Mohd. Wasi And Anr. vs Bachchan Sahib And Ors. on 30 September, 1954

Equivalent citations: AIR1955ALL68, AIR 1955 ALLAHABAD 68

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. This appeal was cognizable by a single Judge but on an application made on behalf of the plaintiffs-appellants that the case involves a general question of importance affecting the Shias and Sunnis, two sects of the Muslim community, it was ordered to be heard by a Bench of three Judges.

2. The two plaintiffs belong to the Sunni sect and are residents of Qasba Mahmudabad, District Sitapur. They brought a suit in their representative capacity under Order 1, Rule 8, Civil P. C. on behalf of the Sunnis of Qasba Mahmudabad against the first five defendants in their representative capacity as representing the Shia Muslims of the same Qasba. In paragraph 6 of the plaint it was said "that as all the Sunni Muslims of Mahmudabad have the right to get a permanent injunction issued the plaintiffs under Order 1, Rule 8, Civil P. C. seek permission to file the suit on behalf of all the Sunnis of Qasba Mahmudabad, and as all the Shias of Mahmudabad are prepared to contest the suit, permission is sought to file, the suit against the defendants on behalf of all the Shia Muslims of Qasba Mahmudabad."

3. When notice of the suit was issued, defendants 6 to 19 who are Sunni Muslims applied that they did not wish to be associated with the plaintiffs, nor did they want the plaintiffs to represent them and they were, therefore, impleaded as defendants to the action.

4. There is a mosque situate near the railway station in Qasba Mahmudabad. The plaintiffs' contention was that it was constructed by a Sunni Musalman, that the Azan and the prayers had all along been said in the Sunni form and that the Shia Musalmans had nothing to do with this mosque, nor did they say their prayers in it, but with the aid of the police the Shia Musalmans had started forcibly decorating Tabut and Gahwara -inside the mosque after doing Matam etc., that according to the belief of the Sunni Musalmans the said action was "against Shariyat and it insults, debases and injures their feelings". It was said that the Shia Musalmans had no right to have the Tabut or the Gahwara decorated inside the mosque or take it out in a procession from thereafter doing Matam

etc. It was, therefore, prayed that a permanent injunction be issued against them. In paragraph 4 the immediate cause for the suit was given as follows :

> "That this year the Shia Musalmans of Mahmudabad after getting warrants of arrest issued under Section 107, Criminal P. C. against the plaintiffs and other Sunni Muslims of Mahmudabad in order to injure their feelings, desire to do the aforesaid acts in the said mosque on 26-3-1942, about which the plaintiffs came to know on 21-3-1942. The Shias desire that the Sunni Muslims should vacate the said mosque after saying their mid-day prayer on 25-3-1942, for this reason a general order was enforced on 24-3-1942, that the Sunni Muslims should completely vacate the said mosque after saying their prayers."

The relief claimed in the plaint was as follows :

> "That a permanent injunction be issued to the effect that the Shia Muslims of Qasba Mahmudabad should not decorate Tabut or Gahwara in the said mosque and take out their procession from the said mosque nor should they do Matam therein."

5. Defendants 1, 3 and 5 filed one written statement while defendants 2 and 4 filed another, and defendants 6 to 19 filed a separate written statement on 22-7-1942, after they had been impleaded. The Sunni defendants 6 to 19 supported the Shia defendants and pleaded that they consider Tazias and Taziadari as part of Islamic religion, that they join and participate in the Gahwara procession and they have no objection to the said acts being done as before. According to them the plaintiffs were a troublesome group who believed in creating disputes between different communities and they realise subscription for the purpose of litigation and misappropriate a part of it. It was pointed out that besides this mosque there were other mosques in Mahmudabad from which Tazias were taken out and Gahwara processions etc., were formed and decorated.

6. The Shia defendants denied that the mosque had been constructed by a Sunni. They claimed that they had been saying their prayers in the said mosque and that the decoration of Gahwara and Matam etc., had been performed in the mosque from a long time and the procession was taken out from there and it was recently that the plaintiffs had started creating trouble. It was also pleaded that a large number of Sunnis believed in Taziadari and they took part in the functions. That the mosque was originally constructed by one Ramzani Halwai who had built an Imambara and Kachcha Idgah and he used to do Taziadari in honour of Hazrat Imam Husain. The Rajas of Mahmudabad (who admittedly belong to the Shia sect) had, it was said rebuilt the mosque when it had fallen down and had been responsible for its upkeep and maintenance.

7. As a result of these pleadings, the learned Munsif framed the following issues : "(1) (a) Whether the mosque in question was built by a Sunni, was it reserved for the Sunnis and has it been used by them only?

(b) If so, its effect?

(2) whether the defendants can be prevented from conducting the ceremonies in question in the mosque in suit?

(3) Whether the suit is maintainable as framed?

(4) (a) Have the defendants and the Shias been using the mosque in suit as alleged by them?

(b) If so, its effect?

(5) To what relief, if any, are the plaintiffs entitled?"

8. The case was fought out at some length and a large number of witnesses were produced by either side. After having carefully considered the matter the learned Munsif dismissed the suit on 13-5-1944.

9. The plaintiffs filed an appeal which was again argued at great length and the learned Judge after devoting considerable time in writing out an elaborate judgment dismissed the appeal on 13-2-1945.

10. This being a Second Appeal the findings of fact recorded by the lower appellate court have not been challenged by counsel. It may be useful to briefly set out those findings.

11. The learned Civil Judge found (1) that there was no satisfactory evidence to prove that Ramzani was a Sunni or a Shia. But as Sunnis predominated in this country there was a presumption that he was a Sunni;

(2) that Ramzani used to do 'taziadari' and had built an 'Imambara';

(3) that the plaintiffs had failed to prove that Idgah mosque was reserved by Ramzani for the use of Sunnis alone;

(4) that it was conceded by counsel for the plaintiffs by a statement made on 21-12-1944, that Shias had been saying their prayers in the mosque in suit from the time that it assumed the shape of a mosque;

(5) that the building had the shape of a mosque at the time of the First Settlement and it was made 'pakka' some time before 1903;

(6) that additions and alterations were made in the building after 1927 by the subscription raised from the public, both Shias and Sunnis. That it was used formerly only for Indian prayers but after 1927 people started going in very large numbers to say their regular prayers and the 'chabutra' was then extended. Shias had contributed to the rebuilding and the repair of the mosque. The Mahmudabad Estate had been white washing the mosque and sending Iftari and providing Badhnis;

(7) that there were no Sunni 'mutwallis' for the mosque. There was no permanent Moazin appointed to call Azans five times a day;

(8) that the plaintiffs had failed to prove that there was a 'Sunni Imam or permanent Moazin to lead the Panchgana prayers and to call out the Azan for the Panchgana prayers in the mosque;

(9) that during the month of Ramzan Taravi prayer is said in the mosque but does not clash with the time when Shias offer their prayers;

(10) that although Shias had been saying individual prayers in the mosque from the time it was used as such there was no fixed Imam for leading the congregational prayers of Shias;

(11) that Gahwara was being decorated in the mosque and taken out in a procession for more than forty years before the date of suit;

(12) that Gahwara is decorated between 3 and 4 p.m. on the 8th of Rabi-ul-awwal during a period of 15 or 20 minutes;

(13) that Sunnis also used the mosque for holding Maulud, Majlises, Taqrirs by Maulanas, meetings of the Anna Fund (which is carried on against 'taziadari'), for taking out Jalus-e-Mohammadi, for the stay of Maulanas and for performing Seyums;

(14) that 'tafias', 'alams' and Gahwaras are taken out from this mosque and other mosques by both Shias and Sunnis; and (15) that the decoration and taking out of Gahwara causes no disturbance to Sunnis who go to say Zohar prayers in the mosque in suit.

12. The learned Judge has devoted considerable time in considering whether the taking out of Gahwara and similar processions, 'taziadari' and 'azadari', are or are not against the Shariat. It is not necessary for us to go into this question nor can we consider ourselves competent to do so. The fact remains that while a section of the Muslims abhor and condemn such practices another section, though numerically less but probably equally well established, consider them meritorious. It is also a fact that even a fair number of Sunnis take part in 'tazias' and 'taziadari' and in the Gahwara procession.

As always happens, with the passing of time, the scriptures are differently interpreted by learned men and, if they can influence a sufficient number to form a nucleus, a new sect grows up and often there is bitter ill-feeling between the members of one sect and another each condemning the other for what it considers to be a heretical or wrong interpretation of the sacred scriptures. This happened among Christians and in the middle ages there were wide spread persecutions of Catholics by the Protestants and also of the Protestants by the Catholics. Protestants and Catholics have, however, separate churches of their own and the problem that has, therefore, arisen in some parts of India, as regards the use of mosques by different sects of Muslims, did not arise among Christians about the use of churches.

13. Chaudhri Niamat Ullah has put forward before us a very short and simple argument. His contention is that a mosque is the property of God primarily dedicated for saying of prayers. No Muslim can be excluded from saying his prayers in a mosque and no objection can be taken to his saying prayers therein so long as he says his prayers according to the well recognised, ecclesiastical rules of Muslim faith. He has contended that, that being the primary object, besides the five prayers prescribed -- the first (Fajir) before dawn, the second (Zohar) after mid-day, the third (Asad) in the afternoon, the fourth (Maghrib) after sunset and the fifth (Isha) before midnight--

a Muslim can say prayers at any time during the day and night and the mosque must, therefore, be available to him whenever he wants it for the purpose of saying his prayers, that anything else done in the mosque is by leave and licence, and that a mosque cannot be put to any other user if a Muslim objects to it on the ground that it interferes with his right to say his prayers.

14. Learned counsel for the respondents has urged that this being an important point dealing with ecclesiastical law he could have produced expert witnesses if it had been raised in the lower court and has urged that, in case we feel inclined to accept this new approach to the case, we should remit an issue to the lower appellate court.

15. Learned counsel for the appellant has, however, relied on tke decision of the Privy Council in -- 'Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar', AIR 1940 PC 116 at p. 120 (A), in support of his objection that oral evidence in such matters will not be admissible and the point raised being a pure question of law it should be decided by us. He has urg-

ed in the alternative that the point was raised in the lower court and was decided. He has drawn our attention to page 180 of the paper book where the learned Judge says :

> "Let us now consider for what purposes a mosque has been and can be used under Mohammedan Ecclesiastical Law."

The discussion under that head, however, shows that the point was not put in the way it has been urged by Chaudhri Niamat Ullah on behalf of the appellants. The lower court was called upon to consider whether the uses to which the building was brought were against the Shariat and for what purposes the building may legitimately be brought.

16. We do not, however, consider it necessary to examine the contention whether a mosque must toe deemed to have been dedicated only for the purpose of saying prayers and any other user must toe by leave and licence. We shall assume that the primary object of dedication of a mosque is the saying of prayers to God and the entire Muslim public are the beneficiaries for that purpose. The fact that the building can be used and has been used from the earliest times for other purposes not repugnant to the Muslim faith can, however, admit of no doubt. The learned Judge has referred us to several authorities to establish that fact, e. g., Mohammad Ali in his Quran, old Edition, foot-note No. 445 has mentioned that "a deputation consisting of 60 Quraish came from Najran in 10 A. H. and they were lodged by the Prophet in the mosque."

In the Hidaya it is mentioned that a Qazi should preferably sit in a mosque to hold his court. Fatwe-Kazi Khan, Vol. 1, page 31 says that travellers can stay in a mosque and it can be used as a school.

Other passages from other books have also been quoted to show that in the days of the Prophet feats of arms were displayed by Abysinians & poems were read inside the mosque. Authorities have been cited that relics of the Prophet and his immediate relations can also be preserved in a mosque.

17. Learned counsel for the appellant has cited s number of authorities to establish his contention that a mosque is dedicated for the purpose o prayer alone, that other user is by leave and licence and that no one can claim a right to use it for any other purpose except for saying of prayers. He has relied on Tyabji's Muhammaden Law, sections 514 to 516. These sections, however, deal with the completion of a dedication. According to them the first public prayer said on the land or within the building Completes a dedication for a mosque. It is also made clear that there can be no power of revocation once a mosque is dedicated and there can be no reservation of rights by the 'waqif' nor can a mosque be dedicated with an effective reservation for a particular sect or class of people.

In -- 'Akbarally A. Adamji v. Mohomedally', AIR 1932 Bom 356 (B), Tyabji J. observed at page 362 "it has been laid down as a principle in a decision of great authority that a mosque must be a mosque for all, that it must be a building dedi- cated to God and not a building dedicated to God with a reservation that it should be used only by persons holding particular views of the ritual; that it is a place where all Mohomedana are entitled to go and perform their devotions as of right according to their conscience:" The learned Judge, made certain observations which we consider significant. He said: "However I feel great difficulty in seeing how it can be given effect to in British India, where each community is free to govern itself by its own customs and usages, and its own interpretation of the Quran and of the fundamental rules of Islam; and the, Court does not lay down what shall be considered the true interpretation where rival interpretations have been adopted."

18. If the argument of learned counsel is given its full effect it can lead to a tyranny of the majority by a few. The Muslims of a locality may have a mosque built for prayers and make elaborate arrangement for 'taziadari' or similar rituals in which they may have great faith. Any Muslim can then come forward and claim that nothing but prayers shall be said in the mosque and it shall not be used for any other purpose as he wants to say his prayers at any time he likes within twenty-four hours and the rituals would disturb his prayers.

19. In a country like India, where people are free to follow their own faith, according to their own belief, the policy of live and let live must govern the relationship between followers of various religions or sects, so long as it does not conflict against the rules of public morality or decency. It is not open to a member of a particular sect to claim that the others should not follow their faith according to their belief because it offends against his susceptibilities. We had recently a case from Amathi in which the Muslims had objected to the blowing of conch-shells on the ground that it was intimately connected with idol worship which was repugnant to Muslim sentiment. (See -- 'Sh. Ahmad Ali v. Babu Ram', 1954 All W. R. (HC) 525 (C)). It appears to us, therefore, that the only way of ensuring peace and religious freedom to all would be by laying down that the practices followed

peacefully and without objection for years at a place of worship should not be disturbed on the ground that it was being objected to by some people because they claimed that it was repugnant to the true tenets of their faith.

20. A Muslim has no doubt a right to say his prayers in a mosque and he cannot be kept out of it. There are certain prayers which are said in a gathering and in that sense they may be called congregational prayers. In every mosque these prayers are said at particular hours and Chaudhri Niamat Ullah has urged, and probably rightly, that any of the five prayers said in a congregation cannot be repeated on the same day for the benefit of those who come late or who want to say the prayers in a different way. He has relied on a decision of the Patna High Court in -- 'Khalil Ahmad v. Malik Israfil', AIR 1916 Pat 87 (D). In that case in an old mosque built by the Sunnis the Qadianis had been saying their prayers for a number of years. The learned Judges held that the plaintiffs who were Qadianis could not get a decree that they were entitled to abstain from joining in the ordinary devotion at the mosque and to appoint an Imam of their own to lead the prayers after the usual daily prayers had been concluded.

21. It may be that nothing can be done in a mosque at a time when the five daily prayers are said so as to disturb the saying of those prayers. Besides the five daily prayers a Muslim can say other prayers at any time of the day and night. These can be said at any place which is clean. The right that a Muslim has is merely to say his prayers and if he is excluded or if he is disturbed or not allowed to say his prayers at the time he has been usually saying them in the mosque he may have a just grievance. No allegation has been made in the plaint that any time when the plaintiffs used to say their prayers the Gahwar and other ceremonies were so performed that the plaintiffs were disturbed or that the plaintiffs' right had been interfered with.

The main ground in the plaint was that it was a Sunni mosque and the Gahwara and other ceremonies were repugnant to the Sunni Muslims. Paragraph 4 of the plaint has been relied upon but that merely sets out the fact that an order was passed by the police that the Sunni Muslims should vacate the mosque after saying prayers. The order did not say that they must vacate the mosque before saying their prayers and the lower appellate court has pointed out that there was no allegation in the plaint and no evidence led to prove that the decoration of the Guhwara and the taking out of the procession from the mosque in suit caused any disturbance to Sunnis in saying their prayers. In the absence of proof that the plaintiffs' rights were affected they cannot be said to have any cause of action for the suit.

22. There is another ground on which the suit must fail. It is clear from the judgment of the learned Civil Judge that the Sunni Muslims are bringing this mosque to various uses which are summarised at page 180 of the paper book as (1) holding of Sayums (2) for holding discourses by Moulanas, (3) for taking out Jaloos Mahamadi procession, (4) holding of Milads, (5) holding of Jalsa Anna Fund, and (6) for the staying of the Maulanas who want to deliver lectures at Mahmudabad. Since they are bringing the. mosque to all these uses they cannot claim that Shias and other Sunnis who believe in 'taziadari' cannot bring the building to such use on the ground that the mosque is dedicated only for the purpose of saying of prayers.

23. There is yet another ground why the suit must fail. The plaintiffs have confined the relief in the plaint to an injunction against Shias while a large section of Sunnis also believe in 'taziadari' and if the suit is decreed they would be free to do taziadari while Shias will be forbidden from do-ing it.

24. Learned counsel for the appellants has, however, pointed out that though the relief may have been claimed only against Shias it is open to the Court under Order 41 Rule 33, Civil P. C. to grant any appropriate relief and that the relief may be granted not only against Shias but also against Sunnis who believe in taziadari. Learned counsel has also relied on the provisions of Sections 54 and 56, Specific Relief Act (1877) and has urged that an injunction can be granted or refused in accordance with the provisions of these two sections and that it is not a discretionary relief like a declaration under Section 43 of the Act. Our attention has been drawn to the* words "the Court may in its discretion" in Section 42 and the absence of those words in Sections 54 and 56 of the Act. We do not, however, think that there is any substance in this argument. No doubt the words "the Court may in its discretion" are not in Sections 54 and 56 of the Act but Section 52 of the Act makes it clear that a relief for injunction, tem-porary or perpetual, is to be granted at the discretion of the Court.

25. We have the findings of the lower appellate court that for more than forty years the ceremonies objected to have been performed in the mosque; that Shias and some Sunnis have been taking part in it; that the original founder himself believed in 'taziadari' and that the mosque was never reserved for Sunnis alone. In these circumstances if by reason of the bitterness of feeling that has recent-ly developed due to Maddhe Sahaba and Tebarra controversy in Lucknow a section of Sunnis have become more sensitive and went to exclude a considerable section of Muslims of the locality from doing what they have been doing peacefully and without objection for the last forty years or more, the Court would be well justified in not using its discretion in favour of the plaintiffs. These observations would be enough to dispose of this appeal but as a number of cases have been cited we may briefly deal with them.

26. A Hanifi Muslim says the word "amen" at the end of his prayer silently or under his breath while Wahabis say it loudly. A Wahabi Muslim for saying "amen" in a loud voice was prosecuted under Sections 79 and 296, Penal Code (1860). He was convicted by the lower court. There was an appeal to the High Court. The case was referred to a Full Bench and the Chief Justice and three other learned Judges sent the case back for a retrial to find out whether the accused had caused any disturbance at the time of saying of the prayers. See --'Queen-Empress v. Ramzan', 7 All 461 (E). Mahmood J. wrote a dissentient judgment in which he said:

> "As to the merits of the present case itself upon this particular point, I have to observe that a Muhammedan mosque is in many respects different, so far as I know, from an ordinary Christian church; because it is not only a place for divine worship, but also intended for religious and moral teaching and discussion, and it is not unusual that in places where the Muham-madan community is still flourishing, a library and a school form part of the mosque. I cannot, therefore, hold that to carry on religious discussion in a mosque, even though the majority of the people present at the time do not approve of such discussion constitutes a criminal offence."

Mr. Das for the respondents has relied on this passage in support of his contention that a mosque may be used for other purposes than of saying prayers. We, however, do not want to go into that question as we consider it unnecessary.

27. Learned counsel for the appellants has relied on -- 'Ata-Ullah v. Azim-Ullah', 12 All 494 (FB) (P). As a result of the prosecution of Wahabis for saying "amen" in a loud voice, some Wahabis filed a suit for a declaration that they were entitled to pray and perform their religious devotion according to their own beliefs. The case was again referred to a Full Bench in which the learned Chief Justice made it clear that a mosque which is dedicated to God cannot be limited in its dedication to any particular sect or sects of Muslims andi that every Muslim has got a right to say his prayers according to the well recognised rules of Mohammedan Ecclesiastical Law.

28. The next case was -- 'Jangu v. Ahmad Ullah' 13 All. 419 (FB) (G). In this case also the dispute related to the saying of the word "amen" in a loud voice at the end of the prayers by the Wahabis and they asked for a declaration from a civil court. The right was recognised but it was made clear that they could not say "amen" 'mala fide' in such a loud voice as to disturb others.

29. The other case relied upon is -- 'Sifat Ali Khan v. Ali Mian', AIR 1933 All 284 (H). This was a case in which the plaintiffs sued for a declaration that they were the 'mutwallis' and 'Imams' of a certain mosque and that they had for more than 25 years been saying namas as members of the Ahmadi or qadiani sect and that the defendants who were non-qadianis had on no account any right to offer their prayers in congregation led by some other Imam. The case came up to this court in second appeal and it was held that the plaintiffs had failed to prove that they were the 'mutwallis' and Imams of the mosque or they had any right to lead the prayers.

30. The next case relied on is -- 'Syed Ahmad T. Hafiz Zahid Hussain', AIR 1934 All 732 (I). In that case a school or 'maktab' was held within the compound of an ancient mosque built nearly 300 years before. Those in charge of the management of the school wanted to have a 'pakka' building for that purpose and a suit was filed on behalf of the mosque and it was held that the mosque was dedicated for a specific purpose and every Muslim, of whatever locality and belonging to whichever sect of Muslims had a right to say his prayers therein and that the local Muslim population could, not claim any special beneficial interest in themselves and could not, therefore, utilize the mosque property for building a school on a part of its ground. If we may say so, with respect, we accept both the propositions laid down in this judgment that a mosque is dedicated for worship and is open to all Muslims, local and others, and that the local Muslims cannot have a right to use it for any other purpose however meritorious or beneficial it may be to them.

31. In -- 'Muthala Kandi v. Pulli Veetil Abu Baker', 17 Ind Cas 386 (Mad) (J), it was held by a Bench of the Madras High Court that every Muhammadan worshipper has the right both to offer prayers and to recite the Koran as a part of his right of worship in a mosque but he cannot claim the right to use the mosque for the purpose of collecting subscriptions or distributing sweetmeats.

32. Prom all the authorities cited above it would appear that it is now well-settled that (1) a Mosque is dedicated for the purpose that any Muslim belonging to any sect can go and say prayers therein;

(2) it cannot be reserved for Muslims of any particular denomination or sect;

(3) no one can claim to have the form of congre-gational prayer usually said in a mosque altered to suit him;

(4) even though the congregational prayers are said in a mosque in a particular form any Muslim belonging to any other sect can go into a mosque and say his prayers at the back of the congregation in the manner followed by him so long as he does not do anything 'mala fide' to disturb the others;

(5) the object of the dedication can neither be altered nor the beneficiaries limited or changed; and
(6) a Muslim will have a cause of action if he is deprived of his right to say prayers in a mosque or is prevented from doing so."

33. Accepting all these propositions the plaintiffs' suit must fail by reason of the fact that they are not able to prove that their right to say prayers has in any way been affected by reason of the action of Shia defendants. Secondly, it must fail because the nature of the relief claimed by them is defective. Thirdly, it must fail on the ground that though the plaintiffs are objecting to certain functions and ceremonies held in the mosque at the instance of the defendants, they themselves have been performing other ceremonies which may be equally objectionable to others. And, lastly, it must fail because from the evidence it is clear that the mosque has been used for 'taziadari' etc. from its very inception; that Gahwara ceremonies have been performed therein for the last forty years or more and that Shias as also some Sunnis have been taking part in it. In these circumstances if the defendants were not doing anything against public morality or decency the plaintiffs cannot be allowed to claim the grant of a discretionary relief that the Shias and others be not allowed to follow the tenets of their faith in their own way without let or hindrance by others.

34. The result, therefore, is that this appeal fails and is dismissed with costs.