CALCUTTA HIGH COURT

Piran

Vs

Abdool Karim

(Macpherson, C.J. Ameer Ali, J.)

07.08.1891

JUDGMENT

Ameer Ali, J.

1. This appeal raises some important questions of Mahomedan law. It appears upon the evidence that the property, which forms the subject-matter of the present suit, has been in the possession of the plaintiff's family from the latter end of the last century; that in the year 1835 it was resumed by Government and settled in 1839 with the plaintiff's mother Hamida. The proceeds of the property appear to have been applied in the maintenance of a shrine or durgah of a saint called Shah Budhan, from whom the plaintiff's family seems to be descended. In 1855 the father of the plaintiff, named, Rahimuddin, who at that time held the office of sajjadanashin or curator of the shrine, made a division of all the family properties among his two sons, Abdur Ruzzack, now deceased, and the plaintiff, and a daughter, named Wasia, expressly reserving the property in suit for the expenses of the durgah. Rahimuddin died in 1856 and was succeeded in the office by Abdur Ruzzack, who, in the year 1859, conveyed to his mother-in-law, a lady of the name of Hasina, all the properties he had received under the taksimnama together with the property in suit. In 1864 Hasina granted or purported to grant a mukarrari of all these properties to her daughter Masihan, the wife of Abdur Ruzzack. Hasina died in 1877, and upon her death Masihan got herself registered as the owner of the properties conveyed by Abdur Ruzzack to Hasina in 1859. Abdur Ruzzack died in the year 1888, and the plaintiff brings this suit against Masihan to recover possession of the property in question on the ground that it is wakf, and that consequently Abdur Ruzzack was not entitled to alienate it. And he bases his right to sue upon the allegation that after his brother's death he was appointed sajjadanashin of the durgah, to which the property is dedicated.

2. The contending defendant in this case was Masihan, the widow of Abdur Ruzzack, and she in her written statement denied, inter alia, that the property was wakf, or that the plaintiff had any title to maintain this suit. She alleged that Abdur Ruzzack before his death nominated his daughter's son Mahbub Alum to the office of sajjadanashin, and that therefore plaintiff could not

be appointed as alleged by him; and she also contended that his appointment was invalid.

3. Upon this state of the pleadings several issues ware raised between the parties, but in the main the case proceeded upon the following points: First.-Whether the property was wakf as alleged by the plaintiff. Second.-Whether the plaintiff was validly appointed as sajjadanashin, or in other words, was he entitled to maintain the present suit? Third.-Whether he was estopped from impugning the transaction between Abdur Ruzzack and Hasina. fourth.--Whether the sale to Hasina was a real or benami transaction Masihan died during the pendency of the suit, and her daughter Piran has been substituted in her place.

4. The lower Court has made a decree in favour of the plaintiff, holding that the property in suit is wakf, and that whatever may be the rights of Mahbub Alum, the plaintiff as the de facto sajjadanashin and manager of the durgah is entitled to sue for a property wrongfully alienated by the late sajjadanashin. It also held that the deeds of 1859 and 1864 were benami, and that the plaintiff was not estopped from impugning those transactions.

5. The defendant has appealed to this Court, and the learned pleader who appears for her contends in the first place that the Subordinate Judge was wrong in holding that the property in suit is wakf, for the deed of 1855 does not constitute it wakf, nor is there any evidence of prior dedication. He further contends that the Court below was in error in referring to documents which in the year 1835 had been found to be fabricated. Now, what appears to have happened in that year is this. Under Regulation II of 1819, Government had instituted an enquiry into the titles of proprietors of land who professed to hold their properties free from revenue under grants from the former rulers. And, in the course of this enquiry, in 1835 Rahimuddin, who was the then sajjadanashin, was called upon to prove his title to hold the villages of which he was in possession free of revenue. He alleged that the villages including the village of Khundwa had been originally granted as maddad maash for the support of the khankah of Shah Budhan. The documents produced by him in support of his allegation were declared not to be genuine. The property was resumed, and, after a temporary settlement with a Kadira, was permanently settled with Hamida, to whom Rahimuddin had purported to convey the same by a baimokasa in lieu of her dower. Hamida died in 1852 or thereabouts, and the names of her sons and daughter were thereupon registered in the Collector's records instead of hers. In 1855, however, Rahimuddin is found dealing with the property as appertaining to the durgah. The Subordinate Judge, looking to the declaration contained in the document of 1855 with Rahimuddin's statements in 1835, thinks that the settlement of the lands in 1839 with Hamida did not in any way alter the mode in which the family had dealt with the proceeds of mauza Khundwa. We do not think he was wrong in drawing from those facts the inference that, though the property stood in Hamida's name, the family had applied, more or less, the income derived therefrom for the support of the durgah. And this inference seems to us to be warranted by the oral evidence on the record. But in the view we take of the document of 1855, we think it immaterial to consider whether such application of the proceeds amounts to proof of dedication or not. In the taksimnama in question,

Rahimuddin admittedly deals with three classes of property--(1) property which he says was inherited by his children from their mother (Hamida), (2) property which stood in their names (being apparently property which he had purchased in their names), and (3) property which stood in his own name. And he divided all these properties among his sons and daughter in the usual proportion, viz., one-fifth to the daughter and two-fifths to each of the sons. Mauza Khundwa, the village in suit, is included in neither of these categories, and is expressly excluded from the partition. If the baimokasa executed by Rahimuddin in 1836 in favour of Hamida represented a real transaction, and if the settlement in 1839 was taken by Hamida herself and not benami for Rahimuddin, the properties settled with her would, upon her death, have devolved upon her husband as well as her children. The Subordinate Judge thinks, not without reason, that the baimokasa of 1836 was a mere colourable transaction entered into for the purpose of enabling Rahimuddin to obtain a settlement of the resumed lands in the name of his wife. But whether that be so or not, upon the hypothesis that it was a real transaction, the persons who were entitled to Hamida's estate were Rahimuddin and his children. They chose to divide the rest of the family properties, treating Khundwa as standing upon a different basis from the others. The question, therefore, resolves itself to this, what was the effect of the reservation made by the parties to the deed of 1855. The passage in that document relating to the property in suit runs thus: Excepting mauza Khundwa, pargana Saseram, and 22 houses of raiyats situated in Mahulla Budhan Bari (details of which are inserted below) and [which are set apart specifically for the expenses of the holy shrine and which] I have made over to the sajjadanashin of the durgah of Shah Budhan, &c.

6. That is, he divides all the properties excepting the one herein mentioned. Towards the end of the document there is an injunction on the heirs: With respect to mauza Khundwa and the 22 houses of raiyats made over [or appertaining] to the said durgah, none of the heirs shall prefer any claim or make any dispute.

7. And in the schedule the property is mentioned thus: The whole 16 annas of mauza Khundwa and 22 houses of raiyats appertaining to the holy durgah of Huzrat Dewan Shah Budhan, &c, shall remain in the charge of the sajjadanashin.

8. Does this amount to a dedication or not? Moulvie Mahomed Yusuf for the defendant contends that it does not. He says that had Rahimuddin intended to create a wakf; he would have used the word wakf. Now it is clear upon the authorities that in order to constitute a wakf, it is not necessary to use the word wakf. So long as it appears that the intention of the donor is to set apart any specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object or of a series of objects recognized as pious by the Mussulman law, it amounts to a valid and binding dedication (Fatawa-i-Alamgiri, vol. 2, pages 460-461; Kazi Khan, vol. 3, page 73; and Raddul-Muhtar, quoted as Shami, vol. 3, page 560). In the case of *Jewun Dass Sahoo v. Shah Kubeerooddeen*[1] the Privy Council adopting the views of the Sudder Dewani Adawlut in the case of Mussummat Qadira v. Shah Kubeerooddeen Ahmud 3 Sel. Rep. 407 held as follows: This decision is in accordance with the doctrine laid down in the Hidaya, Book XV,

of wakf or appropriation, Hamilton's Translation, vol. II, page 334, where it is said, 'wakf' in its primitive sense means 'detention.' In the language of the law (according to Haneefa) it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable purpose in the manner of a loan. According to the two disciples, 'wukf' signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to His creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that Aboo Yoosaf holds the appropriation to be absolute from the moment of its execution, whereas Mahomed holds it to be absolute only on the delivery of it to a mutwali (or procurator), and, consequently, that it cannot be disposed of by gift or sale. It is stated from Shaik-ul-Islam Abdul Hassan that all the mashaikhs (jurists) declare that if they (the congregation) do appoint a mutwali, it would be as valid as if the appointment was made with the permission of the Kazi.

9. And in the Radd-ul-Muhtar it is stated that the modern Mahomedan lawyers recognize the validity of an appointment by the congregation. So also in the Wajiz-ul-Muhtar. It is clear, therefore, that the election of the plaintiff is not invalid under the Mahomedan Law. Besides, it seems to me that the appointment of a sajjadanashin of a durgah must, to a large extent, be regulated by the practice followed in the particular durgah or neighbouring durgahs.

10. Herklot describes the custom in vogue in the durgahs existing in Southern India. And, so far as I am aware, that is consistent with the practice prevailing in other parts of India, viz., that upon the death of the last incumbent, generally on the day of what is called the sium or teja ceremony (performed on the third day after his decease), the fakirs and murids of the durgah, assisted by the heads of neighbouring durgahs, install a competent person on the guddi; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the life-time of the incumbent. But in every case the person installed is supposed to be competent to initiate the murids into the mysteries of the tarikat (the holy path). In the present case the evidence is that in accordance with the general practice and the practice prevailing in the durgah in question, the plaintiff was appointed. And I am of opinion that that appointment was valid, and the plaintiff has a title to maintain this suit.

11. As regards the question of estoppel, I agree with the Subordinate Judge. Upon the evidence, I am by no means satisfied that the plaintiff attested the document in favour of Hasina, nor is there any evidence pointing to the fact that the plaintiff knew, at the time he attested the other documents referred to in argument, that Abdul Ruzzack had purported to deal with Khundwa as his private property.

12. For these reasons, I am of opinion that this appeal should be dismissed with costs.

Cases Referred.

[1]2 Moo. I.A. 390 (421)