

CALCUTTA HIGH COURT

Commissioner of Wakfs

Vs.

Shahebzada Mohammed Zahangir Shah

(Pal, J.)

25.05.1943

JUDGMENT

Pal, J.

1. This appeal is by the Commissioner of Wakfs, Bengal, the added defendant 9 in a suit for a declaration that the entries in the Cadastral Survey Khatian No. 866 in respect of Cadastral Survey Dag No. 1118/1341 in the remark column as "Pirosthan for use of Mahomedan public" and in the Northern boundary column as 'Hedayetulla' are incorrect. The cadastral survey record was finally published on 7th September 1931, and the present suit was instituted on 29th July 1937. The Khatian No. 866 is Ex. D in this case, and it relates to a lakheraj comprising more than 50 plots of lands. Yusuf Sultan, the original plaintiff, is recorded as one of the cosharers of this lakheraj. Plots NOS. 1118/1841, 1119, 1118/1366 and 1118/1367 are recorded as being in the possession of Yusuf Sultan, though in the remarks column against the first two of these plots the right of user of the Mahomedan public is also entered. Of these the present suit relates only to the entries in respect of the Dag No. 1118/1341. Admittedly, the entry regarding its Northern boundary is wrong. The dispute relates only to the entry in the remarks column. The plaintiff's case is that this plot of land is his secular property in his personal enjoyment. It is not a Pirosthan and the Mahomedan public has no right of user in it. The entry in the remarks column of the khatian against this plot describing it as 'Pirosthan,' the Mahomedan public having right to use it (Pirsthan-Musalman sadharaner byabaharjya), is wrong.

2. As has been stated above, the cadastral survey record recorded the plot as the secular property of the plaintiff in the plaintiff's possession but with the above remarks. The plaintiff instituted the present suit on 29th July 1937, for a declaration that these remarks in the cadastral survey khatian were wrong. Six persons were named by him in his plaint as the defendants representing the Mahomedan public under C. 1, Rule 8, Civil Procedure Code and he took the necessary permission of the Court for the purpose. The notice of the institution of this suit was given to the Mahomedan public by public advertisement. Summonses on the defendants were issued on 31st July 1937, and were served on them on 6th August 1937. It appears from Ex. B that on 26th

August 1937, the Commissioner of Wakfs, Bengal, enrolled Cadastral Survey Dag No. 1341 as wakf under Section 29, Bengal Wakf Act, 1934. Defendants 3 and 6 appeared on 30th August 1937, and took time for filing written statements. Defendants 3 and 6 filed a written statement on 20th September 1937. One Syed Osman Ali appeared and got himself added as defendant 7 on 20th September 1937. He filed his written statement on 27th September 1937. Later on, on 3rd May 1938, one Majibar Rahaman Molla appeared and got himself added as defendant 8. He filed his written statement on 12th May 1938. The original plaintiff was Sahebzada Mahammad Yusuf Sultan. He died during the pendency of the suit and on his death the original defendant 3 Sahebzada Mohammad Jahangir Shah, became substituted in his place as his heir and legal representative on 5th December 1938.

3. It appears that defendants 7 and 8 in their written statements stated that the Commissioner of Wakfs, Bengal had declared the disputed property to be wakf property under the provisions of the Bengal Wakf Act. The substituted plaintiff on 19th December 1938, applied for amendment of the plaint by adding the Commissioner of Wakfs, Bengal, as defendant 9 in the suit. This application was granted on 5th January 1939, and the Commissioner of Wakfs, Bengal, appeared on 10th February 1939, and filed his written statement on 25th February 1939. The plaint also was amended by the addition of prayer 2 (a) which ran thus:

To declare that the decision of the Commissioner of Wakfs, Bengal, that the property in suit is wakf is illegal and ultra vires.

4. The case of the defendants, relevant for the purposes of the present appeal, is to be found in Paras. 6 and 8 of the written statement of defendants 3 and 6, Paras. 9, 11, 12, 14 and 15 of the written statement of defendant 7, Paras. 11, 13, 14, 10 and 17 of the written statement of defendant 8 and paras. 3, 4, 10, 12, 14 and 17 of the written statement of defendant 9, the Commissioner of Wakfs, Bengal. The defendants in substance allege that the property is not the secular property of the plaintiff and is not in his possession and enjoyment, that it is "a wakf property dedicated to God and appertains to the adjoining public mosque on plot No. 1119", that there have been on this wakf property from time immemorial tombs, burial grounds, Darga of Saint known as Pagla Pir and a Musafirkhana for the pilgrims visiting the sacred place, that annual fairs and periodical ceremonies are held here and pilgrims and local people frequently visit the place for religious purposes and devotion and that the entries in the remark column of the Cadastral Survey Khatian as Pirsthan-Musalman sadharaner byabaharjya were correct. The Commissioner of Wakfs, Bengal, also pleads that the suit is liable to be dismissed as against him for want of notice under Section 80, Civil Procedure Code that it is not maintainable under Section 42, Specific Relief Act, and that it having been determined and duly enrolled by him as a valid wakf under the provisions of the Bengal Wakf Act, 1934, the decision of the Commissioner of Wakfs, Bengal, cannot be avoided except by a proper and regular suit brought in a competent Court for the purpose.

5. On these pleadings no less than 20 issues were raised in this case, of which issues 1,5, 6, 9,12, 16 and 18 relate to the questions raised in the present appeal. Issue 1 is "Is the suit maintainable in its present form?" and this is the issue which was taken to include the question whether the suit is maintainable as against the Commissioner of Wakfs, Bengal, without any notice under Section 80, Civil Procedure Code Issue 12 relates to the infirmity alleged in view of Section 42, Specific Relief Act, and stands thus: "Is the suit-barred by the provisions of Section 42, Specific Relief Act?" Issue 16 stands thus:

Is the property in suit a public wakf property ? Can and the decision of the Commissioner of Wakfs, Bengal, determining the same as valid wakf, be avoided by means of the present suit?

Issue 5 are the entries in settlement Khatian No. 866, with regard to the plot in suit in the remark column as also respecting the northern boundary incorrect?

6. Issues 6, 9 and 18 are really repetitions of this issue 5 in different languages and forms. The learned Subordinate Judge decreed the suit of the plaintiff overruling the contentions of the defendants and made the following declaration:

It is declared that the entry in the remark column of Khatian No. 866 in respect of C.S. 1341 and the northern boundary of that plot is incorrect.

No declaration was made in terms of the added prayer 2 (a) as stated above. In their written statements the defendants denied that the land in suit was ever the secular property of the plaintiff's predecessors. At the hearing of the suit, however, they seem to have given up this contention in view of the evidence adduced by the plaintiff in proof of his title. On this evidence the learned Subordinate Judge found that the land belonged to the plaintiff's predecessors as their secular property. The learned Judge then noticed that it was not the defence case that by any express dedication the land became wakf. He also noticed that there was no evidence of any dedication at any time. The defendants contended that by 'tradition and reputation' the land was wakf and relied on the following user of the land to establish its wakf character: 1. User as a burial ground. 2. User for the ceremonies in connexion with Urs. 3. User as part of the public mosque on C.S. Plot NO. 1119.

7. Admittedly in some portion of the disputed plot there are some tombs. The learned Subordinate Judge found that these were all tombs of the deceased members of the plaintiff's own family. The story that there were tombs of outsiders was found to be altogether unfounded. As regards Urs ceremonies the learned Subordinate Judge did not accept the evidence of such user from time immemorial. As regards the alleged public mosque on C.S. Plot NO. 1119, the learned Subordinate Judge found that there was no such mosque on it and that the disputed land never formed part of the C.S. Plot No. 1119 and was never used as of right for any of the

purposes of the alleged mosque. He therefore, found the entry in question- in the C.S. record to be wrong. As regards issue 12 the learned Subordinate Judge found that the plaintiff was not ousted from the land and consequently was entitled to have the declaration prayed for without seeking any consequential relief. As regards issue 16 the learned Subordinate Judge held that as the enrolment of the property as wakf was made during the pendency of the present suit, the Order was ultra vires. As regards the notice under Section 80, Civil Procedure Code the learned Subordinate Judge was of opinion: (1) that the Commissioner of Wakfs was not a public officer within the meaning of Section 80, Civil Procedure Code though he was a public servant within the meaning of Section 21, Penal Code, and (2) that in any case in view of Section 70, Bengal Wakf Act, 1934, on a proper construction of the Act, the Commissioner is not entitled to any notice under Section 80 Civil Procedure Code

8. From the above decree of the learned Subordinate Judge, the Commissioner of Wakfs and another defendant preferred two separate appeals to the District Judge. These were Title Appeals Nos. 31 and 59 of 1940 of the Second Court of the Additional District Judge at Alipore. The plaintiff neither preferred any appeal nor took any cross-objection to the decree. The learned Additional District Judge dismissed the appeals and confirmed the judgment and decree of the Court of first instance.

9. The present appeal is from this decree of the learned Additional District Judge. In the Court of appeal below the defendants did not question the finding that the land in suit once belonged to the plaintiff's predecessors in secular right. Nor did they make any case of express dedication by the plaintiff or his predecessors. It further appears that they did not make any case that apart from the property being a public wakf, the Mahomedan public had any other right of user in it acquired in any other way. The only case urged by them seems to have been that there was a public mosque on plot No. 1119 and that the disputed land became wakf by long user for the purposes of this public mosque. The learned Additional District Judge, however, found on the evidence on the record that there was no mosque on Plot No. 1119 and that the suit land was never used for the purposes of any public mosque.

10. As regards the notice under Section 80 Civil Procedure Code the learned Judge upheld the view of the Subordinate Judge that the Commissioner of Wakfs was not a public officer within the meaning of Section 80, Civil Procedure Code. The questions raised in issues 12 and 16 were not urged before the learned Additional District Judge. The learned Advocate appearing in support of the appeal before us contends: (1) That in view of the entry in the C.S. record regarding plot NO. 1119 and in view of the pleadings of the parties, the Courts below went wrong in holding that there was no public mosque on the plot and in basing their decision regarding the disputed plot on their finding about plot No. 1119. (2) That the Court of appeal below went wrong in holding that the Commissioner of Wakfs was not a public officer within the meaning of Section 80, Civil Procedure Code and was, not entitled to a notice of the present suit under that section. (3) That in view of the provisions of Section 46A, Bengal Wakf Act, 1934,

and in view of the fact that the land in suit was enrolled as wakf property by the Commissioner of Wakfs under the provisions of the Act the present suit was not maintainable (a) as there was no prayer for setting aside or modifying the decision of the Commissioner (b) as there was no notice given to the Commissioner under Section 80, Civil Procedure Code

11. The Plot NO. 1119 is also recorded in Khatian No. 866. The entry in the C.S. record does not support the case of the defendants that the plot is a wakf property. No doubt it is described as having a masjid on it and in the remarks column it is stated to be in the possession of Yusuf Sultan but with right of user by the Mahomedan public. The plaintiff in the present suit did not claim any relief in respect of this Plot No. 1119 and hence did not make any case regarding it in the plaint. The defendants, however, in their written statement claimed this plot as wakf property having a public mosque on it and asserted that the suit land appertained to this wakf and was always used as such for the purposes of this mosque. The plaintiff denied this and hence both parties adduced evidence in support of their respective cases in respect of this Plot No. 1119. On this evidence both the Courts found that the alleged mosque on Plot No. 1119 is not a mosque at all and the suit land does not appertain to the estate of that mosque. We do not find any error of law or of procedure that would entitle us to interfere with this finding of fact arrived at by the Court of appeal below. The relevant portion of Section 80, Civil Procedure Code stands thus:

No suit shall be instituted ... against a public officer in respect of any act purporting to be done by such officer in his official capacity, until the expiration of two months next after notice in writing has been ... delivered to him or left at his office

Thus a notice under this section will be required only: (1) if the Commissioner of Wakfs, Bengal, be a 'public officer' (2) if the suit be in respect of any act purporting to be done by him in his official capacity.

12. Both the Courts below have held that the Commissioner of Wakfs, Bengal, is not a 'public officer' within the meaning of this section of the Code of Civil Procedure. We, however, do not feel so sure as to this. Section 2 (17) of the Code defines "public officer." In the Code of Civil Procedure, unless there is anything repugnant in the subject or context, the expression 'public officer' must be taken to mean what is defined in Section 2 (17). There the expression is defined to mean a person falling under any of the eight different descriptions given in cls. (a) to (h). Clause (h) gives the following description:

every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty. We are not sure if the Commissioner of Wakfs is not in the service of the Government. Sections 16 to 22, Bengal Wakf Act, 1934, deal with his appointment, salary and legal position. His duty and functions are prescribed by the provisions made in chap. 3 of the Act. We do not see why he cannot be said to be in the service of the Government. According to the definitions given in the General Clauses Act 'Government' or 'the Government' includes the 'local Government'

(now, Provincial Government) as well as the Central Government. Again we are not sure why he cannot be said to be performing a public duty within the meaning of the above definition. The expression 'public duty' refers to duty concerning the affairs or service of the public. The word 'public' in our opinion may include any class of the public or any community. At least in one statute (viz., the Penal Code, vide Section 12) the word is expressly used in this sense. Public wakfs are public, religious or charitable endowments, and one who functions in relation to such public endowments in general may be said to perform a public duty. The question, however, does not fall to be decided in the present case as, in our opinion, the present suit is not of the type contemplated by Section 80, Civil Procedure Code

13. The suit is for a declaration that certain entries in the Cadastral Survey record are wrong. The act in respect of which this relief is claimed can in no way be said to be the act of the Commissioner of Wakfs. So far as this relief is concerned, certainly no notice under Section 80, Civil Procedure Code need be given to the Commissioner of Wakfs. The Commissioner may be entitled to a notice of such a suit under Section 70, Bengal Wakf Act, 1984, and may himself intervene in the suit under Section 71 of the Act or may be made a party defendant by the plaintiff quite unnecessarily. In none of these cases a notice under Section 80, Civil Procedure Code is needed. By the addition of the Commissioner of Wakfs as a party defendant the suit itself does not change its character in this respect so as to bring in the question of notice under Section 80, Civil Procedure Code

14. The Commissioner contends that the addition of the prayer 2 (a) converted the suit into one in respect of an act purporting to be done by him in his official capacity. One short answer to this contention is that this relief has not been granted and so far as this relief is concerned the matter is no longer before us. Further, even in a suit for this relief the Commissioner is neither a necessary nor a proper party, though Section 70, Bengal Wakf Act, may make it incumbent upon the Court in such a suit to give notice of this suit to the Commissioner leaving it to him to see if he should come in under Section 71 of the Act. Obviously no question of notice under Section 80, Civil Procedure Code would arise in such a case. Section 46A, Bengal Wakf Act, 1934, was inserted by Section 3, Bengal Wakf (Amendment) Act, 1935 (Bengal Act 4 of 1936). The section stands thus:

Any question whether a particular property is wakr property or not ... shall be decided by the Commissioner whose decision, unless revoked or modified by a competent Court, shall be final

15. This Act also amended Sub-clause (a) of Clause (1) of Section 27 by inserting the words 'and determining' after the word "investigating" in it. After this amendment Clause 1 (a) of Section 27 stands thus: "the functions of the Commissioner shall include investigating and determining the nature and extent of wakfs and wakf property..." It will be pertinent to notice the provisions of

Section 92 of the Act in this connexion. The section says: "No suit shall be brought in any civil or revenue Court to set aside or modify any Order made under this Act "It would thus appear that "a decision" of the Commissioner and "an Order made under the Act" stand on different footings. When any wakf is enrolled by the Commissioner this enrolment may imply two things, namely (1) a decision that the property is wakf and (2) an Order of enrolment. No suit lies for setting aside the order. But the decision is always subject to revocation or modification by a competent Court. So far as this decision is concerned, the Commissioner discharges a quasi judicial function and in a suit for revoking or modifying this decision he is not at all a necessary party. It should not be a suit against this Commissioner at all in his capacity as the officer giving the decision. But even in such a suit the Commissioner may be entitled to a notice under Section 70 of the Act and may intervene under Section 71 of the Act. When he comes in as intervener the suit does not become a suit against him in respect of any act purporting to be done by him in his official capacity. As has been pointed out above, prayer No. 2 (a) in the present case was "for a declaration that the decision of the Commissioner of Wakfs, Bengal, that the property in suit is wakf, is illegal, wrong and ultra vires." Even for this relief the Commissioner as the deciding officer was not a necessary party. Rather, it would be improper to add him as a party defendant in his capacity of the officer giving the decision. But, at the same time, he as Commissioner of Wakfs was entitled to a notice of the suit under Section 70 of the Act and was entitled to intervene under Section 71 of the Act. In this case the procedure adopted in adding him as a party defendant was irregular. But as the Commissioner contested the claim on its merits we do not see why we should not treat him as an intervener under Section 71 of the Act. The irregularity in the procedure adopted has not in the least affected the merits of the case or the jurisdiction of the Court.

16. The next contention of the Commissioner is that if the decree of the Court below be taken as one of refusal of the relief claimed in prayer NO. 2 (a), then the suit must fail, the decision in question of the Commissioner having become final under Section 46A of the Act. We are unable to accept this contention of the appellant. We have not been shown any express decision of the Commissioner that the land in suit is a wakf. Section 27 (1) (a) of the Act, as it now stands, makes the function of the Commissioner to investigate and determine the wakf property. Nothing could be placed before us showing any such determination of the question excepting the exparte Order of enrolment as wakf. There is thus no express decision in this case that requires to be revoked under Section 46A of the Act.

17. Assuming that the Order of enrolment implies a decision that the property is wakf and further assuming that even such implied decision requires revocation, we are of opinion that in the facts of this case Section 46A is not at all attracted. As has been pointed out above, the present suit was instituted before the Commissioner made any Order of enrolment. Further the Order in question was made without any notice to the plaintiff who was recorded in the Cadastral Survey Khatian as the person in possession. Such an Order did not imply any decision available against the plaintiff. At any rate there is nothing in the Act which Would take away the jurisdiction of the Court to try the suit already instituted by reason of such subsequent Order made by the

Commissioner. The Order in our opinion cannot affect the result of the suit to which everyone interested in the matter including the Commissioner of Wakfs is a party. All the contentions raised by the appellant thus fail and the appeal is dismissed. The parties will bear their own costs in this appeal.

B.K. Mukherjea, J.

18. I agree.

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