

Muhammad Yusuf and ors. Vs. Muhammad Shafi and ors.

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Court : Allahabad

Decided On : Sep-04-1934

Reported in : AIR1934All1013; 153Ind.Cas.344

Appellant : Muhammad Yusuf and ors.

Respondent : Muhammad Shafi and ors.

Judgement :

Collister, J.

1. This appeal arises out of a suit under Section 92, Civil P.C, which was instituted by four Mahomedans, of whom two are Sunnis and two are Shias. It was alleged in the plaint that about a hundred years ago, one Allah Rakhu built an Imambara and made a public wakf of it and that the said Imambara has ever since that time been used by the Musalman public for religious purposes. It is stated in the plaint that Allah Rakhu appointed one Mohammad Ibrahim as the first mutwalli and that he subsequently appointed a man named Ghulam Husain. After the death of the founder, his daughter's son, by name, Abdul Rahim, appointed one Ahmad Ali as mutwalli by means of a document dated 10th June 1911, and on the death of Ahmad Ali he appointed the latter's brother Abdul Hamid and defendants 1 to 3, as mutwallis by means of a document dated 14th November 1913. Abdul Hamid died soon afterwards, but defendants 1-3 have continued upto this day to act as mutwallis of the dedicated property. It is alleged in the plaint that defendants 1 to 3

have allowed the wooden structure of a tazia, which was placed in the Imambara by the founder thereof, to fall into decay, that they have allowed the Imambara building to fall into disrepair; that they have removed and misappropriated the pewter cover of the tazia; that they pay no attention to the performance of the religious and charitable objects for which the trust was founded; that they do not allow members of the Musalman public to take out the Ashra procession on the 10th day of Moharrum, that they prevent the public from arranging for the installation of sabils, distribution of alms and other ceremonies such as majlis, recitation from the Holy Koran, etc., and that they have discontinued the annual procession which used to go from the Imambara to Lallapur. The plaintiffs therefore prayed that the defendants be removed from the possession and management of the wakf property and that one or more new mutwallis be appointed and that a scheme be prepared by the Court for the proper management of the property.

2. Defendants 1 and 2, are the sons of Ahmad Ali and defendant 3 is his nephew. Defendant 4 is a son of Ghulam Husain and defendants 5 to 7 are descendants of Allah Rakhu, the founder of the Imambara. The defence is that Allah Rakhu who admittedly founded the Imambara in dispute treated it as his own property and never divested himself of his proprietary rights therein. On his death the property went to his daughter's son Shah Mohammad and after the latter's death it went to defendants 5 to 7 as well as other descendants of Allah Rakhu. Allah Rakhu used to invite friends and relatives for religious functions in the Imambara and in the time of Shah Mohammad, his friend Ghulam Husain used to assist him at such functions. After the death of Ghulam Huaain, the latter's son Ali Akbar set up a title to the Imambara and accordingly Shah Mohammad's son Abdul Rahim thereupon executed a document whereby the entrusted Ahmad Ali with the supervision and management of the ceremonies of the Imambara. On Ahmad Ali's death Abdul Rahim executed a similar document in favour of defendants 1 to 3. The defendants deny that any wakf was created at all; but they plead that if there was a wakf, it was of a private nature. They also set up a plea that the shia plaintiffs had no interest in the property within the meaning of Section 92, Civil P.C. and that therefore they had no right of suit.

3. The lower Court has found that the Shia plaintiffs have no right of suit and has found that no public wakf was created such as is contemplated by Section 92, Civil P.C. The point for determination in this appeal is whether or not Allah Rakhu created a trust for public purposes of a charitable or a religious nature within the meaning of Section 92, Civil P.C. One of the plaintiffs has given evidence and they have examined five other witnesses : Mohammad Sulaiman, Abdul Ghaffar, Mohammad Zahur, Mohammad Ibrahim and Abdul Karim. These witnesses state that the Imambara is a public wakf and that it is used by the public for religious purposes at the time of Moharrum and on other occasions. Their statement as regards the origin of the alleged wakf is based on evidence which has not been shown to be admissible and their evidence as regards the use which is made of the Imambara by members of the Mahomedan public is not inconsistent with the case of the defendants. Not a single member of the public has been produced who is able to say that he himself has ever placed a tazia in the Imambara or has ever held a majlis there or has ever attended the Imambara in any capacity otherwise than with the permission of the defendants. We have been referred to certain documents in support of the allegation that the Imambara is a public trust.

4. The first of these documents are the so-called tauliyatnamas of 10th June 1911 and 14th November 1913. In these documents Abdul Rahim, a descendant of the founder, stated that the Imambara had been built, owned and possessed by Allah Rakhu and that since the latter's death, the executant and his brothers had been in possession. He stated that he himself was the mutwalli and that he had appointed Ghulam Husain for the purpose of observing the tazia dari ceremonies add that he was now appointing Ahmad AH for the same purpose as naib mutwalli and manager. There is nothing in these two documents which is inconsistent with the proposition that Allah Rakhu had not divested himself of his proprietary title in the Imambara; in fact, they definitely stated the contrary. The use of the word 'mutwalli' and 'naib mutwalli' leads to no inference of a public trust being created or having been created. There is a municipal register for the period 1st April 1922, to 31st March 1927, which shows that water tax was not collected in respect of this Imambara; but this can prove nothing more than a possible misunderstanding on the part of the Municipal Board as regards the character of this building. Finally there is a plaint which was filed by the present defendants 1 to 3, on the 17th

March 1920, in which they stated that they were the mutwallis of this Imambara and that the Makomedan residents of Madanpura Mohalla were in the habit of using the Imambara for religious meetings on occasions of mourning. If the allegations in this plaint amount to an admission of the Imambara being a public wakf, such admission obviously cannot bind the descendants of the founder. There are no other documents in support of the oral evidence; and as we have already shown, the oral evidence does not avail to establish the existence of a public trust.

5. Admittedly, there is no income from the the alleged trust and the plaintiffs have totally failed to prove that any public subscriptions are ever raised for its maintenance. We doubt whether an Imambara has ever been made the subject of a public wakf except in cases where there is some income - bearing property attached to it and included in the dedication. In the case of *Delrus Banoo v. Kazee Abdoor Ruhman* (1875) 23 W.R. 453, a Bench of the Calcutta High Court observed as follows:

An Imambara moreover is not a public place of worship as is a mosque or temple, but an apartment in a private house set apart, no doubt, for the performance of certain Moharrum ceremonies but no more open to the general public than a private oratory in England would be; as a matter of fact, strangers are ordinarily excluded from these celebrations.

6. With these observations we are in full agreement. It is true that that particular case was concerned with an Imambara which was a room within a house; but it is common for a Mahomedan owner of a house to build a separate Imambara for the use of himself and the members of his family, and the remarks of the Calcutta High Court, referred to above, would apply with equal force to such an Imambara. The plaintiffs have totally failed to prove that members of the public are at liberty to place their own tazias in the Imambara in dispute or to convene a majlis therein at their own pleasure and without the permission of the defendants the utmost that has been proved is that members of the public are allowed inside the Imambara when the defendants choose to hold a majlis or perform any other ceremony and throw the Imambara open to the public. It has not been shown that acts of the

managers in respect of the Imambara in dispute are in any way inconsistent with the theory of private ownership on the part of the descendants of Allah Bakhu or with the theory of a private wakf having been created for the benefit of the members of Allah Rakhu's family. Mr. Mayne at p. 615 of his book on Hindu Law and Usage, Edn. 9 deals with appasense or imperfect trusts. He observes:

And there will be a further difference where the trust is only apparent and not a real one, and where it creates no rights in any one except the holder of the fund. The last case arises where the founder applies his own property to the creation of a pagoda or any other religious or charitable foundation, keeping the property itself, and the control over it, absolutely in his own hands. The community may be greatly benefited by this arrangement, so long as it lasts, but its continuance is entirely at his own pleasure. It is like a private chapel in a gentleman's park, and the fact that the public have been permitted to resort to it will not prevent its being closed, or pulled down, provided there has been no dedication of it to the public. It will pass equally unencumbered to his heirs, or to his assignees in insolvency.

7. We are inclined to think that this is the position as regards the Imambara in dispute; but if there was a dedication at all, we have no hesitation in agreeing with the Court below that the trust was not of a public nature such as is contemplated by Section 92, Civil P.C. We accordingly dismiss this appeal with costs.