ALLAHABAD HIGH COURT

Miru

Vs

Ramgopal

(Bennet, J.)

02.04.1935

JUDGMENT

Bennet, J.

1. This is a Letters Patent appeal by the defendants from the judgment of a Single Judge of this Court. The plaintiff is the sole zamindar of a certain mahal and in his plaint he sets out that Rahim Bakhsh formerly occupied a khasra plot No. 119 in the abadi and Rahim Bakhsh made a katcha platform on the said plot for offering prayers, and that this was the condition of affairs at the time of the partition in 1904, that there was no pacca or katcha mosque in the said plot, and that the defendants now desire to make a pucca mosque on the plot. The plaintiff therefore asked for an injunction against the defendants to restrain them from constructing any katcha or pucca mosque in this plot. The written statement alleged that there had always existed a katcha mosque on the plot in question, that in the last rainy season before the suit, which was brought in 1929, the mosque required repairs and the defendants demolished the mosque and dug up the foundations and desired to rebuild it with the katcha bricks, but the Hindus objected to bricks being used from their tanks and accordingly the defendants brought pucca bricks from Saharanpur, It was claimed that in para. 8 contesting defendants have a right to build a mosque in a pucca manner, that the site of the mosque cannot be the property of the plaintiff or anyone else, that it is wakf property and that every Mahomedan has a right to make a pucca mosque in place of a katcha mosque. The trial Court framed the issue whether any katcha mosque has been in existence on plot No. 119 and it found in the negative. The lower appellate Court reversed the finding on this issue and held that "in my opinion the...mosque existed in the year 1904." The finding was that there had been originally a raiyat Rahim. Bakhsh in the house and he had left the house and gone to another house and that the house had been used as a place of worship by the Mussalmans of the village for more than 30 years, that Rahim Bakhsh had died 10 or 11 years before the suit, that various constructions had been made to adapt the house to a mosque during the time it was a katcha mosque, that is, there was a room and in front a thatched verandah, and a platform with a pucca drain and hummam for heating water and a bath room and a lavatory and a hand tube well. The lower appellate Court inspected the spot and came to a careful finding of fact

on the issue before it.

2. Considerable argument has been made as to the correctness of that finding and the Single Judge of this Court set the finding aside and held that the facts known would not result in the finding that there was a mosque. The Judge observed : "I am satisfied that the decision of the lower appellate Court cannot be supported."

3. We find that the lower appellate Court based its finding on not only the oral evidence produced by the parties, but also certain documentary evidence. This documentary evidence consisted of three documents, firstly, there was a khasra Ex. A of the year 1311 Fasli (1903-04). This khasra states that plot No. 119 was entered as "masjid." During the partition the usual partition proceedings were drawn up under Section 114, Land Revenue Act, detailing how the partition is to be made. In this partition proceeding at a certain place, following what is laid down in Section 121, there was a note in regard to places of worship and burial grounds. The partition proceeding entered that there was a mosque, and this entry was crossed out by a line and it was stated that on this No. 119 was a chabutra for the purpose of prayers. Considerable argument was made by counsel for the plaintiff in regard to this entry but it should be noted that where the entry is made at all in this portion of the partition proceedings, the entry must be one in regard to Section 121, Land Revenue Act, which deals with places of worship and burial grounds. As the number is not a burial ground, it must come into the other category of a place of worship. The defendants were tenants in the village and they were not parties to the partition proceedings. On the other hand, plaintiff's predecessor was a party to the partition proceedings. All the co-sharers in the partition proceedings were Hindus. In the particular qura which was formed for the plaintiff Ex. D, there is this No. 119 shown again as masjid, that is in the year 1907. The plaintiff's predecessor therefore consented to the entry in his qura of this No. 119 as masjid. If he had had an objection to that entry, he could have made an application to the Court under Section 111, Land Revenue Act, The fact that he did not make any objection to the entry shows that he acquiesced in the entry. On this evidence we consider that the lower appellate Court had sufficient grounds to come to the finding of fact at which it arrived. That finding of fact is that the number in question has been used since before the partition in 1904 for the purpose of a mosque.

4. We now come to the legal arguments on the point. Learned Counsel for the respondent argued that the Easements Act, Chap. 6, should apply and that the question was merely one of license under Chap. 6, and that in this case under Section 60 the zamindar could revoke the license. He argued that the case did not come under Section 60, because there was no transfer of property under Sub-section (a) and that under Sub-section (b) the katcha building was not a work of a permanent character. He referred to the ruling reported in Basi Mal v. Ghayas Uddin (1904) 27 All 356. That was a case in which a tenant had a certain shed in his yard outside his house and the tenant allowed the Mahomedans of the village to use this for purposes of prayer. The tenant himself then erected a permanent building on the site of the temporary shed, and the tenant described the permanent building as a mosque. The zemindars sued for demolition. This Court

laid down that the claim of the zemindars was well-founded. The case is easily distinguishable from the present case, because in the present case there is a finding that the plot has long been used for a mosque and that the use has been by the Mahomedan inhabitants of the locality and not merely by a particular tenant who allowed other people to come there for the purpose of prayer. Further, in the ruling in question there was a condition in the wajib-ul-arz that a tenant should not build a new house outside the compound of his dwelling house without the zamindar's permission. The ruling laid down that a tenant might make a dwelling within his compound, but in the case of the erection of a mosque which would by dedication become vested in the religious body for whose observance it was used, the contention of the defendants was unsound. The present case also differs because in the ruling there had been no mosque until the erection was made which was the cause of the suit. In the present case the finding is that since 1904 and before it there has been a mosque on the site. We do not think therefore that the ruling has any bearing on the present case. A reference is also made in *Fuzlur Rahaman v. Anath Bandhupal*[1] That was a case for specific performance of a contract by a Hindu to dedicate certain property for the maintenance of a mosque. The property was at the time in the hands of a receiver. There is always a discretion for the Court to grant or withhold specific performance and the Court acted apparently in the exercise of this discretion and held that it was not for a lawful purpose. Learned counsel argued at considerable length that a Hindu zamindar could not lawfully dedicate land for a mosque. We do not think that any difficulty exists of that nature in the present case. It is not stated that the zemindar dedicated the property to the mosque. It is stated that the zemindar allowed the defendants to dedicate the building as a mosque by their user of the building for the purpose of a mosque with the consent, express or implied, of the zemindar. The case is somewhat similar to that reported in Sheoraj Chamar v. Muder Khan 1934 All 868, where it was held by a Bench of which one of us was a member, that in the case of a land being used as a grave-yard from time immemorial, there was a presumption of the consent by the Hindu zemindars.

5. It has also been held by their Lordships of the Privy Council in Court of *Wards v. Ilahi Baksh*[2] that a grave-yard by user became wakf. We do not think that the provisions of the Easements Act or of any part of Chap. 6, in regard to license apply where a zemindar allows the Mahomedan population to use a building as a mosque. The provisions in Chap. 6, appear to us altogether inconsistent. In such a case we consider that where there is a finding that a mosque exists, this necessarily implies that there is no longer any question of easement or of license. Under the Mahomedan law the mosque is the property of God and not the property I of the zemindar. Learned Counsel for the plaintiff objected that there was no case of a transfer such as is necessary for transfer of property, but we consider that the consent of the zemindar to the use of a building as a mosque is sufficient. We note that it is specially provided in Section 2, Sub-section (b), Easements Act, that there is nothing in that Act which will affect any customary or other right not being a license in or over immovable property, which the Government, the public or any person may possess in respect of other immovable property. That is, the Act deals with certain cases of easements which are connected with the property of the persons who enjoyed the easement and Section 18 recognizes the case of easements which may be acquired by virtue of

legal custom, but besides those provisions of the Act there are customary and other rights in or over an immovable property which are not affected by the Act. We consider that the case of a mosque does not come under the Easements Act and that it is one of those cases which is excepted by Section 2. This appears to be the correct method of dealing with the property which is used for a mosque and we do not consider that such property can be dealt with satisfactorily in any other manner. Under these circumstances we consider that the appeal should be allowed and we allow this Letters Patent appeal with costs and restore the judgment of the lower appellate Court.

Sulaiman, C.J.

6. I agree and would like to add a few words only on the question of law which has been raised as to the nature of the right claimed in this case.

7. It is quite obvious that if a person holds a mere license, he is not entitled to vary the user so as to claim a higher right than what was granted. A right to perform any religious worship whether claimed by a Hindu, Mahomedan or Christian over the land of another may depend on grant, if so claimed by the grantee. It may also, if claimed by an individual, be acquired as a private easement, provided he is the owner of a dominant tenement. But in addition to such individual rights, a right of worship may also be acquired as a customary right which can be availed of by a large body of persons by virtue of such custom. Again, a right to perform worship may be claimed as a part of public right, which, of course, would be a right vested in an entire community. Under Section 2 of that Act, these last two classes of rights would be saved from the provisions of the Easements Act. But where there is merely a right to perform worship, e.g., to offer prayers, such a right would not authorise the persons entitled to it, to put up a building on the land in order to make it more convenient for them to perform the same worship.

8. But where a building has stood on a piece of land for a long time and the worship has been performed in that building, then it would be a matter of inference for the Court which is the Judge of facts, as to whether the right has been exercised in that building for such a sufficiently long time as to justify the presumption that the building itself had been allowed to be consecrated for the purposes of such lights being performed. Where there is a mosque or a temple, which has been in existence for a long time and the terms of the original grant of the land cannot now be ascertained, there would be a fair presumption that the sites on which mosques or temples stand are dedicated property. There can be no legal impediment to such a dedication, as the owner of the land can make a grant of the site even to persons of a different community and creed and allow them then to dedicate that site by building a place of worship on it. Where therefore the Court finds that a mosque or a temple has stood for a long time and worship has been performed in it by the public, it is open to the Court to infer that the building does not stand there merely by the leave and license of the owner of the site, but that the land itself is a dedicated property and the site is a consecrated land, and is no longer the private property of the original owner. There is

nothing legally objectionable in non-Muslim owners making a grant of a land to Muslims and in that way to enable them to build a mosque on such land, just as it would not be legally objectionable for Muslims to make grants of lands to persons belonging to other religions, which the latter may utilise for the purpose of building houses of worship. In the case of grave-yards, it has been held in several cases that long user justifies the inference that the land itself is a dedicated or consecrated property, or that even if it is not dedicated, it has become wakf property. The presumption would be all the greater in the case of a building, which is used as a mosque or a temple.

9. If the finding merely were that there is a right to perform worship on a piece of ground, there would, of course, be no right to put up a pucca building on that land for such a purpose. But if the finding is that there is already a mosque or a temple on the land, though the structure is katcha, the necessary inference would be that the site has become a consecrated and dedicated property, and then there can be no objection to the building being converted into a pucca building. It is no longer the case of a mere license which cannot be exceeded beyond the terms on which it was granted. I therefore concur in the order proposed by my learned brother.

Cases Referred.

1(1911) 11 I.C. 436
2(1913) 40 Cal 297