Gopal, Krishnaji Ketkar vs Mahomed Haji Latif & Ors on 19 April, 1968

Equivalent citations: 1968 AIR 1413, 1968 SCR (3) 862, AIR 1968 SUPREME COURT 1413

Author: V. Ramaswami

Bench: V. Ramaswami, J.C. Shah, G.K. Mitter

PETITIONER:
GOPAL, KRISHNAJI KETKAR

Vs.

RESPONDENT:
MAHOMED HAJI LATIF & ORS.

DATE OF JUDGMENT:
19/04/1968

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
SHAH, J.C.
MITTER, G.K.

CITATION:
1968 AIR 1413 1968 SCR (3) 862

ACT:
Evidence--Important documentary evidence withheld--Technical plea of onus of proof cannot prevent adverse inference.

HEADNOTE:
The appellant claimed before the authorities under the Bombay Public Trusts Act, 1950, inter alia, that a certain plot of land belonged to him and not to the Trust of which he was Manager. The High Court when the matter went before it held that the plot belonged to the Trust.In appeal by certificate to this Court,

HELD : On the evidence the, plot in question must be held to be the property of the Trust. The failure of the appellant to produce the account books admitted to be in his possession from which it could be seen how the income from

the plot was dealt with would justify an adverse inference against him. [865 E, 866 E, 867 E]
Even if the burden of proof does not lie on a party the court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts in issue. It is not a sound practice for those desiring to rely upon a certain state of affairs to withhold from the court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. [866 F]
Murugesam Pillai v. Manickavasaka Pandara, 44 I.A. 98, Biltu Ram & Ors. v. Jainandan Prasad & Ors. C.A. No. 941 of 1965 dt. 15-4-68 and Bilas Kunwar v. Desraj Ranjit Singh & Ors. 42 I.A. 202, relied on.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 954 of 1965. Appeal from the judgment and decree dated March 8, 1963 of the Bombay High Court in First Appeal Nos. 338 and 422 of 1960.

H.R. Gokhale, W. P. Oka, S. W. Oka and Ganpat Rai, for the appellant.

Danial Latifi and Hardev Singh, for respondents Nos. 3 and

4. M. S. K. Sastri and R. H. Dhebar, for respondent No. 5. The Judgment of the Court was delivered by Ramaswami J. This appeal is brought, by certificate, from the judgment of the, Bombay High Court dated March 8, 1963 in First Appeals Nos. 338 of 1960 and 422 of 1960. On or about April 15, 1952 the appellant made an application to the Deputy Charity Commissioner, Greater Bombay. Region under s. 18 of the Bombay Public Trusts Act (Bombay Act XXIX of 1950), hereinafter referred to as the 'Act' for registration of the Peer Haji Malang Dargah near Kalyan in the Thana District (hereinafter referred to as the 'Dargah) without prejudice to his contention that the Dargah was not a public trust to which the Act was applicable. On August 3, 1953 the Deputy Charity Commissioner made an order declaring that the Dargah was a public trust and directed its registration as such. The Deputy Charity Commissioner further held that among the properties of the Dargah was the land bearingSurvey No. 134 of village Wadi on a portion of which the Dargah is located. The Deputy Charity Commissioner alsodirected that the appropriate court might be moved for framing a scheme and appointing Trustees. The appellant preferred an appeal to the Charity Commissioner, Bombay under s. 70 of the Act against the order of the Deputy Charity Commissioner. The appeal was registered as Appeal No. 66 of 1953. Under orders of the Government the appeal was heard by the Deputy Charity Commissioner, Ahmedabad invested for that purpose with the powers of the Charity Commissioner. By his order dated September 11, 1954, the said Deputy Commissioner with appellate powers dismissed the appeal. Feeling aggrieved, the appellant filed an application under s. 72 of the Act in the Court of the District Judge, Thana to set aside the order of the Deputy Charity Commissioner with appellate powers, contending that the

Dargah was not a public trust, that Survey No. 134 was not the property of the Trust and that the appellant was a hereditary Trustee. The application was opposed by respondents Nos. 1 to 4 who had intervened during the proceedings before the Deputy Charity Commissioner and by the Charity Commissioner, respondent No. 5 who was also impleaded by the appellant in that application. The respondent contended that the Dargah was a public trust and the land bearing Survey No. 134 belonged to the Trust and the appellant was not a Trustee of the Dargah. By his judgment dated April 26, 1955 the District Judge, Thana held that the Dargah was a public trust but he left the questions as to whether"Survey plot No. 134 belonged to the Dargah or not and whether the appellant was a trustee or only a de facto. Manager of the Dargah, open for decision in the suit which had been filed by the Charity Commissioner. Against the order of the District fudge the Charity Commissioner filed an appeal in the High Court, being Appeal No. 501 of 1955. The appellant also filed his cross objections. The said appeal and cross objections were heard together and the High Court by its judgment dated November 19, 1958 confirmed the finding of the District Judge about the public nature of the trust and further held that the District Judge should have decided whether Survey plot No. 134 was the property of the Dargah or not and whether the appellant-

was a trustee or a Manager of the trust. The case was therefore remanded back to the District Judge for deciding these questions. Accordingly the District Judge reheard the matter and by judgment dated February 29, 1960 held, in the first place, that Survey plot No. 134 of village Wadi was not the property of the Public Trust Peer Haji Malang Saheb Dargah and that the appellant was the hereditary trustee of the Trust, his family being its hereditary trustee. Against the judgment of the District Judge two appeals were filed in the High Court. First Appeal No. 338. of 1960 was filed by respondents Nos. 3 and 4 and First Appeal No. 422 of 1960 was filed by the Charity Commissioner, respondent No. 5. Both the appeals were heard together by the High Court. By its judgment dated March 8, 1968, the High Court allowed both the appeals. The High Court confirmed, in the first place, the finding of the District Judge that the management of the Dargah has been in the family of the appellant. With regard to ownership of Survey plot No. 134 on which the Dargah is situated, the High Court held that the appellant was not the owner of that plot but that it was the property of the Dargah.

The main question presented for determination in this appeal is whether the land comprised in Survey plot No. 134 was the property of the Dargah or whether it belonged to the appellant.

It is necessary at this stage to set out the origin and history of the Dargah. The Dargah has been in existence for over about 700 years. Its origin is lost in antiquity but the Gazetteer of the Bombay Presidency tells us that the tomb is that of a Muslim saint who came to India as an Arab missionary in the thirteenth century. According to tradition, there are two tombs in the Dargah in one of which is the dead-body of a Hindu princess and in the other tomb the dead-body of the Muslim saint. The fame of the saint was at height when the English made their appearance at Kalyan in 1780. As they only stayed for two years, their departure in the year 1782 was ascribed to the power of the dead saint. The Peshwas were then in power in that region and after the departure of the English they sent a thanks offering under the charge of one Kashinath Pant Ketkar, a Kalyan Brahmin. It is said that the offering sent by the Peshwas was a pall of cloth of gold trimmed with pearls and supported on silver posts. The tomb was in disrepair and Kashinath started to repair it and according to

tradition was miraculously assisted by the dead saint who, without human aid, quarried and dressed the large blocks of stone which now cover the tomb. It appears that Kashinath was not content to repair the tomb. He also wanted to manage it and this led to a dispute with Kalyan Muslims who resented Brahmin management of a Muslim shrine. Matters came to a head in 1817 and the dispute came before the. Collector who declared that the dead saint should settle the affair and that the only way of ascertaining the saint's wishes was by casting lots. This was done and three times the lot fell on the representative of Kashinath and so the matter ended and Kashinath's representative was proclaimed guardian of the tomb. On behalf of the appellant reference was made to the Area Book, Ex. 66 of the year 1890. The entry shows the name of Laxmibai widow of Govind Gopal Ketkar under the heading (name of the person). Exhibit 67 is the entry from the Phalani Book for the year 1897 and shows the land as "Kilyacha Dongar" and under the column is shown the name of Laxmibai widow of Govind Gopal. Exhibit 68 is of the same year from the revision Phalani containing Similar entry with the map attached. In Exhibit 70 the name of Laxmibai is shown as "Khatedar" for the year 1906. In the remarks column there is an entry "one built well, one pakka built masjid, one Dargah, one tomb". Exhibit 71 is an entry for the year 1915 from Akar Phod Patrak and in the column of "Kabjedar" the name of Rukminibai Hari appears with regard to plot 134.Thereafter, in the record of rights for the year 1913, Ex. 76, the name of the predecessor of the appellant is shown. On the basis of these entries it was submitted by Mr. Gokhale that the ownership of the plot was with the appellant and not with the Dargah. But there are important circumstances in this case which indicate that the appellant is not the owner of Survey plot No. 134. Exhibits 64 and 65 are significant in this connection. Exhibit 64 is an entry from the "Sud" in Marathi for the year 1858 in connection with Survey plot No. 134 (Revisional Survey Number). The original Survey number of this plot was 24 and it was known as "Kilyacha Dongar". The total area is shown to be 249 acres and 24 Gunthas. It is shown as 'Khalsa' land. Kharaba is shown as 89 acres 24 Gunthas and the balance of the area is shown as 160 acres. In the last column the name of the cultivator is not mentioned but it is shown as "Khapachi". It is significant that the name of the Ketkar family is absent from this record. No convincing reason was furnished on behalf of the appellant to show why his name was not entered in the "Sud". It is also important to notice that the appellant has furnished no documentary evidence to show how his family acquired title to the land from the earliest time; there is no sanad or grant produced by the appellant to show that he had acquired title to the land. It further appears that the appellant's family did not assert any title to the land at the time of the survey made in 1858; otherwise there is no reason why its name was not entered in the "Sud" of the year 1858. It is true that there are a number of entries subsequent to the year 1890 and 1897 in which the Ketkar family is shown as the "Khatedar" or the occupant but these entries are not of much significance since the Ketkar family was in the fiduciary position of a Manager of the Dargah and was lawfully in possession of Survey plot 134 in that capacity. There is also another important circumstance that the appellant has no lands of his own near plot No. 134 and the nearest lands he owns are in Bandhanwadi which are admittedly 3-1/2 to 4 miles away from the top of the hill. There is also the important admission made by the appellant in the course of his evidence that there are 2 or 3 tombs behind the Musaferkhana. He stated further that "there is no cemetery or burial ground in Survey No. 134". But this evidence is in direct conflict with the statement of the appellant in the previous case that "Round about the Dargah many people die every year..... Anyone that died there, whether Hindu, Muslim or Parsee if he has no heirs is buried there". He also conceded that there is one public tank known as "Chasmyachi Vihir" near the Dargah and there are 5 wells near the Dargah

and five boundary 'Aranas' about one mile from the Dargah. Lastly, reference should be made to the important circumstance that the appellant has not produced the account of the Dargah income. In the course of his evidence the appellant admitted that he was enjoying the income of plot No. 134 but he did not produce any accounts to substantiate his contention. He also admitted that "he had got record of the Dargah income and that account was kept separately." But the appellant has not produced either his own accounts or the account of the Dargah to show as to how the income from plot No. 134 was dealt with. Mr. Gokhale, however, argued that it was no part of the appel- lant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In Murugesam Pillai v. Manichavasaka Pandara(1) Lord Shaw observed as follows:

> "A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to, the, Courts the best material for its decision.. With regard to (1) 44 I. A. 98, at P. 103.

third parties, this may be right enough-they have no responsibility for the conduct of the suit but with regard to the parties to the suit it is, in their Lordships' opinion an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This passage was cited with approval by this Court in a recent decision--Biltu Ram & Ors. v. Jainandan Prasad & Ors.(1). In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in Bilas Kunwar v. Desrai Ranjit Singh & OrS.(2) "But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents."

But Shah, J., speaking for the Court, stated:

> " The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with illustration

(g) of s. 114 of the Evidence Act, and also an impressive body of authority."

For these reasons we are of the opinion that the High Court was right in reaching the conclusion that Survey plot No. 134 belonged to the Dargah and must be shown as the property belonging to the Public Trust. This appeal is accordingly dismissed with costs. One hearing fee G.C. Appeal dismissed.

(1) Civil Appeal 941 of 1965 decided on April 15, 1968. (2) 42 1. A. 202, at p. 206.