

Privy Council Appeals Nos. 79 and 80 of 1914.

Mahomed Ismail Ariff and Others - - - *Appellants,*

v.

Hajee Ahmed Moolla Dawood and Another - *Respondents,*

Mahomed Ismail Ariff and Others - - - *Appellants*

v.

Mahomed Suleiman Ismailjee and Others - *Respondents,*

Consolidated Appeals

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 15TH MAY, 1916.

Present at the Hearing :

VISCOUNT HALDANE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by MR. AMEER ALI.*]

The suit which gives rise to these consolidated appeals was brought in the Chief Court of Lower Burma in its original civil jurisdiction, under the provisions of section 539 of Act XIV of 1882, for the appointment of trustees and the settlement of a scheme of management in respect of a mosque, situated in the city of Rangoon. The plaintiffs in the action are five Mahomedan worshippers at the mosque, who trace their origin to a place called Randher, said to be a suburb or the city of Surat in the Bombay Presidency, and in the earlier stages of these proceedings they appear to have claimed it as a Randheria mosque. It is, however, conceded now that it is a public mosque dedicated to the performance of religious worship by all Sunni Mahomedans without restriction as to place of origin, and that it is commonly known as the Sunni Juma Musjid.

To explain the contest between the parties it is necessary to give a short summary of the circumstances that have led to this unfortunate litigation. Like many other places in Burma, Rangoon is inhabited by a large number of Mahomedan emigrants from various parts of India who have domiciled themselves in the country for purposes of trade, and are generally known by the names of the towns or villages whence they originally came. For example, the plaintiffs, as already stated, derive their origin from Randher and, therefore, call themselves Randherias; whilst the larger community of Suratis or Soortees come either from the city or district of Surat. It is necessary to bear this in mind, as the mosque in question is sometimes called the Surati mosque. The Randherias, though trying to differentiate themselves from the others, form in reality a section of the Surati community. They are mostly Voras, and they all profess the Sunni doctrines.

It appears that the site of the present mosque was formerly occupied by a bamboo structure built in 1854 by one Moolla Hashim, a native of Randher. It was dedicated to the same purpose, and bore the same name as the present masonry mosque. Divine worship was performed here by all Sunni Mahomedans until it was burnt down three years later, when Moolla Hashim replaced it with a building made of wooden planks. This continued to be the public place of worship until 1872, when the masonry mosque was erected.

The land on which the mosque was first built appears to have been afterwards added to by purchases made by Moolla Hashim or by his fellow-townsmen, who made the same over to him as the custodian of the mosque. In 1862 one Moolla Ibrahim, a brother of Moolla Hashim, and two persons of the names of Golam Moideen Moollah and Cassim Azim, obtained from the Government a grant in respect of certain other plots on the express trust "to build and maintain thereon a mosque or place of worship for and to the use of all persons professing the Sunni sect of the Mahomedan religion."

These lands were also added or attached to the existing mosque, and shops were built there to yield an income for its maintenance.

In 1864, Moolla Hashim went on a pilgrimage to Mecca, leaving the management of the mosque in the hands of Moolla Ibrahim and the two persons already mentioned. He returned to Rangoon in 1866, but never resumed his management of the mosque. At this time the person in charge was one Mohammed Hashim Mehtar, who also is said to have been a native of Randher.

In 1870, the Government, finding that no mosque had been built on the lands granted in 1862, and that on the contrary shops had been erected thereon, issued a notice on the grantees to show cause why those lands should not be resumed. A meeting was thereupon held, apparently at the instance of the Randherias, of all the Sunni Mahomedans entitled to worship

at the mosque, and it was decided to buy outright from the Government the land, and build on it a proper masonry structure suitable to the growing needs of the community. Although there is some dispute with regard to the contributions of the general body of Sunnis apart from the Randherias, it may be taken as fairly uncontroverted that the bulk of the fund was subscribed by the Randheria section of the worshippers. The conveyance was taken in the names of five persons, named respectively Dooplay, Ariff, Pattal, Mohammed Hashim and Ebrahim Ali Moolla, and these men in 1872, whilst the masonry mosque was in course of building, purported to create a new dedication.

The trust deed bears date the 16th March, 1872, and after reciting that it was made between the persons named above, of the one part, and one Mohammed Hashim, representing the general Sunni Mussulman community, of the other part, proceeds to declare that "the pieces or parcels of land upon a certain portion of which the Sunni Jamaet Musjid is erected or is in the course of being built, together with the godowns attached thereto, are solely dedicated for the purpose of divine worship." It then goes on to provide *inter alia* that its management shall remain exclusively in the hands of the Randheria Jamaet (people or assembly).

The five persons in whose names the conveyance stood and who had executed the trust deed appear to have carried on the management for several years; in course of time some dropped out and others came in as trustees. How these men were placed in charge of the management of the mosque is not clear, for apparently no meeting of the Randheria Panchayet was held until 1894, and none between 1894 and 1906, nor in fact had the Randherias any "organised association" with written rules for the purpose of giving effect to the wishes of their section of the community.

Matters remained in this condition until 1908, when disputes arose regarding the validity of the election of one Hashim Yacub Ally as a trustee in place of another Randheria, who had died the year before. It was in consequence of the quarrels among the Randherias themselves in connection with the election or appointment of this man, that the present suit was launched in the Chief Court of Lower Burmah. The original defendants to the action were four persons who were actually managing the mosque as trustees, but the validity of whose appointment as such was impugned by the plaintiffs. In addition three others were joined as defendants ostensibly to represent the Randheria section, but in reality, as the trustee defendants charge, to represent the plaintiffs' faction.

On the institution of the suit notices were issued by the Court under section 30 of the Civil Procedure Code to all persons entitled to worship at the mosque. Thereupon defendants 12 and 13, representing the general body of Sunni worshippers, and defendants 8 to 11 claiming to represent

the Surati community, and 14 to 17 the other Randherias appeared and applied to be joined as parties. Each set of defendants has filed a separate defence. Although the trustee defendants deny the plaintiffs' allegation that the mosque in question is a Randheria mosque, and affirm the validity of their and Hashim Yacub Ally's appointment as trustees, they associate themselves with the plaintiffs and their Randheria co-defendants in claiming that the right of management of the mosque belongs exclusively to their party. And they ask that the scheme, if any is to be framed, should be framed on that basis.

The defendants 12 and 13, who represent the general body of worshippers, controvert in substance the right of the Randherias to a monopoly of the management as opposed to the whole nature of the trust; and they claim that as the mosque is dedicated to the performance of public worship by all Mahommedans of the Sunni persuasion, now that a scheme is proposed to be settled under the direction of the Court they should be allowed a voice in its administration.

The suit proceeded to trial before Mr. Justice Robinson, and the whole dispute centred round two points, viz. :—

1. The effect of the trust deed of 1872, and
2. Whether the Randherias should or should not have the sole and exclusive charge and management of the mosque.

The Randherias rested their case on the trust deed of 1872; they contended that it created a new trust and that the founders, namely, the five persons in whose names the land had been purchased from the Government, were entitled to provide that the management should remain exclusively in the hands of their own section of the community. The learned trial Judge states their contentions in the following terms :—

“ It is urged that the original mosque was created by a Randheria ;
 “ that the original grant was revoked and the lands sold outright to
 “ Randherias, that they thus became the creators of the trust and were
 “ at liberty to make any lawful condition they pleased as to the
 “ management of the trust.”

And his decision is expressed in these words :—

“ The position in 1871, then, was that the five vendees became the
 “ absolute and untrammelled owners of these two plots and could do
 “ with them as they pleased. . . . They became the owners of the
 “ mosque, shops, and lands, and created a trust of them. It was
 “ undoubtedly open to them to manage the trust themselves or to lay
 “ down the manner in which it was to be managed, and this they did in
 “ Exhibit C.”

He accordingly came to the conclusion that the Randheria party were exclusively entitled to the management of the mosque.

On appeal by the respondents in the first and second appeals respectively, the learned Judges of the Chief Court, differing from the Trial Judge, held in substance that the lands which were purchased by or in the names of the five persons in 1871 were acquired by them as trustees for the purposes of the existing mosque and subject to the trust therefor; and that nothing that took place in 1871 or 1872 had the effect of cancelling, or could in law cancel, the original trust; and that as the original trust was for the benefit of all persons "professing the Sunni sect of the Mahomedan religion," they thought that "all Sunni Mahomedans were entitled to a voice and control of the Juma Musjid, of Rangoon."

The plaintiffs and the trustee defendants have appealed to His Majesty in Council, and the same contention that was put forward in the Courts below, based on the document of 1872, has been urged on their behalf. It has further been contended that under the Mahomedan law the Court has no discretion in the matter and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or *mutwallees*. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the Kâzi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kâzi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.

Illustrations of this rule are to be found in almost every work on Mussulman law. And the authorities lay down that, "were the *wâkif* (the founder) to make a condition that the King or Kâzi should not interfere in the management of the *wakf*, still the Kâzi will have his superintendence over it, for his supervision is above everything."

Their Lordships agree with the Chief Court that the transactions which took place in 1871 and 1872 in no way affected the existing trust, and that the trust deed of 1872 did not create

a new dedication ; the mosque remained as heretofore a public mosque, dedicated to the performance of worship by all Sunni Mahomedans as originally founded.

In their Lordships' opinion, the real point in issue in the case, owing probably to the nature of the pleadings, has to some extent been missed by the Courts in India. It has been treated as a question involving the determination of conflicting rights rather than a consideration of the best method for fully and effectively carrying out the purpose for which the trust was created. The suit is brought under section 539 of the Code, which vests a very wide discretion in the Court. It declares (omitting the parts not material to this case) that—

“ whenever the direction of the Court is deemed necessary for the
 “ administration of any express or constructive trust created for
 “ public, charitable, or religious purposes, the Advocate-General, acting
 “ *ex officio*, or two or more persons having a direct interest in the
 “ trust and having obtained the consent in writing of the Advocate-
 “ General, may institute a suit in the High Court, or the District Court
 “ within the local limits of whose civil jurisdiction the whole or any
 “ part of the subject-matter of the trust is situate, to obtain a
 “ decree—

“ (a.) Appointing new trustees under the trust ;

“ (e.) Settling a scheme for its management ;

“ or granting such further or other relief as the nature of the case
 “ may require.”

In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

In the present case, Moolla Hashim, although he was assisted by several of his compatriots in acquiring the land on which the bamboo mosque was built, was to all intents and purposes its original founder ; in 1857, when the bamboo structure was burned down, he replaced it with a plank building ; he and his Randheria fellow-townsmen held the *mutwalleeship* until 1871. Since that date also the management has been carried on by people belonging to Randher. In 1862, the lands were purchased with money supplied by them ; and in 1871 the bulk of the money appears to have come from the same source. It is not alleged that they have mismanaged the trust or committed any dereliction of duty, or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers. In these circumstances it seems to their Lordships, in the exercise of the discretion which the Mussulman

law vests in the Kâzi, that the Randheria section of the worshippers, all other conditions being equal, are preferably entitled to the *mutwalleeship* of the mosque. With regard to the case of *Ibrahim Esmael v. Abdool Carrim Peermamode*,* which has been relied upon on behalf of the respondents, their Lordships deem it sufficient to say that the facts to which they have referred differentiate it widely from the present case.

The present case, however, in their Lordships' opinion, illustrates the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they call themselves *Punchayet* or *Jamaet*. In order to avoid so far as possible a recurrence of the trouble that has brought about this long-drawn litigation, their Lordships think it desirable, in the interests of the institution which form the primary matter for consideration, that the appointment of future trustees should be entrusted to a committee of the worshippers the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Judge should lay down rules for their guidance in the discharge of any supervisitorial functions that it may appear necessary to confide to them and for filling up vacancies on their body subject to his control.

Their Lordships are accordingly of opinion that the orders of the Courts of India should be discharged and that the case should be remitted with the following declaration and directions to the Chief Court of Lower Burma to deal finally with the matter: That all other conditions being equal, the Randheria section of the worshippers are preferably entitled to manage and act as trustees of the Sunni Juma Musjid, of Rangoon; that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which committee should be in the discretion of the Court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisitorial functions that it may appear necessary to confide to them, and for filling up vacancies on their body subject to its control.

As regards the costs in the Courts below, the trustee-defendants will have their costs out of the funds of the institution; the rest of the parties will bear their own costs.

The parties will bear their own costs of these appeals.

And their Lordships will humbly advise His Majesty accordingly.

* L.R. 35, I.A. 151.

In the Privy Council.

MAHOMED ISMAIL ARIFF
AND OTHERS

2.

HAJEE AHMED MOOLLA DAWOOD
AND ANOTHER.

MAHOMED ISMAIL ARIFF
AND OTHERS

2.

MAHOMED SULEIMAN ISMAILJEE
AND OTHERS.

DELIVERED BY
MR. AMEER ALI.