Nazim Ali

Vs

Anjuman Islamia Chhatarpur

Civil Appeal No. 2943 of 1981

(K. Venkataswami, S. Rajendra Babu JJ)

10.02.1999

JUDGMENT

S. Rajendra Babu J.

1. Anjuman Islamia Chhatarpur (Respondent No. 1) filed a suit (Civil Suit No. 2-A of 1974) on the file of the District Judge, Chhatarpur in Madhya Pradesh for declaration that the suit property known as `Badi Takia' described in plaint sketch Ex.P-2 except for a plot measuring 6'x6' situate in it is wakf. In respect of this property there are three rounds of litigation.

2. First of them was brought by Tegh Ali and Wajid Ali by way of a suit filed on April 4, 1959 which was numbered C.S. 28 of 1960 in the court of the Civil Judge, Chhatarpur for declaration, possession and damages against the respondents on the ground that they were owners of the whole property known as `Badi Takia' for over 250 years and the respondents had without consent of plaintiffs had put their Tazia on the land. The Civil Judge II Class, Chhatarpur decreed the suit declaring that the plaintiffs are title holders, owners and occupiers of `Badi Takia' and the respondent had committed trespass by keeping their Tazia of the suit land. In the appeal referred against that decree the Appellate Court reversed the decree of the Trail Court and held the property to be Wakf property. The matter was carried successfully further in second appeal to the High Court. As against the judgment in the second appeal, an appeal was filed in this Court being Civil Appeal No. 2527 of 1966 which was dismissed upholding the judgment of the High Court in second appeal.

3. Second round of litigation was commenced thereafter by the respondents seeking recovery of Rs. 597.71 paise for repairs of Mosque against defendants in the suit, Munshi Tegh Ali, Mohammad Jakir and others, regarding fund collected for repair of Mosque. The Trial Court held that the Mosque is a wakf property but was not maintained by Anjuman Islamia and, therefore, dismissed the suit.

4. Third round of litigation was commenced thereafter by the respondents out of which the present appeal arises. In that suit the respondents sought for declaration that appellants have no right over property known as `Badi Takia'. The Trial Court dismissed the suit on several grounds : (i) that Mosque is a wakf property by user and not other portions of the property and the respondents are not the Mutwallis of the suit property and therefore, not competent to file the suit; (ii) that the plaintiffs not being in possession of the suit property, suit was barred by Section 34 of the Specific Relief Act; and (iii) that the suit was also barred by principle of res judicata by virtue of the decision in C.S. No. 28 of 1960 to which we have already adverted to. The appeal filed by the respondents was allowed by the high Court reversing the findings on all issues. In particular, it was held that the decision in the earlier suit in C.S. No. 28 of 1960 is not res judicata and Mosque, water tank, taps,

imambada and imamchowk were wakf property by user but residential houses have not been established as wakf by user. The High Court relied upon agreement executed by Tegh Ali and Wajid Ali on September 19, 1953 and construed that the appellants were estopped from contending that the property in `Badi Takia' was not wakf property.

5. In this appeal, Shri Mehta, learned counsel for the appellants, submitted that the High Court erred in construing the effect of the agreement dated September 19, 1953 and ought to have given due weight to the finding that had been recorded by the trial court, appellate court and the High Court in the earlier proceedings that the said agreement does not amount to estoppel when that finding had become final. In the previous proceedings in C.S. No. 28 of 1960 it is submitted that it is only the Mosque which had been held to be a wakf property and other properties in `Badi Takia' were never treated as wakf property. He has also pointed out that there is no basis for the conclusion reached by the High Court that the Mosque and the land around the Mosque within the compound along with imambada and imamchowk, as shown in the plan Ex.P.2 are part of the Wakf property. He further submitted that the best that could have been said by the High Court was that the Mosque with the land around it alone could be declared to be wakf property and not the other parts thereof.

6. Shri Qamaruddin, learned counsel for the respondents, on the other hand, submitted that the view taken by the High Court is in accordance with law on the material placed before the Court and therefore, it is not necessary for us to interfere with the same.

7. In view of the arguments made before us, we shall consider two questions, namely, (i) whether the suit filed by the respondent is hit by principles of res judicata; and (ii) effect of the agreement dated 19th September, 1953. As noticed by the High Court, the decision of this Court was final but the High Court sought to distinguish it by stating it was not only limited to a small extent of property but also did not decide the other questions arising in this case.

8. In the second appeal arising out of C.S. No. 28 of 1960, two aspects were examined; (i) whether the appellants or the respondents have title to the suit property, and (ii) whether there was a wakf of the entire property or a part thereof. On account of the nature of user from time immemorial it was held that no case of a wakf by declaration of intention or by a will is either pleaded or proved. Therefore, the question whether the property is a wakf property had to be decided only on the basis of long and immemorial user, if any. At para 8 of its judgment the High Court found that the trial Court and the first appellate court had held `Badi Takia' is ancestral property of predecessors in title of appellants, has been in their possession long before Anjuman Islami was constituted and therefore their claim was confined to the inference of wakf on the basis of long user. After examining the evidence it was held that appellant's ancestors should be deemed owners of suit property and the burden that there is an implied wakf was not discharged and except for the area covered by Mosque remaining property has always been private property. On that basis the second appeal was allowed setting aside the judgment and decree passed by the Appellate Court and restored that of the Trial Court holding that only the Mosque is wakf property on account of long user which is severable from the other personal property of the appellants and their ancestors upon which no implied wakf can be inferred.

9. It is now necessary to notice as to what is the subject matter of the suit C.S. No. 28 of 1960 and the present suit with the pleadings thereto. The property in dispute was described in Ex.P.2 as comprising of a Mosque, open yard around the said Mosque, imambada, a platform called `imamchowk', a Hujra' (small room) adjoining the main Mosque, a well adjacent thereto, water tank and taps adjoining defendants further contended that Anjuman never over charge of `Badi Takia' nor

every looked after its affairs. They explained the effect of the agreement said to have been executed in 1953 by the predecessors-in-title of the appellants and stated that it will not affect the title in respect of the suit property. This Court in its order in Civil Appeal No.2527 of 1966 noticed that the courts below held that the appellants' ancestors were the owners of the `Badi Takia' and on case of wakf by declaration of intention or by a will was either pleaded or proved and the proof adduced was not sufficient to hold that the entire `Badi Takia' is wakf property and all that could be said is that the Mosque in `Badi Takia' is a wakf property. This Court agreed with the decision of the High Court and dismissed the appeal by stating as follows :-

> "In view of the relief claimed in the plaint, the only point that the court had to decide was whether the plot on which the Tazia was placed was wakf property. On that question no satisfactory proof was placed by the defendant before the Court. *Hence we agree with the judgment and decree of the High Court*." [emphasis supplied by us]

10. It is clear from the aforesaid extract from the judgment of this Court that it was noticed that the only question was whether the plot on which Tazia was placed was wakf property and on that question no satisfactory proof was placed by the defendants before the court and therefore, this Court agreed with the view of the High Court but did not upset any of the finding recorded by the court below which was affirmed by the High Court. Therefore, it was not open to the parties to raise this question once over again particularly when `Badi Takia' was held to be a vast extent of property in which there was a Mosque which alone was shown to have been dedicated for purpose of wakf. The basis upon which the High Court disposed of the matter is noticed by this Court but it was pointed out that in the suit the principal question was relating to the plot where Tazia had been placed and that whether the property had been dedicated to a wakf or not and when those findings the Mosque on the south-east corner, residential house of the defendants described as `Panchayat-ka-kamra' towards the north, and a big room adjoining to it on the eastern side described as `Musafirkhana'. No measurements have been set forth in the plan Ex.P.2. The respondents had in previous proceedings (C.S. No. 28 of 1960) contended that the property in the suit known as `Badi Takia' consisting of Mosque, open compound and building were constructed by Mohammedans of Chhatarpur by raising funds as well as with the help and aid provided by the State Rulers about 200 years back and the same was looked after and used by the Mohammedan community and the whole property was surrounded by a compound well. The residential house had been used for residence of Faquirs. After the construction of imambada the Tazia was being erected there and placed on the imamchowk within the Mosque compound. The Musafirkhana had been used by the outsiders who visited Chhatarpur and the Panchayatghar was being used for holding meetings and the school was also being run in `Badi Takia' for imparting education to the Mohammedan children.

11. The defendants therein (who are appellants in the present appeal) contended that the suit property was not wakf property and claimed the same to be their private ancestral property known as `Badi Takia' and the houses called as `Panchayatghar' and `Musafirkhana' were in fact the residential house of the defendants and their predecessors-in-title, which were constructed about long time back. They denied the contention of the plaintiffs (therein) that the property in question has been constructed by the Mohammedans of Chhatarpur and the same were looked after by the Mohammedan community. The allegation of running of any school in the `Badi Takia' was also denied. The only admission made by the appellants was that the Mohammedans of Chhatarpur congregated in the Mosque for prayers but they denied the use of open compound for prayers by them. The had become final and not disturbed by this Court, we think that the learned District Judge was justified in holding that the proceedings were barred by res judicata. However, the contention put forth by respondents is that the previous suit was in respect of only a plot measuring 6'x6' and

not entire property of `Badi Takia'. A careful examination of the pleadings in the previous suit will indicate that though the plaintiffs had not raised the issue as to the entire property in `Badi Takia' was wakf property and, therefore, the suit was liable to be dismissed. Hence, even before this Court the point agitated and put in issue was that the entire property in `Badi Takia' was wakf property which was rejected by sating that though the Mosque and the school were wakf property that inference would not result in holding that the entire `Badi Takia' is wakf property as no proof had been placed to reach any such conclusion and thus the conclusion or the findings of the High Court affirming that of the trail court were not upset or modified in any manner. The findings of the High Court as to the nature of the property having remained unaltered the claim of the respondents in the suit being contrary is barred by principles of res judicata. This finding of the trial court has to be restored, while setting aside that of the High Court.

12. So far as the question raised in the matter that as to whether the agreement dated September 19, 1953 executed by Tegh Ali and Wajid Ali could be construed to be estoppel is concerned, in the suit, O.S. No. 28/60, it had been decided by the Trial Court that the agreement would not operate as estoppel as it related primarily to the Muharram arrangements and not to the settlement of the rights over `Badi Takia'. Similarly the Collector also had passed an order on August 31, 1954 which examines the background in which the agreement had been made. Several disputes had arisen between the parties out of which this dispute relating to Muharram arrangements was one and by an agreement it was decided that the Tazia of `Badi Takia' belongs to all the seven sects of Muslims and the Tazia of `Badi Takia' was taken out according to old prevalent custom and it was made clear that the other private dispute will be settled in other proceedings and the High Court affirmed this finding by stating as follows :

> "The agreement Exhibit D-1 dated 19.9.1953, arrived at before the Tehsildar, Chhatarpur mentioning that the `Badi Takia' was the property of seven communities would not operate as an estoppel against the appellants, as was rightly held by the learned Judges of the Courts below concurrently."

13. That point stood decided against the respondents and therefore, on principles of res judicata it was not open to the High Court to reexamine that aspect of the matter and to hold that the same amounts to estoppel.

14. The other findings recorded by the High Court as to the maintainability of the suit by the respondents or the form in which it was filed or the reliefs sought for would pale into insignificance in view of what we have stated above.

15. These two grounds are sufficient to set aside the judgment and decree made by the High Court and restore that of the trial court. The appeal is accordingly allowed but considering the nature and circumstances of the case, we make no order as to costs.