and 7/1 were formerly No. 4/5, Goristhan Lane. No. 4/4, Goristhan Lane is now No. 6 and 6/1, McLeod Street. Before I deal with the facts, there being numerous parties, I shall mention how the parties are interested. Defendant 1 now claims to be entitled to the whole of No. 7, McLeod Street, less one room. Defendant 2 claims to be entitled to half of No. 7/1 plus a down stair room in No. 7. Defendant 3 is the widow of one Sachindranath Mitter who bought a leasehold interest in No. 7/1, and the room, the leasehold however being of considerable value. Defendants 4, 9, 10 and 11, are the representatives of the purchaser of the entirety of No. 5. Defendant 6 is the holder of a decree in execution of which. Amir Ahmed, defendant 1, and defendant 2 made their purchases. Defendant 7 is Abdul Mannon and defendant 8 is Rachael Khatun, the wife of Abdul Mannon. They are alleged to have been in occupation of the premises in suit as mutwallis and as such mutwallis to have made in breach of trust these transfers and these transactions which ultimately resulted in the situation which we now have. These transactions are set out with sufficient and perhaps surprising accuracy in the plaint.

2. Put shortly, the position is as follows: One Nawab Jan in 1907 made a gift of the three premises to his sons Abdul Mannon and Abdul Rahman in equal shares.

Nawab Jan had apparently been in possession of these properties (in what capacity I do not for the moment discuss) since 1850. By various transactions between the brothers and sisters, the children of Nawab Jan, the premises became vested as follows: as to No. 5 in Zabida who is represented by defendants 4, 9, 10 and 11. At the period of time I am about to mention Abdul Mannon and Rachael Khatun had a half of Nos. 7 and 7/1 plus another 1/4th purchased from Rahman's branch, After these transactions, somewhere about 1925 Mannon and Rachael Khatun began to be in difficulties. In particular one M.K. Bose, a solicitor, in respect of costs obtained a charge on the interest of Mannon and Rachael Khatun in Nos. 7 and 7/1. In 1926 when Mr. M.K. Bose and other creditors were pressing their claims, the question of wakf was mooted amongst members of the family of Nawab Jan. In 1928 Mahomed Maki's suit was filed, a suit of a similar nature in this respect that it was brought to establish the wakf character of these properties, the only difference being that in that case Mahomed Maki claimed to be in some way a member of the family. It was dismissed on 14th July 1929 by Costello, J. who held that the properties were not wakf.

3. In August 1931 there was a sale of these properties under the charge and decree of Mr. M.K. Bose. At this sale as I have already said, Ameer Ahmed bought the half share of Mannon and Rachael in No. 7, and defendant 2 bought their interest in No. 7/1 plus the room. Some time thereafter Ameer Ahmed who was apparently the owner of No. 4 ejected Mr. Cohen, the brother of Rachael from those premises. In 1932 Ameer Ahmed filed a partition suit in respect of No. 7 and on 4th August 1933 obtained a preliminary decree. On 8th August this suit was filed, history thus repeating itself. I refer of course to the suit of Mahomed Maki. On 13th December 1934 was filed the other suit, 1968 of 1934, by Abdul Mannon against Ameer Ahmed, in which I have already delivered judgment.

4. Now these are all the facts which I propose to state. The issues raised, besides of course the vital issue of wakf or no wakf, include various technical points, points of limitation, res judicata and so forth. The vital issue is that of wakf. Mr. Noorudin Ahmed who appears for the plaintiffs in a difficult case relies upon wakf by user or reputation, and if I may say so, he has made the best of a difficult and as I think a bad case. He has in my opinion been reduced to rely upon wakf by suspicion. Before I deal with the evidence, I shall make the following observations, and express my opinion. I have sat here on the Bench for some five years and that should be enough to make a man fairly cynical, but I think in this case cynicism has reached its limits. I think it is an excellent illustration of how a rotten system of administration of justice can affect the character of the people and for this system I think both the Government and the communities concerned are to blame. Neither have desired a proper system of registration nor regulation of charities for their own separate reasons. My own view is, accustomed as I am sitting here, to hear the name of God in one form or other bandied about, treated rather as a joke, and used as a cloak to recover property

which dishonest trustees have made a profit out of, that it would be better to destroy wakfs outright. Although nobody can suggest that I have not been anxious to preserve wakfs, I think it would be better to destroy them outright than to keep them as a breeding ground for litigation. This is what has been done for the last 50 years. There is a curse upon those who use the name of God to cheat others and I think the result of the curse upon both communities has been this: that the whole spirit of benevolence in both communities has been turned into sour and muddy trickles of petty litigation. Now this property might be wakf but I have to decide "on the evidence" whether it is. I hold that it is not. I have mentioned that Mr. Noorudin Ahmed relies upon wakf by user and reputation, but in point of fact there is no such thing as wakf "by" anything. It is either wakf or it is not wakf. It is purely a question of evidence. Of course when there is a wakfnama there is no question except challenging the wakfnama. Where there is none, it is a question of proof. Now the proof put forward here is of three kinds: Mr. Noorudin Ahmed relies mainly upon records, revenue records. Most of them were before Costello, J. on the previous occasion but not all. There is one document on which Mr. Ahmed strongly relies. Secondly he relies upon the oral evidence of the plaintiff, because only one of them has appeared here, because of his position generally, high standing and considerable age. Lastly he puts reliance upon certain statements or admissions in correspondence between members of the family, the father of Mr. Amir Ahmed, Mr. Rahamuddin Ahmad, related by marriage to Abdul Mannon being the son-in-law of Nawab Jan.

5. I will take the last matter first. The important letter, so far as I remember, is one dated 13th or 16th August 1926, just before the suit of Ahmed Maki was filed. It is a letter to Mr. Cohen, and it is in answer to a letter of Mr. Cohen in which obviously a suggestion had been made as to a suit to establish the wakf nature of this property. In it R. Ahmed suggests that there might have been a wakf deed, the words are something of the following nature: "With regard to wakf deed it might have been lost or destroyed by...". This letter and other letters of the same period shows that this gentleman had very grave doubts as to the success of the contemplated suit and he pointed out the reasons why: in particular the transactions between the members of Nawab Jan's family since 1907, the fact that nobody raised the question of wakf in the suit filed by one Ahad in 1899 which was decided in 1904 and he suggested that some female member for these reasons should be made plaintiff. All that merely shows that the family were preparing at the instigation or suggestion of somebody to set up a wakf to defeat their creditors. The only indication that there was really a wakf is the phrase or sentence I have referred to which reads as if the writer was referring not to a part of a preconceived plan but to something which had really existed. Now two points arise, first, as to the admissibility of the letter as a matter of evidence; and secondly, as to the value I should attach to the statement itself assuming it to be admissible. As regards the law, in my opinion it is only relevant or admissible as an admission against anybody who can be regarded as having caused or been a party to the admission. For the purpose of

this case I am prepared to regard Ameer Ahmed as having been a party to this admission, his evidence on this point being unsatisfactory. Against the other parties I do not consider it evidence but assuming that it is, and I have considered the letter as if it were evidence against everybody, in my opinion no material value should be attributed to this letter. The reasons for my saying this are involved in my opinion of Mr. Cohen as a witness and as a factor in these transactions. I hold that Mr. Cohen was responsible for Ahamad Maki's suit and is responsible for this suit and generally to be the litigation expert behind the whole of this litigation. It would therefore be obviously unsafe to rely upon an admission in a letter from a person who has not been called in answer to some letter from Mr. Cohen which was part of the preparation for the litigation in question. I may as well deal now with Mr. Cohen and not refer again to what I consider an unpleasant subject. Cunning, stupid and utterly untrustworthy, fluent in four languages but truthful in none, I have no doubt that Mr. Cohen is the mysterious Khoda Bux from whom the plaintiff in this case is supposed to have derived his information.

6. That brings me to the plaintiff's evidence. The plaintiff is a venerable looking old gentleman and as people's motives are not always unmixed, I am willing to assume that in the part he has adopted there is some percentage of philanthropy. He may, I think probably he does feel, that this property may be wakf or there is something behind it and he may think that he is doing nothing wrong in coming forward to support it, but substantially I have no doubt whatever that he is simply the tool of Mr. Cohen. In these circumstances it is quite impossible for me, although I have been asked for technical reasons by counsel for the defendants to consider the suit a bona fide one, to come to any such conclusion. Bona fides is out of the question whatever be the technicalities of the matter and whatever the results may be. With regard to his evidence such as it is, in so far as it consists of opinions of living persons, it must be rejected, and in so far as it consists of opinions of persons who are deceased, it is on the assumption that this is a matter coming under public rights or general rights, a matter which I do not decide. But his evidence boils down to what he heard from this gentleman Khoda Bux, of whose existence, independently of Mr. Cohen, I have such grave doubts. It is therefore of no value. The other witness is a man of a very different class, but in my opinion, having regard to the distance of time in regard to the events to which he speaks, it would not be safe to rely upon his recollection. Incidentally he speaks of Nawab Jan having said that his own mother-in-law was the founder of the wakf. That cannot be so and that is not the case of Mr. Ahmed. That brings me to the question of the origin of this wakf and Mr. Ahmed quite rightly concentrated upon the documents which have a bearing on the matter and I will discuss these documents to the best of my ability, his case being that he is entitled to ask the Court for a finding that there is a wakf by reputation. He has not been able to give evidence satisfactory to me at any rate of user, for instance by application of rents. On the contrary the evidence is that the alleged mutawallis and their families and dependents and relations lived

continuously in these houses or some of them.

7. The bearing of that point, although small, was not at first, I think, apparent, at any rate to the parties. My community in Bengal, although they consider themselves experts on the shariat, are not apparently aware-this is my experience- that there is any objection to mutawallis living or squatting, as is generally the case, in the wakf properties. So general is this that public is apt to assume that this is one of the rights recognized by Mahommedan law, and I have heard that expressed not only by members of other communities but also by my own. I speak, of course, of cases where the wakf deed does not or cannot be construed so as to provide for mutawallis living in the wakf properties. The Mahommedan law, so far as I understand it without that intimate knowledge which so many, not only lawyers, profess in this province, is to the contrary-a very wise provision. The normal inference, therefore, to be drawn from evidence that a person is living in property alleged to be wakf, subject to proof of a provision in the wakfnama, is that it is not being used as wakf property, and, in my opinion, the sooner that is recognized the better. There is, therefore, no proof or satisfactory proof of user. I now come to reputation. Mr. Nooruddin Ahmad has been most helpful on the documents. It would, however, have been more useful-I say this in no spirit of criticism-if the documents, both favourable and unfavourable, had been produced in order of date. As it is, we have to dodge about. I will take the documents in order of date. Exs. E, F and O-9 are four diary registers of 19th November 1852. Ex. E, diary register No. 1320, is in respect of a musjid in Gorasthan Lane, not numbered, measuring 1 cotta, and the proprietor or occupier is recorded as Sri Sri Allah, Sebait Bibi Peerun. Ex. F is diary register No. 1313 in respect of No. 4/4 Gorasthan Lane, measuring 15 cottas 8 chataks, and the recorded occupier is Jaun Bibi. This is the premises which is now No. 6 and 6/1 McLeod Street. The mosque is now No. 3/1 McLeod Street. Ex. O-9 is diary register Nos. 1315 and 1316, both recording Jallan Bibi, in respect of No. 4/3 Gorasthan Lane, 6 cottas, and No. 4/5 Gorasthan Lane, entered as 2 cottas, probably an error. No. 4/3 is now No. 5 McLeod Street and No. 4/5 is now No. 7 and No. 7/1.

8. Then come certain settlement proceedings in respect of holding No. 176, stated to measure 1 bigha 5 cottas odd. This is Ex. B. The previous entries in the diary register are referred to, and the owners recorded are: "Jallan Bibi, Jaun Bibi and Sri Sri Allah, Sebait Peerun Bibi".

9. This is the entry upon which is founded the finding of the Deputy Collector in 1904, which is really the foundation of Mr. Nooruddin Ahmad's case, and which was the sheet anchor suggested in a letter to Mr. Cohen from Ameer Ahmad's father to which I have already referred, the suggestion being that the only hope was this finding of the Deputy Collector. Next come Exs. C, D and I. These are the second anchor of Mr. Nooruddin Ahmad, if I may use the expression, Ex. C not having been, if I remember rightly, put before Costello, J. during the previous trial. These are the bill registers from the year 1856-57, a petition by Bibi

Madaran on 14th June 1859, for a potta in respect of No. 4/5, and the proceedings in which the Collector made enquiry as to the propriety of issuing such potta in her favour. What appears is that this lady Madaran bought No. 4/4 Gorasthan Lane from Jaun Bibi, consisting, as I have stated, of 15 cottas 8 chataks. The Collector made an enquiry, allowed the change to be made and the potta to be issued, and deducted 15 cottas 8 chataks from the 1 bigha 5 cottas, which was the original area of holding No. 176. Incidentally during the enquiry, it appears from the record, somebody was sent to the spot, and the report contains statements to the effect that on enquiry this particular land is not wakf property. Mr. Ahmad has based upon these documents an ingenious point that, taking these documents together, we must assume a finding that the rest of the property, that is, the balance after deducting 15 cottas 8 chataks, was wakf, or, alter, natively, we must at any rate draw the inference from these proceedings and documents that is the case. In my opinion it does not follow. It appears to me that the contents of the diary register plainly show that these ladies were separately in occupation and ownership of the lots I have mentioned. Ex. B in my opinion does not show otherwise, nor do I think that any inference such as has been suggested can be drawn from the proceedings in respect of Bibi Madaran's potta. It is, of course, the existence of these diary registers that compelled Mr. Ahmad to suggest that the wakf was founded between 1852 and 1859, a suggestion which, in my opinion, is highly improbable.

10. In 1875 a more detailed system of registration was adopted, but as far as I can judge from the exhibits during the period from 1859 onwards, there is no reference to any of the properties being other than of a secular nature:, see Exs. O-11. O-12, O-14 and O-15. Indeed the mosque with its one cotta from 1876 to 1928 was transferred to another holding: see Smart's plan, Ex. O-13. In 1928 it was on the application of Rachael Cohen retransferred to holding No. 176: see Exs. O-15 and O-12. This was after the trouble had arisen, and indeed the contents of the petition is to my mind very significant. Incidentally, the plan annexed to the report (I forget the number of the exhibit) obtained by the Board of Revenue for this purpose is the most helpful of the plans upon the record, plainly showing the plots. In 1899 was filed the High Court suit by Ahad against Nawabjan, not alleging the wakf nature of the property. It was defeated by Nawabjan, as far as I can gather, on the basis of his long and undisturbed possession. The question of wakf was not raised on either side, and although I believe that the learned Judge who tried the case did incidentally contemplate the possibility of Nawabjan having been in possession in one or two capacities, that formed no part of the decision. It was during the pendency of this suit that the proceedings before the Deputy Collector, so strongly relied upon both in the suit of Ahmad Maki and before me, took place, and this is the second sheet anchor of the plaintiff's case. There is in the proceedings a finding by the Deputy Collector that the premises in question are wakf. He was in fact not dealing with these particular premises, nor of course was the question of wakf before him for decision. Nevertheless Mr. Ahmad contends that it is a finding or it is a

transaction which is admissible in evidence u/s 13, Evidence Act, and I propose to assume that is the case. It has in this manner once been considered by Costello, J. I have no doubt that the Sub-Deputy Collector is in a position to arrive at the truth far better than the Judge sitting on the Original Side, and it has been suggested by Mr. Ahmad that his finding must be the result of local investigation. But I can make no such assumption and it is my duty to arrive at a conclusion on the same materials that were before him. The same materials are before me so far as I know, namely, the records that Mr. Nooruddin Ahmad has been good enough to put before me. Now, apparently, the Deputy Collector's inference is based upon the entry in Ex. B. I have already expressed the view that entry does not, in itself, justify the inference which the officer has drawn. On the contrary, taken with the other entries it appears to me that the inference should be in the other sense.

11. That deals with the principal issue, and in the circumstances I do not propose to go into the other issues which are purely issues of law. So far, however, as one incidental question of fact is concerned it is proper that I should express an opinion. In so far as any question of limitation or otherwise should turn upon the question of the purchaser being unaware of the wakf nature of the property (on the assumption that it is wakf) I should have been prepared to hold that Ameer Ahmad had such knowledge. That I think is a legitimate inference from the fact of the letters produced and from his replies in cross-examination. What the effect of such knowledge is I do not propose to discuss. In my opinion this question does not arise. The suit must fail in substance and it will therefore be dismissed with costs. The question of the incidence of costs arises upon my finding that the plaintiff really does not know what is going on at all, and that Mr. Cohen is really at the bottom of the whole affair. Mr. Nooruddin Ahmad has reminded me that he called Mr. Cohen only to prove the letters received by him, and this is a fact. He did ask me at the time to stop cross-examination on any other point, but that was obviously impossible. It may also be that Mr. Ahmad, had he realized fully the manner in which Mr. Cohen was going to give evidence, would have chosen some other method of proving the letters. He therefore feels that in some sense Mr. Cohen has been thrust upon him-an unwelcome gift. He asks me to take this into consideration. It does not, however, appear to me relevant on the question of costs between the parties as to who is to bear them. What I have said indeed, is, in some sense, in favour of Mr. Ahmad's client. I think he is a mere tool. In these circumstances the question arises as to whether I ought to make Abdul Mannon and Rachael Cohen pay the costs or make Mr. Cohen pay the costs. I have not seen either Rachael Cohen or Mr. Abdul Mannan, but from what I know of the case and have seen of Cohen I think they also are probably pawns in the game. But they have lent themselves to it and they are the real plaintiffs. I am quite clear that I could make an order for costs against these two defendants. In my opinion, and this is supported by what Mr. Kanjilal says, it would not be right to make an order against a person who is not a party to the suit, such as Mr. Cohen, without issuing notice upon him. It is undesirable to protract these

proceedings. With regard to Abdul Mannon and Rachael Cohen I would normally have made an order against them for costs, but having regard to the fact that Cohen is in my opinion mainly responsible and that the matter is really academic having regard to their financial position, I shall make no order upon them.