Privy Council Appeal No. 71 of 1945

Bengal Appeal No. 27 of 1941

Hafiz Mohammed Fateh Nasib - - - - - *Appellant*

v.

Sir Swarup Chand Hukum Chand, a firm, and another - - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1947

Present at the Hearing:

LORD MACMILLAN
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated 28th May, 1941, confirming a decree of the First-Class Subordinate Judge 24 Parganas Alipore dated 31st May, 1934.

Respondent No. 1 (hereafter referred to as "the plaintiff") instituted this suit on the 18th July, 1931, claiming a declaration of title to the property in suit Nos. 2, 2/1, 2/2, and 3, Rowland Road, Calcutta, and possession of the premises other than No. 2/2, Rowland Road, of which the plaintiff was already in possession. The present appellant was the first defendant, and he claimed that the property in suit was wakf property, and that he was the Mutwalli of the wakf estates having been appointed to that position by the will of Abdul Alim Abed (who will be referred to hereafter as "Abed") the alleged former Mutwalli. The second respondent was the second defendant, and claimed to be in possession under a lease granted by the first defendant of the premises of which the plaintiff sought possession.

The facts giving rise to this appeal are these: On the 28th January, 1876, Juman Mistry, a Mohammedan inhabitant of Calcutta, executed a Towliatnama (deed of trust) by which he purported to create a wakf of certain pieces of land and appointed Mutwallis of the wakf. The properties in suit which Juman owned were not included in the wakf. On the 21st June, 1880, Juman executed a fresh Towliatnama by which he varied the deed of 1876. In the year 1884 Juman died intestate leaving as his heirs his son Umar Ali and his daughter, Aberjan, and Umar Ali thereupon acted as Mutwalli of the wakf properties. On the 5th April, 1888, Umar Ali and Aberjan executed a deed of partition dividing between them the properties left by Juman other than those the subject of the two deeds. The properties allotted to the share of Umar Ali included the property in suit. On the 11th November, 1908, Umar Ali executed a wakfnama by which he purported to make wakf, for the purposes and

as part of the wakf created by Juman by the deed of 1880 above mentioned. of certain properties including the property in suit. He appointed Aberjan and Samiruddin, son of his cousin Karim Bux, to be Mutwallis, on his death, of the entire properties. He also purported to provide that on the death of either of the said Mutwallis, Abed, son of his daughter, should be appointed Mutwalli in his or her place. On either the 7th September or the 7th November, 1911, Umar Ali died intestate leaving as his heirs Aberjan and Karim Bux. Both dates are given in the record, but nothing turns on the exact date of Umar Ali's death.

In the year 1912 Aberjan instituted Title Suit No. 36 of 1912 in the Court of the First Subordinate Judge at Alipore. The defendants were Karim Bux, his sons Samiruddin and Aminuddin, the minor sons of Samiruddin, Abed the minor grandson of Umar Ali, and Mohammed Buksh. The minor defendants were represented by their guardian Karim Bux. The relief sought was a declaration that Aberjan, as co-heir with Karim Bux of Umar Ali, was entitled to a share of the properties purported to have been made wakf by Juman and Umar Ali, and a declaration that the said wakfs were invalid and did not affect the title of Aberjan to the properties, and for partition. The final decree in the suit, passed on the 5th October, 1912, declared the wakfs of 1876, 1880 and 1908 to be invalid, set them aside, and partitioned the property of Umar Ali between Aberjan and Karim Bux, the property in Rowland Road now in suit being allotted to the share of Aberjan. On the 2nd March, 1913, in execution of this decree Aberjan was put in possession of the properties decreed to her including the property in suit. On the 22nd June, 1913, by a Heba-bil-ewaj, or deed of gift, Aberjan gave the property in suit to Badruddin, grandson of her husband's brother.

In the year 1915 Samiruddin, his three minor sons and four Mohammedan members of the public, instituted Title Suit No. 190 of 1915 in the Court of the First Subordinate Judge of Alipore against Aberjan, Karim Bux, his son Aminuddin, Badruddin, Samchun Nehar Bibi and Abed, then a minor who was represented in the suit by the sheristadar of the Court as guardian *ad litem*. The relief sought was recovery of possession of the properties purported to be dedicated by Juman and Umar Ali and the setting aside of the decree in suit No. 36 of 1912 as having been obtained by fraud. On the 27th November, 1916, the Subordinate Judge delivered judgment. He held that so far as the suit was for possession and vesting of the properties in the plaintiff jointly with Aberjan it was not maintainable since it had not been instituted in accordance with the provisions of Section 92 of the Code of Civil Procedure and that the Court had no jurisdiction to try the claim, but that the suit was maintainable by Samiruddin and his sons in so far as it sought to set aside the decree in suit No. 36 of 1912. He then held the wakfs of 1880 and 1908 to be invalid and thought no fraud had been perpetrated in obtaining the decree in suit No. 36 of 1912. From this decision Samiruddin and his minor sons filed an appeal to the High Court, but by consent the High Court passed a decree allowing the appeal to be withdrawn on terms, such withdrawal being in the opinion of the Court for the benefit of the minors concerned.

On the 9th December, 1919, Badruddin conveyed the property in suit to one, Anadi, for the sum of Rs.1,36,975. On the 16th December, 1919, Anadi, who had bought the property as benamidar for Mohananda Nandi, executed a deed of release of the property in favour of the latter.

On the 28th May, 1921, Abed, who had attained majority on the 30th May, 1918, instituted Title Suit No. 150 of 1921, subsequently renumbered as No. 153 of 1922, in the Court of the Third Subordinate Judge at Alipore. The defendants were Aberjan, Samiruddin, Karim Bux, Aminuddin, three minor sons of Samiruddin, Badruddin and a number of transferees including Mohananda Nandi and Anadi. The relief sought was a declaration that the wakfnamas of 1880 and 1908 were valid and operative and a declaration that the decree in Title Suit No. 36 of 1912 was a nullity. On the 27th June, 1927, the Subordinate Judge delivered

judgment. He found that suit No. 36 of 1912 was a collusive suit and that the decree was fraudulently and collusively obtained, and that it was a nullity as against Abed who was entitled to a declaration as to its nullity. He held that the decree in suit No. 190 of 1915 did not operate as *res judicata* in the suit. He also held that the three wakfs of 1876, 1880 and 1908 were valid and that the appointment of Abed to act as Mutwalli after Aberjan and Samiruddin was valid. He accordingly passed a decree declaring that the wakfnamas of 1880 and 1908 were valid and operative and created a valid wakf of the properties mentioned in them, and that the decree obtained by Aberjan in suit No. 36 of 1912 was a nullity as against the plaintiff, Abed. From this decision two appeals were filed in the High Court, one by Mohananda Nandi and other defendant transferees, and the other by Aberjan. The High Court agreed with the Subordinate Judge that Abed was entitled to relief in respect of the decree in suit No. 36 of 1912 and that it was not binding on him. The Court, however, held, for the reasons specified in the judgment of the Chief Justice, that the appeals must be allowed so far as regarded the declaration that the wakfs of 1880 and 1908 were valid and operative, which declaration was set aside.

On the 28th January, 1927, the firm of Nalinakshya Tah and Company, through Mohananda Nandi who was a partner in the firm, borrowed from the plaintiff a sum of Rs.1,30,000 upon the security of a promissory note payable on demand and of the deposit by way of equitable mortgage of the title deeds of the property in suit and another property.

On the 15th May, 1928, Abed executed a will by which, *inter alia*, he purported to appoint the present appellant Mutwalli upon his death of the properties made wakf by Juman and Umar Ali. On the 17th May, 1928, Abed died. On the 14th June, 1928, on the petition of a creditor, the firm of Nalinakshya Tah and Company was adjudicated insolvent by order of the High Court at Calcutta, the estate and effects of the firm and its members being thereby vested in the Official Assignee. On the 12th February, 1929, an order was made in the insolvency proceedings holding the plaintiff to be a secured creditor of the insolvent firm by virtue of the equitable mortgage above mentioned which was declared to be a valid and subsisting first mortgage of the property so charged, and directing the Official Assignee to sell such property with liberty to the plaintiff to buy at such sale. On the 22nd January, 1931, the property in suit was put up for sale by public auction by the Official Assignee and was bought by the plaintiff for the sum of Rs.42,000, and on the 26th March, 1931, the property was conveyed to the plaintiff by the Official Assignee. The plaintiff thereupon sought to obtain possession of the property in suit but, apart from obtaining possession of No. 2/2, Rowland Road, from a tenant who attorned, was prevented from doing so by respondent No. 2 which claimed to be in possession of the rest of the properties in suit by virtue of a lease for 25 years dated 30th July, 1929, granted to it by the present appellant.

On the 18th July, 1931, the plaintiff filed the present suit in the First Court of the Subordinate Judge 24 Parganas Alipore, claiming a declaration of title to the property in suit and an order for possession of the properties in possession of the defendants. In the plaint his case was based on continuous, open, exclusive and undisturbed possession by the said Mohananda Nandi and his predecessors in interest, Badruddin and Aberjan whereby Mohananda Nandi had acquired an indefeasible title to the property in suit by adverse possession against the whole world. It was further alleged that in the year 1928 the present appellant, taking advantage of the unsettled state of the affairs of Mohananda Nandi had surreptitiously taken unlawful possession of the property in suit which was then only a vacant piece of land. The appellant as the first defendant in his written statement denied the possession of the plaintiff and his predecessors-in-interest. He claimed that Abed had been in possession of the suit property as Mutwalli of the wakf for many years prior to the suit and that he, the appellant, had acquired the property on the death of Abed as Mutwalli appointed by his last will.

On the 31st May, 1934, the learned Subordinate Judge gave judgment. His relevant findings were that the gift by Aberjan to Badruddin on the 22nd June, 1913, was not fraudulent; that the purchase by Mohananda Nandi from Badruddin was a *bona fide* transaction and for consideration; that Mohananda Nandi and his firm created a valid charge on the properties in suit in favour of the plaintiff; that the will executed by Abed in favour of the appellant was a genuine document; that Abed was never a Mutwalli of the wakf property and had no authority to appoint the appellant as Mutwalli after his death; that the wakfs created by Juman Mistry and Umar Ali were valid; that the decisions in suit No. 36 of 1912 and 190 of 1915 did not operate as *res judicata* as to the secular character of the property; that the predecessors of the plaintiff were in possession of the suit property up to June, 1928, and that the suit was not barred by limitation, but that the plaintiff was in the position of a mere trespasser or wrongdoer, that his possession was in part constructive and non-continuous and was not such as to found a title by adverse possession. He held, however, that it had not been proved that Abed was ever in possession of the disputed property as Mutwalli. Notwithstanding these findings he decreed the plaintiff's suit on the ground that he was a purchaser for value without notice, which was not the case alleged in the plaint.

From this decision an appeal was brought to the High Court at Calcutta, which dismissed the appeal though for reasons somewhat different from those which had commended themselves to the learned Subordinate Judge. The leading judgment was given by Mr. Justice Edgley. The learned Judge was not prepared to hold that the wakf of 1908, which alone of the said wakfs affected the property in suit, was invalid, if that question was open, but he held that as between the parties to the appeal the secular character of the property in suit had been established by suit No. 190 of 1915, the decree in which operated as *res judicata*. The view he took was that in that suit Abed was litigating in a representative capacity on behalf of the wakf, and that in the present suit the appellant, though not validly appointed Mutwalli by the will of Abed, was also litigating in a representative capacity on behalf of the wakf and must be deemed to be claiming under Abed within Explanation 6 of Section 11 of the Code of Civil Procedure. In the view their Lordships take of this appeal it is not necessary to consider the question of *res judicata*, and they express no opinion upon it. Sir Thomas Strangman for the plaintiff (first respondent) argued the appeal upon the assumption that the wakf of 1908 was valid, and that it was open to the appellant so to assert, and their Lordships will deal with the appeal on the same footing. On that basis the first question to be determined is whether the plaintiff proved continuous, open, exclusive and undisturbed possession of the property in suit for 12 years and upwards before 1928 when he was dispossessed, that being the relevant date under Article 142 of the Limitation Act. If that question is answered in the affirmative then the further question arises whether such possession was adverse to the wakf.

Upon the first question the learned trial judge held, as already noted, that the plaintiff and his predecessors-in-interest had been in possession of the suit property within 12 years prior to the commencement of the suit, so as to prevent limitation from running, but he thought that the possession was in part constructive and had been interrupted for a short period as shown by certain criminal cases, to which he referred, and that he could not hold that the plaintiff, who claimed as a mere trespasser had established a title under Section 28 of the Limitation Act. The High Court took a different view upon this question. They stated the rule to be applied in these terms: " The proper test to be applied in a case of this nature is whether the predecessors of the plaintiffs for a period of 12 years or more exercised such dominion over the property in suit as to justify the inference of fact that they were in possession of the whole. It was not necessary that they should prove affirmatively that their predecessors had actually been in physical possession of every square inch of this land, but it should have been considered whether the acts of possession which had been proved would legitimately show that th

predecessors of the plaintiff had enjoyed dominion over this property in the manner in which such dominion is normally exercised." Their Lordships agree that this is the correct test to apply and, having examined the evidence, oral and documentary, they agree with the finding of the High Court that the plaintiff and his predecessors-in-interest had been in possession of the suit property for more than 12 years prior to 1928 so as to acquire a title under Section 28 of the Limitation Act. It is no doubt true, as the learned Subordinate Judge held, that the claim of a mere trespasser to title by adverse possession will be confined strictly to the property of which he has been in actual possession. But that principle has no application in the present case. The plaintiff is not a mere trespasser; he himself purchased the property for a large sum and Aberjan, upon whose possession the claim ultimately rests, was put into possession by an order of the Court, whether or not such order was rightly made. Apart from this, their Lordships think that the character of the possession established by the plaintiff was adequate to found title even in a trespasser. The view of the learned Subordinate Judge involves some inconsistency, since the possession necessary to found a title by adverse possession under Section 28 of the Limitation Act is not different in character (though it may be in duration) from the possession required to prevent limitation from running under Article 142 or 144.

The evidence as to possession by Aberjan from the 2nd March, 1913, when the Court gave her possession until the gift to Badruddin, and by Badruddin down to the 9th December, 1919, when he conveyed the property to Anadi was not, as the High Court noted, seriously challenged. It was the possession by Mohananda Nandi between December, 1919, and June, 1928, which was challenged. It was, in their Lordships' opinion, proved that on his purchase from Badruddin the tenants of the property attorned to Mohananda Nandi; that Mohananda Nandi fenced the land with corrugated iron sheets, though the actual date of such fencing is not given; that he took the fruit of the trees on the land; that he gave a permit for training horses on the land; and that he was registered as the owner with the Municipality. It is true that after 1921 Abed endeavoured to interfere with the possession of Mohananda Nandi, and induced some of the tenants to attorn to him. But proceedings were instituted against such tenants by Mohananda Nandi and they were ejected under orders of the Court. Mohananda Nandi's action in taking proceedings against recalcitrant tenants is strong evidence of the assertion of his claim to possession. Reliance has been placed on behalf of the appellant on the criminal proceedings on which the learned Subordinate Judge relied. There were two such proceedings. On the 11th October, 1919, Badruddin filed a complaint against Abed and others for criminal trespass under Section 447 of the Indian Penal Code in respect of the suit property. The learned Judge dismissed the complaint on the ground that the nature of the trespass, if any such was committed, did not constitute a criminal trespass under the Penal Code. This decision is of no value at all for the present purpose. There is rather more substance in the second case. In 1928 Mohananda Nandi filed a complaint against Abed and the present appellant, under Section 426 of the Indian Penal Code alleging that the accused had removed a bamboo fencing raised by the complainant. The Magistrate dismissed the complaint on the ground that the prosecution had not been able to prove that the land on which the fence was erected belonged to and was in possession of the complainant. The fact that Mohananda Nandi failed on this occasion to prove that he was in possession of a fence on the property is a small matter to weigh against the mass of evidence in favour of his possession. Their Lordships feel no hesitation in agreeing with the High Court that adverse possession by the plaintiff and his predecessors-in-interest has been proved for the requisite period.

The only question which then remains is whether such possession was adverse to the wakf. It is not disputed that in law a title by adverse possession can be established against wakf property, but it is clear that a trustee for a Charity entering into possession of property belonging to the Charity cannot, whilst remaining a trustee, change the character of

his possession, and assert that he is in possession as a beneficial owner. If, upon the death of Umar Ali, Aberjan accepted the position of Mutwalli of the wakf, her subsequent possession of the wakf property would be as Mutwalli, and Badruddin, who claimed under her as a volunteer, would be in no better position. The question whether Aberjan ever became Mutwalli of the wakf arises therefore for decision. Unfortunately, the written statement did not allege that Aberjan became Mutwalli of the wakf. No issue was raised as to this; and the question was not discussed by the trial Judge. The relevance of the question was, however, appreciated by the Judges in the High Court, who held that Aberjan never accepted the position of Mutwalli. Their Lordships agree with this conclusion. There is no direct evidence that Aberjan ever acted as Mutwalli, but reliance is placed by the appellant on two documents. The first is Exhibit Z 18, an entry in the Assessment Book of the Corporation of Calcutta on the 29th November, 1911, of the names of Samiruddin and Aberjan as joint Mutwallis of the properties 2, 2/1, 2/2, 3, and 4, Rowland Road. This would be strong evidence that Aberjan accepted the position of Mutwalli if it were shown that she was a party to the application on which the entry in the Assessment Book was made, or that she knew about the entry; but there is no evidence whatever as to this. The application was made by Samiruddin and there is nothing to show that Aberjan knew anything about it. The other document on which the appellant relies is Exhibit 51, a deed of release executed by Karim Bux in favour of Aberjan on the 4th April, 1913. The document recites that the property of Juman and Umar Ali had been inherited by Aberjan and Karim Bux and that Aberjan was to get the properties in Schedule " A " and Karim Bux the properties in Schedule " B ". It then recites that Aberjan had been managing the property in Schedule " B ", and that as Karim Bux had demanded the title deeds from Aberjan and she had handed them over he granted her a release in respect of the properties left by Juman and Umar Ali. The appellant suggests that as Aberjan had been managing the property it must be inferred that she had done so in her capacity as Mutwalli; but as the document recites that Aberjan had a title as heir by inheritance, the natural inference is that she managed the property in that capacity, the existence of the wakfs not being referred to in the document. The conduct of Aberjan in filing suit No. 36 of 1912 within a few months of the death of Umar Ali and in that suit challenging the validity of the wakfs and asserting her own title to the property in suit makes it very improbable that she accepted the position of Mutwalli on the death of Umar Ali. Reliance was also placed by the appellant on the omission of Aberjan to give evidence that she had not accepted the office of Mutwalli. Aberjan, who was referred to in the wakf of 1876 as the eldest of the three daughters of Juman and as already married, must have been a very old woman when this suit was heard, and it may be that she was incompetent to give evidence. Be this as it may, it was not for the plaintiff to prove the character in which Aberjan took possession. He proved the fact of her possession by the order of the Court putting her into possession and, if the evidence rested there, the presumption would be that she took possession in her own right. If the appellant desired to prove that her possession was that of a trustee and not of a beneficial owner the burden was upon him to prove this fact. No doubt Aberjan might have been a dangerous witness for the appellant to call, and no inference against him can be drawn from his omission to call her, but the reluctance of the defendant to call her as a witness did not impose an obligation on the plaintiff to do so. She might have been a dangerous witness for the plaintiff also.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

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In the Privy Council

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