

PRIVY COUNCIL

Mazhar Husain

Vs.

Rao Bahadur Adiya Saran Singh
P.C.A.No.59 of 1944

(Lord Simonds, Lord Uthwatt and Sir John Beaumont JJ.)

24.07.1947

JUDGMENT

LORD UTHWATT J.

1.This is an appeal from a judgment and decree of the High Court of Judicature at Allahabad dated 8.9.1941, reversing in part a judgment and decree of the District Judge of Cawnpore dated 4.10.1934.

2. The appellants were the plaintiffs in the suit giving rise to this appeal. In it they claimed the removal of the respondent, defendant in the suit, from the trusteeship of certain properties alleged to be wakf properties and consequential relief. The respondent denied that any wakf was ever created. The only question at issue in the appeal is whether the subject of the wakf was, as found by the High Court, a mosque only or was, as found by the District Judge, a mosque, a grove and imambara and two villages endowed for the upkeep of the mosque, grove and imambara. The appellants' case is that a wakf extending to all these properties was created by Haidar Bakhsh. The following pedigree shows the relation between the persons who figure in the history of the matter :

3. Haidar Bakhsh - reputedly a very wealthy man - belonged to a Hindu family but some time prior to 1794 A.D. embraced Islam, remaining nevertheless on good terms with his brother and his brother's descendants. Sometime about 1813 A. D. Haidar Bakhsh built a mosque and imambara and planted a grove known as Imam Bagh. These were in a compound containing residential houses in one of which Haidar Bakhsh lived. The appellants' case is that thenceforward the mosque was used for worship and the imambara for the burial of "Tazias" at the Moharram and for other purposes connected with the Mahomedan religion.

4. In 1834 the two villages in question - Charli and Jafarpur Sathra - were bought in the name of Maiku Lal, grand - nephew of Haidar Bakhsh, and Lal Bahadur, great - grand - nephew of Haidar Bakhsh, their respective fathers being then living. The names of Maiku Lal and Bahadur Lal were mutated in the village papers as proprietors. Haidar Bakhsh had no Mahomedan heirs. The appellants' case is that this purchase was made by Haidar Bakhsh "benami" to ensure the perpetuity of the wakf consisting of the mosque, grove and imambara. Haidar Bakhsh died in 1837/1838 A. D.

5. There is no evidence that Haidar Bakhsh ever executed a wakfnama and no direct evidence of any oral dedication by him. But if the proper inference from the history of the matter, the dealings with the properties, the litigation that has affected it and the admissions and assertions made by the respondent's predecessors - in - title is that Haidar Bakhsh purchased the villages in the names of Maiku Lal and Bahadur Lal on the expressed footing that they were to be an endowment of an existing wakf consisting of the mosque, grove and imambara, their Lordships do not doubt that all the requirements of Shia law necessary to the valid creation of a wakf attaching to the villages were satisfied.

6. The matter to be determined is merely one of the proper inference to be drawn from facts none of which is now in dispute. In the principles to be applied and the method of approach to be followed their Lordships are in agreement with the High Court. They differ from the High Court as to the conclusion which ought to be drawn from the material proved in the case. The elaborate and careful statement of the facts contained in the judgment of the District Judge and the High Court relieves their Lordships from the need of stating much of the detail.

7. Three important matters may be summarily disposed of. First, their Lordships are satisfied that the villages were purchased by Haidar Bakhsh. That was admitted by counsel for Iqbal Bahadur in a suit in 1875 and the admission accords with all the probabilities of the case. The District Judge found that the villages were so bought and his view was not in terms dissented from by the High Court. Second, the oral evidence established to the satisfaction of the District Judge that until recent years the imambara as well as the mosque was open to the public and was generally used by the public. This finding of fact was accepted by the High Court and was not open to dispute before their Lordships. Third, it is not disputed that for many years the income from the villages has been expended wholly or in part on the upkeep of the mosque and imambara by the respondent's family. Oral evidence was led on this topic to which

it is not necessary to refer. In addition it was shown that in a former suit relating to the wakf there was evidence given in 1875 by Sahib Ali Khan, tahsildar from 1858 to 1868 in the district of Fatehpur (the relevant district), that the income during his time as such tahsildar was "spent on Taziadari etc." There is nothing in the history of the case which suggests that the spending of the income for the purpose of the wakf alleged represented a change from a practice that had existed from the time of Haidar Bakhsh. Their Lordships draw the inference that the practice existed throughout.

8. The documentary evidence is dealt with in considerable detail in the Courts below. The respondent mainly relies on the facts : (1) that Maiku Lal and Lal Bahadur were entered in the village papers as proprietors and that Haidar Bakhsh made no attempt to have mutation effected in the name of the Almighty and to have Lal Bahadur and Maiku Lal recorded as mutawallis in lieu of proprietors ; (2) that leases of the villages made in 1834 and 1839 made no mention of a wakf, (3) that Maiku Lal affected to deal with his half share in the villages as if he were absolute owner; (4) that in the khewats of 1863 and 1864 Lal Bahadur is recorded as proprietor notwithstanding that he had asserted in 1861 that he was in possession as trustee and that the villages were being devoted to sacred purposes ; (5) that in the khewat of 1875 Iqbal Bahadur and his minor son are recorded as pattidars.

9. The point made is that in the earlier history of the villages-down to 1861 or thereabouts-there is not to be found any statement in any written instrument that the villages were wakf property.

10. The appellants produce against this the fact that in the Settlement of 1875 A. D. the wajib - ul - arz for each village states in terms : "the village has been made a wakf for Taziadari during Moharram, repairs of imambara and mosque." Later settlements do not, however, make mention of any wakf. The appellants mainly rely upon admissions, or more accurately, assertions made in various proceedings relating to the villages by the respondent's predecessors - in - title.

11. It appears that from the year 1873 onwards a series of suits was brought by persons claiming to be Mahomedan heirs of Haidar Bakhsh. In these suits Iqbal Bahadur and Mewa Lal consistently asserted that these villages were wakf created by Haidar Bakhsh. These assertions are open to the criticism that they may have been devices to which resort was made with a view to defeating Muslim claimants but, with the High Court, their Lordships consider that these statements cannot entirely be put out of account. It may be added that in one of these suits in the year 1877 a detailed

statement was made by Iqbal Bahadur and the guardian of Mewa Lal, then a minor, that in 1853 Maiku Lal applied for partition of the villages but that the application was struck off owing to the fact that the properties were proved to be wakf properties. The dates of the Courts' orders are given specifically as 19.4.1860 and 31.7.1861. The orders were not apparently produced in evidence.

12. There is one suit (case No. 421 of 1860) to which it is necessary to refer in more detail. It appears that Maiku Lal affected to sell his share in the villages to one Sheo Dayal who in execution proceedings against Maiku Lal obtained an order for possession of Maiku Lal's share on 1.12.1859. Lal Bahadur entered a demurrer under Article 8 of 1859-the then Civil Procedure Code-claiming that the villages were devoted to sacred purposes by the ancestors of both parties and that, as he was in possession as trustee and received the rents "under the ruling of the S. D. A. No. 1166 dated 17.8.1838," the property could not be alienated. The Subordinate Judge decided in favour of the demurrer. Sheo Dayal appealed to the District Judge who found also for the demurrer. He observed that the revenue authorities on 21st May to 6.10.1853, declared that Maiku Lal was out of possession and he found that the property was really devoted to sacred purposes. He dismissed the appeal. An appeal to the Sadar Diwani Adalat was dismissed the Court stating "the estates were wakf (the father of Lal Bahadur we observe was a proselyte from Hinduism to Mahomadism)."

13. In their Lordships' view the High Court did not attach proper weight to this case in arriving at a conclusion upon the matter. The errors in the report were emphasised to the neglect of the importance of the decision itself.

14. The only discernible errors of fact in the report of the decision are : (1) that Lal Bahadur is referred to as the son of Haidar Bakhsh and Haidar Bakhsh is consequently referred to as an ancestor of Lal Bahadur, and (2) that Haidar Bakhsh is referred to as the brother of Maiku Lal. But it is clear (1) that the convert to Islam -Haidar Bakhsh-came into consideration as the person responsible for the dedication to wakf if such a dedication was made; (2) that the question whether or not there had been such a dedication was directly in issue; (3) that evidence on the point was taken; and (4) that the point was decided.

15. That is a general summary of the effect of the evidence. The critical question is whether the villages were dedicated by Haidar Bakhsh as a wakf. If they were the conclusion is inevitable that the mosque, imambara and grove were also so dedicated.

16. In considering the evidence as to the villages their Lordships do not attach to the

documentary evidence prior to 1861 relied on by the respondents the weight attributed to it by the High Court. That evidence is undoubtedly consistent with the claim to a proprietary title but does not-and here they differ from the High Court-repel the hypothesis of the creation of a wakf by Haidar Baksh. The entries in the village records are not conclusive, though they are of weight. The lease of the villages is not of itself inconsistent with the dedication of the villages as an endowment. No weight can be attributed to Maiku Lal's attempted disposition of his share in light of the findings in the suit No. 421 of 1860. The consistent use of the mosque and imambara and of the profits of the villages for the purposes of the mosque and imambara; the fact that Haidar Baksh found the purchase money for the villages; Maiku Lal's failure to obtain a partition in the suit which was begun in 1853; the admissions and assertions made by the respondent's predecessors - in - title; and the judgment in the Suit No. 421 of 1860 lead their Lordships to the conclusion that the proper inference is not - as the High Court thought-that there were unenforceable directions given by Haidar Baksh that to perpetuate his memory some portion of the income of the villages was to be devoted to the upkeep of the mosque and the imambara, but that the transaction under which the villages were transferred to Lal Bahadur and Maiku Lal was accompanied by such overt expressions of intention as were necessary to create a wakf attaching to the villages for the endowment of the mosque, grove and imambara. A lawful and effective creation of a wakf is consistent with all the proved facts; and in their Lordships' view is the proper and reasonable inference from those facts.

17. Their Lordships will therefore humbly advise His Majesty that this appeal be allowed and that the judgment of the District Judge be restored. The respondent will pay the costs of the proceedings in the High Court and of this appeal.

Appeal allowed.