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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JAIPUR BENCH : JAIPUR.

S.B. CIVIL SECOND APPEAL NO. 242 of 1984.

Prabhu Singh Son of Shri Ballu Singh, by caste
Sikh, resident of village Kotkasim, Tehsil
Kishangarhbas, District Alwar.

....Defendant/Appellant.

v e r s u s

The Rajasthan Board of Muslim Wakfs, Jaipur
through Nisar Ahmed Son of Nasib Khan, resi-
dent of village Kotkasim, Tehsil Kishangarhbas,
District Alwar.

....Plaintiff/Non-petitioner.

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SINGLE BENCH CIVIL SECOND APPEAL
UNDER SECTION 100 OF THE CIVIL
PROCEDURE CODE, 1908 READ WITH
ORDER XLI RULE 1 OF THE C.P.C.
AGAINST THE JUDGMENT AND DECREE
DATED 24TH OF NOVEMBER, 1984
PASSED BY THE LEARNED ADDITIONAL
DISTRICT JUDGE, KISHANGARHBAS,
DISTRICT ALWAR IN CIVIL REGULAR
FIRST APPEAL NO.92 OF 1979
AFFIRMING THEREBY THE JUDGMENT
AND DECREE DATED 20TH OF AUGUST,
1979 BY THE LEARNED MUNSIF AND

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JUDICIAL MAGISTRATE, KISHANGARHBAS
DISTRICT ALWAR ~~DATE~~ IN CIVIL SUIT
No.34 OF 1969 :

Valuation of the suit/
Appeal for different
reliefs totalling Rs.660/-.
Court fees paid. Rs. 50/-.
.....

To,

The Hon'ble Chief Justice, Shri P.K.Banerjee,
and his Companion Judges of the High Court of
Judicature for Rajasthan at Jaipur Bench,
J A I P U R.

MAY IT PLEASE YOUR LORDSHIPS,

The defendant/appellant, named above,
most humbly and respectfully begs to submit as
under : -

1. That the plaintiff/respondent filed a suit
against the defendant/appellant on or
about 15th of April, 1969 in the court of
the learned Munsif and Judicial Magistrate,
Kishangarhbas, District Alwar for posse-
ssion, injunction, demolition and f o r
recovery of mesne profits etc.

The case of the plaintiff in brief
was that in the town Kotkasim, there is
a 'Jama Masjid' and towards its ~~south~~
south, there is a chowk of the s-aid

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Jama Masjid measuring 45 yards north-south and 28 yards east-west.

In para No.1 of the plaint, it was described that towards the south of the said chowk, there is a 'Nohra' of Nisar Ahmed and towards the west, there are houses of the refugees. Towards the east, the house of the defendant - appellant situates and that of Bishan Singh, refugee was described.

In the plaint, it was further alleged that on 13th of November, 1968, ~~they~~ without any authority the defendant/appellant opened three doors towards the chowk of the Jama Masjid and constructed a 'Chabutara' measuring 27½ feet in length and 6 feet in width.

It is further alleged that on 25th of December, 1968, certain other constructions in the form of 'Chabutaras' were also made towards the said chowk.

It is further alleged that since the chowk, in question, is the property of the wakf and is left for the benefit of the Jama Masjid, Nisar Ahmed was authorised by the Rajasthan Board of Muslim Wakf, Jaipur to file a civil

suit, out of which the present appeal arises.

Since the defendant/appellant opened the doors in his own house towards the chowk of the Jama Masjid described by the words 'A', 'B', 'C', and 'D' and gave it shape of shops and were let out @ Rs.15/- per month and as such, the plaintiff is entitled to recover the said amount as mesne profits from the defendant/appellant.

Since according to the plaintiff, the defendant/appellant was in illegal possession of the 'Chabutara' constructed on the chowk of the Jama Masjid and so also he opened the doors towards that side, his premises are being used as the shopw, therefore, the plaintiff was entitled to the mesne profits so recovered amounting to Rs.285/- and a sum of Rs.60/- per month till the defendant/appellant is dis - possessed from the 'Chabutara'.

An injunction was also sought for that the defendant/appellant be restrained by means of a mandatory injunction for ~~not~~ closing the doors of the shops so opened and then by means of perpetual injunction restraining him from opening the same again.

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2. That the defendant/appellant contested the suit and denied the allegations made by the plaintiff. It was inter alia submitted that the chowk 'in question', is not a chowk of the Jama Masjid and is a public property and the defendant/appellant has every right to open the doors of his house towards the said chowk. The 'Chabutaras' which have been constructed by the defendant had not been constructed in the chowk.

It was pleaded that the plaintiff has got no right to bring the present suit and the constructions so made by the defendant/appellant were with the permission of the Gram Panchayat with whom the land had vested being a public land.

It was further pleaded that the plaintiff is not entitled to claim any mesne profits from the appellant, since the tenants have been kept by the appellant in his own shops.

THEREFORE, the suit brought by the plaintiff deserves to be dismissed, and accordingly prayed so.

3. That the learned trial court after hearing the parties framed the issues and recorded the evidence of the parties and by his judgment and decree dated 20th of August, 1979 decreed the plaintiff's suit with

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regard to the closure of the doors of the shops of the appellant and so also the demolition of the 'Chabutaras', in question.

With regard to the mesne profits, the learned trial court granted a decree with effect from 15th of April, 1969 @ Rs. 40/- per month for unauthorised use and damages.

The aforesaid judgment and decree of the learned trial court dated 20th of August, 1979 was upheld in appeal by the learned Additional District Judge, Kishan-garhbas, District Alwar vide his judgment and decree dated 24th of November, 1984, in an appeal brought by the defendant.

FEELING AGGRIEVED AGAINST THE aforesaid judgment and decree passed by the learned two courts below, the defendant/appellant, named above, most humbly and respectfully begs to submit t h e present civil second appeal before this Hon'ble Court on the following grounds amongst others : -

- a) THAT the learned two courts below have seriously erred in holding that the chowk, in question, is the property of the Rajasthan Muslim Wakf Board and,

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therefore, the 'Chabutaras' constructed by the defendant/appellant and so also opening of the doors towards the said chowk was/were unauthorised and as such it was directed that the 'Chabutaras', in question, be removed and the doors be closed.

It is submitted that this finding of the learned two courts below is absolutely perverse inasmuch as the plaintiff has not been able to prove that the said chowk was the wakf property.

- b) THAT in holding that the property was a wakf property, the learned two courts below have relied upon the document Ex.1 and its Hindi version Ex.A.1.

The learned first appellate court has reproduced in its judgment the extract of the document Ex.A.1.

From a bare perusal of the said reproduction, it appears that towards the east of the said chowk, there is 'Aam Rasta'.

Again a 'Rasta' has been shown towards the south.

So far as the appellant's property and the 'Chabutaras' are concerned, these are towards the east of the said

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'Rasta' and from the document itself, which has been reproduced by the learned first appellate court, it is clear that the 'Chabutara' and the doors face the 'Rasta' and not the chowk.

From the document it is further clear that except the 'Rastas', which have been shown therein, rest of the property has been dedicated to the wakf.

Taking the document as such, though the appellant contest the genuineness and so the inferences drawn from the said document, the construction of the 'Chabutaras' and the opening of the doors are towards the 'Rasta' and not abating on the chowk itself.

That being so, the learned two courts below have seriously erred in directing the appellant to demolish the Chabutaras and so also close the doors of the shops.

- c) THAT from the evidence of the plaintiff, it is not at all clear and it has not at all been proved that the constructions where the 'Chabutaras', which have been constructed by the defendant/appellant and so also the doors opened by him are abating on the chowk and further that the chowk belongs to the Jama Masjid or a wakf property.

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Firstly, the document which is said to be of Hizri 1257 has not at all been proved nor any identity with regard to the chowk, in question, has been established. This is an admitted position that there is an 'Aam Rasta' on the sides of the said open land, which is described as the chowk and so also an 'Aam Rasta' passes through the said chowk.

Secondly, it is also an admitted position that on all the sides of the chowk, there are shops facing the chowk, in question.

So far as the shops other than that of the appellant are concerned i.e. on other three sides, namely, on the north, west and south of the chowk, they are the shops of the wakf.

The very fact that the shops are situated on the three sides, apart from that of the appellant, would go to prove that it is the property of the general public and has vested in the Gram Panchayat only.

- d) THAT the defendant/appellant, / has taken the permission for construction of the 'Chabutaras', in question and so also has opened the doors towards the chowk, in question, by taking the permission

from the Gram Panchayat, then in that case, the plaintiff ought to have impleaded the Gram Panchayat as a party to the suit and in the absence of the Gram Panchayat as a defendant to whom the property, in question, belongs, & as has been contended by the appellant, then in that case, in the absence of the necessary party, the suit must fail.

Apart from above, the plaintiff ought to have brought a suit for declaration failing which no relief of injunction could be granted to the plaintiff in the absence of a suit for declaration.

- e) THAT under Section 5 of the Wakf Act, 1954, had the property, namely the chowk, in question, been the wakf property, it would have been notified in the Official Gazette after necessary survey, as per different provisions of the Wakf Act, 1954 and it is not the case of the plaintiff that the chowk, in question, has been notified in the Official Gazette in the list of the properties of the Wakf and, therefore, in the absence of any such notification in the Official Gazette, the property, in question, namely, the Rajasthan Board of Muslim Wakf, Jaipur.

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As against the aforesaid, since it was an open chowk and so was the public property, it had vested in the Gram Panchayat by virtue of the provisions of the Rajasthan Panchayat Act.

- f) THAT as has been submitted hereinbefore, the identity of the chowk and so also the measurements have not been proved by the plaintiff.

It has not been proved that the chowk shown in Ex.4 is a chowk of the Jama Masjid and the actual measurement overlaps the constructions like the Chabutaras of the appellant. Even the Hindi version Ex.A.1 has not been proved to be correct inasmuch as this has been done by PW/1 himself, who is an interested person and an admission in favour of the plaintiff himself, is not binding on the appellant.

The plaintiff has also not been able to prove that the chowk, in question, once belonged to one Pahar Khan, who is alleged to have dedicated the same to the Jama Masjid, belonged to the plaintiff himself or to the wakf.

- g) THAT PW/1 Nisar Khan in his statement as PW/1 that because of the stamp of

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the Kazi, it is a registered "Wakfnama", which is Ex.1.

It is submitted that simply because it bears some impression of a seal allegedly said to be that of the Kazi without any proof or the source of the knowledge of Nisar Ahmed, PW/1, it is not proved that the Ex.1 is a registered "wakf deed".

Even Ex.2, a decision dated 13th of June, 1935 does not prove that the said chowk is the one which was in dispute at that time and further it is a chowk dedicated to the Jama Masjid.

The Ex.3, the copy of the decision of the Panchayat Samiti against the judgment of the Gram Panchayat does not prove the property, in question, namely, the chowk to be the wakf property. Even if any construction made by one Ram Avtar Aggarwal and a decision of the Gram Panchayat to remove it have not been set aside in appeal, will not entitle the plaintiff to claim or said to be proved that it is the wakf property.

The most important admission on the part of PW/1 Nisar Ahmed that in the chowk, the entire public has a right to access both ingress and outgress and so it has been admitted that the shops of

the appellant have also an access both ingress and outgress through the said chowk by the public.

It has also been admitted that in spite of the construction of the 'Chabutaras' in front of the shops of the appellant, no obstruction is created in the thoroughfare through the chowk, in question.

PW/2, Hasmat Khan has admitted that from the very beginning on all the four sides of the chowk, in question, there are shops.

PW/3 Prabhati has also proved that between the shops and the chowk, there is a Rasta but he has said part of the 'Chabutara' falls in the Rasta.

He has further stated that the General Public Meetings are also held in the said chowk and the processions also pass through the said chowk as a thoroughfare and no permission for holding the meetings are obtained from anybody.

So none of the witnesses of the plaintiff has proved by cogent evidence that the property of the chowk, in question, is the property of the plaintiff.

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AS SUCH, their testimony can not be relief upon.

- h) THAT the documents Ex.2, Ex.3 and Ex.6 ^{not} have/proved the property of the chowk to be that of the Jama Masjid or that of the plaintiff and the learned two courts below gave a perverse finding against the appellant.

Apart from above, the evidence produced by the appellant clearly shows coupled with the admissions in cross - examination or otherwise of the plaintiffs' witnesses that the chowk, in question, is a public chowk, which is vested in the Gram Panchayat.

- i) THAT the learned two courts below have seriously erred in assessing the mesne profits or the damages in favour of the plaintiff @ Rs.10/- per month for four shops and the findings in this regard so given by the learned two courts below are absolutely perverse inasmuch as the shops are in existence and admittedly are the property of the appellant. Even if the doors have been opened towards the chowk, in question, it will not entitle the plaintiff for any damages or the mesne profits whatsoever

and if there is any encroachment, which has not at all been proved, by virtue of construction of the 'Chabutaras', then in that case, the plaintiff could have got a decree for the demolition of the 'Chabutaras' but not the mesne profits and the damages.

In the present case, neither any encroachment on the property of the plaintiff has been proved nor the plaintiff can be said to be entitled to any mesne profits or the damages.

The estimate made by the learned trial court and affirmed by the learned first appellate court @ Rs.10/- per month is also perverse and without any basis.

j) THAT the other grounds shall be submitted at the time of the final arguments of the case.

k) THAT on the basis of the aforementioned submissions, the following important substantial questions of law arise in the present appeal for the determination and decision by this Hon'ble Court : -

1) WHETHER the inferences drawn by the learned two courts below on

the basis of Ex.A.1 and Ex.2 that the chowk, in question, is the property of the plaintiff, is perverse ?

- 11) WHETHER on the admissions of the plaintiff and his witnesses that on all the sides of the chowk, in question, the shops are existing, the General Public Meetings are held in the chowk and processions are taken out from the chowk as a thoroughfare and particularly, the passage in front of the shops of the appellant.

A part of a Rasta, can the plaintiff be entitled to have a decree of demolition of the Chabutaras and so also a mandatory and perpetual injunction for the closure of the doors and future restraint be granted in favour of the plaintiff ?

- 111) WHETHER the property, namely, the chowk, in question, had been the property of the Rajasthan Board of Muslim Wakf was required to be notified in the Official Gazette under Section 5 of the Wakf Act, 1954 and in the absence of such

notification, can the property of the chowk, in question, be held to be that of the plaintiff ?

- iv) WHETHER the plaintiff is entitled to a mesne profit or damages @ Rs. 10/- per month simply because the shops, which are admittedly the property of the appellant, for which a rent of Rs. 15/- per month is being paid.

It is, therefore, humbly prayed that your Lordships may very graciously be pleased to accept and allow the present civil second appeal on behalf of the defendant/appellant and the decree and judgment dated 24th of November, 1984 passed by the learned Additional District Judge, Kishangarhbas, District Alwar in Civil Regular First Appeal No.92 of 1979 affirming thereby the judgment and decree dated 20th of August, 1979 passed by the learned Munsif and Judicial Magistrate, Kishangarhbas, District Alwar in Civil Suit No.34 of 1969, may kindly be quashed and set aside, and the suit filed by the plaintiff/non-petitioner be also dismissed, with costs throughout.

Humble appellant.
through his Counsel:

J.P. Goyal
(H.C. Rastogi/J.P. Goyal)
Advocates.

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CERTIFIED :

1. That no such civil second appeal has been filed prior to this before this Hon'ble Court on behalf of the defendant/appellant.
2. That the extra copy, P.F., Notices etc. shall be submitted within three days of its admission by this Hon'ble Court.
3. That the Pie Papers were not readily available, hence the stout papers have been put to use.
4. That this has been typed out in my office by my private Stenographer, who is not employed.

J.P. Goyal

COUNSEL FOR THE APPELLANT.

JAIPUR.

DATED : 30.11.1984.

J.P. Goyal, Adv.

.....
[Stamp: राजस्थान रिपोर्टर, राज. उच्च न्यायालय पीठ, जयपुर]
11/12/84