IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

-VERSUS-

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

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COMPILATION OF JUDGMENTS ON WAQF

BY
DR. RAJEEV DHAVAN, SENIOR ADVOCATE

(PLEASE SEE INDEX INSIDE)

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

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courts of appeal against the order of the tribunal. These courts only exercise advisory jurisdiction in such references. The High Court in a reference under Section 66 of the Act can, however, go into the question as to whether the conclusion of the tribunal on a question of fact is based upon relevant evidence . . . . The fact that the High Court on appreciation of evidence would have arrived at a conclusion of fact different from that of the tribunal did not warrant interference with the finding of the tribunal.

On the facts as found by the tribunal the answer to the question referred under Section 66(1) must, therefore, be in the affirmative. As regards the three questions referred under Section 66(2), for the reasons already stated, the tribunal was right in holding that Section 25A of the Indian Income-tax Act, 1922, had no application in the present case and the answer to the first question must also be in the affirmative. In view of the affirmative answers to these two questions, the other two questions referred under Section 66(2) do not really arise; we have, however already held that on the facts appearing from the order of the tribunal the onus was upon the department to prove that the income in question belonged to the Hindu undivided family.

7. In the result the appeals are allowed but in the circumstances of the case without any order as to costs.

(1976) 4 Supreme Court Cases 780

(BEFORE P. K. GOSWAMI AND S. MURTAZA FAZAL ALI, JJ.)

SYED MOHD. SALIE LABBAI (DEAD) BY L. Rs. AND OTHERS . . Appellants;

Versus

MOHD. HANIFA (DEAD) BY L. Rs. AND OTHERS . . Respondents.

And

VICE VERSA

Civil Appeal Nos. 1223-1224 and 2026 of 1968†, decided on March 22, 1976

Mahomedan Law — Wakf — Mosque and its adjuncts when to be deemed of public character — Hanfi (Sunni) school of Mahomedan Law — Distinction between private and public wakf explained — Right to become Imam to be decided on facts — Office not hereditary

The ancestors of the plaintiff Rowthers, who constituted a bulk of the Muslim population in the village, approached the ancestors of the defendants for permission to erect a building for the purpose of worship. There was no mosque in the village. The agreement that emerged recited (i) that the plaintiffs were constructing a 'pallivasal' on the defendants' ancestor's land. (ii) after completion of the building, described as a mosque, they would have no right except that of worship, (iii) such right would only contemplate the lighting of lamps and also being responsible for the maintenance of the mosque, (iv) that the said construction was being made purely for the purpose

†From the Judgment and Decree dated October 28, 1966 of the Madras High Court in Appeals 227 of 1960, 427 of 1961 and 227 of 1960 respectively.

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of worship; (v) that there shall be a doorway and two windows affixed on the southern wall of the mosque and one doorway on the eastern side so as to serve as entrances.

Held:

As regards a mosque in order to create a valid dedication of a public nature, the following conditions must be satisfied:

(1) that the founder must declare his intention to dedicate a property for the purpose of a mosque. No particular form of declaration is necessary. The declaration can be presumed from the conduct of the founder either express or implied;

(2) that the founder must divest himself completely from the ownership of the property. The divestment can be inferred from the fact that he had delivered possession to the mutawalli or an imam of the mosque. Even if there is no actual delivery of possession the mere fact that members of the Mahomedan public are permitted to offer prayers with azan and ikamat, the wakf is complete and irrevocable; and

(3) that the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque. (Para 39)

Jewun Doss Sahoo v. *Shah Kubeer-ood-deen*, (1840) 2 MIA 393, *relied on.*

As regards the adjuncts the law is that where a mosque is built or dedicated for the public if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, those constructions would be deemed to be accretions to the mosque and the entire thing will form one single unit so as to be a part of the mosque. (Para 39)

Sayad Maher Husein v. *Haji Alimahomed*, AIR 1934 Bom 257, *approved.*

Mohammad Shah v. *Fasihuddin Ansari*, AIR 1956 SC 713, *relied on.*

A mosque becomes consecrated for public worship either by delivery or on the declaration of the wakif that he has constituted it into a musjid, or on the performance of prayers therein even by one person. (Para 42)

Adam Sheik v. *Isha Sheik*, 1 CWN 76 and *Saiyad Maher Husein* v. *Haji Alimahomed*, AIR 1934 Bom 257, *approved.*

Even a vacant place may be dedicated as a mosque without having the appearance of a mosque. (Para 43)

Akbarali v. *Mahamedally*, AIR 1942 Bom 356, *approved.*

Also where a mosque has been in existence for a long time and prayers have been offered therein, the court will infer that it is not by leave and licence but that the dedication is complete and the property no longer belongs to the owner. (Para 44)

Mitru v. *Ramgopal*, AIR 1935 All 891; *Abdul Rahim Khan* v. *Fakir Mohammad Shah*, AIR 1946 Nag 401; *Musahib Khan* v. *Raj Kumar Bakshi*, AIR 1938 Oudh 238 and *Maula Baksh* v. *Imamuddin*, AIR 1920 Lah 384, *approved.*

Masjid Shahid Ganj Mosque v. *Shrimani Gurdwara Prabandhak Committee, Amritsar*, LR 67 IA 251: AIR 1940 PC 116, *relied on.*

It may be stressed that in the case of a mosque, the founder's permission or the bare act of allowing the members of the Mahomedan public to offer prayers amounts to a complete delivery of possession. (Para 47)

Also once there was a complete dedication to the mosque as a place

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was that the graveyard was a family graveyard of the defendants and they allowed corpses of other Mahomedans to be buried only on charging pit fees and other amounts. Hence the earlier judgments in the first place operated as res judicata so far as the graveyard is concerned. and secondly they constituted conclusive evidence to prove that the burial ground had been used as public graveyard from time immemorial and thus became a public graveyard by dedication. The defendants. however. being the descendants of the founder had established a right by usage to charge pit fees and other charges. (Paras 9 to 19, 27, 33, 34 and 62)

Civil Procedure Code, 1908 — Section 11 — Res judicata — Absence of pleadings of earlier suit — Inference from its judgment — Held, obiter dicta observations of the Court cannot operate as res judicata (Para 18)

Appeals dismissed M/2934/C

Advocates who appeared in this case:

T. S. Krishnamurthy Iyer, Senior Advocate (*K. Jayaram* and *R. Chandrasekhar*, Advocates, with him), for the Appellants in C.A. Nos. 1223-1224 of 1968 and for the Respondents in C.A. No. 2026 of 1968;

A. K. Sen, Senior Advocate (*A. V. Rangam* and *Miss A. Subhashini*, Advocates, with him), for the Respondents in C.A. Nos. 1223-1224 of 1968 and for the Appellants in C.A. No. 2026 of 1968.

The Judgment of the Court was delivered by

FAZAL ALI J.—These appeals, by certificate granted by the High Court, arise out of a common judgment and will be dealt with by one judgment. The appeals have had a chequered career resulting from a highly contested litigation spreading over a century and a half. A review of the historical background of the case reveals a rather sad story and an unfortunate saga of a perpetual strife and struggle, disputes and differences between the two sections of the Muslim community of village Vijayapuram (situated in Tiruvarur district in the State of Madras) setting up diverse rights and rival claims over the property which was essentially a religious property originating from a fountain of purity flowing from the life and teachings of a celebrated saint who was the original founder of the property. Property essentially dedicated to God appears to have been used for mundane purposes which evoked loud protests from another section of the Mahomedan community who wanted to protect the public character of the trust property and this has led to several suits in various courts.

2. The most unfortunate part of the drama long in process is that the courts before whom the disputes came up for decision handed down judgments which were not strictly in accordance with the *shariat* and the essential tenets of the Mahomedan Law which encouraged the parties to plunge themselves into a longdrawn and unnecessary litigation, until the High Court of Madras in one of the litigations had to point out that the only remedy to put an end to the disputes was to invoke the provisions of Section 92 of the Code of Civil Procedure and this is what appears to have been done in the action out of which these appeals arise.

3. With this pragmatic preface we now proceed to consider the facts of the case which are by no means short and simple, but present highly complicated and complex features. It appears that sometime towards the beginning of the eighteenth century Syed Sultan Makhdoom Sahib a sufi saint was residing at Vijayapuram who by his pious and saintly life attracted disciples not only belonging to the Mahomedan community but also some

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Wakf Act, 1954 — Section 55(2) — Applicability — Held, not applicable and not a bar to a suit under Section 92, C.P.C., if no Board had been constituted by that time (Para 63)

Civil Procedure Code, 1908 — Section 92 — Trustees — Suit against persons exercising de facto control over property dedicated to public use, held, maintainable — Action under Section 92 justified where properties mismanaged

Held:

In the present case the defendants have only been de facto managers of the properties in suit either as Pesh Imams or otherwise but that does not make any difference so far as application of Section 92 of the Code of Civil Procedure is concerned. The defendants have no doubt been looking after the properties in one capacity or the other and had been enjoying the usufruct thereof. They are, therefore, trustees de son tort and the mere fact that they put forward their own title to the properties would not make them trespassers. (Para 64)

Abdul Rahim Khan v. *Fakir Muhammad Shah*, AIR 1916 Nag 401; *Mahomed Shirazi* v. *Province of Bengal*, AIR 1942 Cal 313 and *Ramdas Bhagwat* v. *Krishna Prasad*, AIR 1940 Pat 425, *approved*.

On facts, there is overwhelming evidence on the record to show that the defendants were guilty of grave mismanagement and therefore a clear case for formulating a scheme under Section 92 of the Code of Civil Procedure by a suit has been made out by the plaintiffs. The scheme, however, will be confined only to the mosque, its adjuncts and the burial ground and not to the dargah which has been held to be the private property of the defendants. (Para 65)

Civil Procedure Code, 1908 — Section 11 — Res judicata — Plea of when proved — Approach — Question whether public character of the suit properties was ever in dispute in the numerous suits contested between the same parties

Held:

Before a plea of res judicata can be given effect, the following conditions must be proved:

(1) that the litigating parties must be the same;

(2) that the subject-matter of the suit also must be identical;

(3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction. (Para 7)

The best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata. But pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment. (Para 8)

On facts, the question of the public character of the wakfs in any suit filed by one party or the other was never raised. The only questions that were raised from time to time were the questions regarding the performance of certain religious ceremonies, the question of officiation of the imam and so on. Even as regards the graveyard it was never claimed by the defendants in the suits which formed the subject-matter of the judgments relied upon for proving res judicata that the Mahomedan community had no right at all to bury their dead in the graveyard. All that was contended

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Mahomedan Law — Wakf — Graveyard when deemed to be a public one — Test — Continued right to collect fees does not detract from its public character

Held :

Under the Mahomedan Law the graveyards may be of two kinds — a family or private graveyard and a public graveyard. A graveyard is a private one which is confined only to the burial of corpses of the founder, his relations or his descendants. In such a burial ground no person who does not belong to the family of the founder is permitted to bury his dead. On the other hand if any member of the public is permitted to be buried in a graveyard and this practice grows so that it is proved by instances adequate in character, number and extent, then the presumption will be that the dedication is complete and the graveyard has become a public graveyard where the Mahomedan public will have the right to bury their dead. (Para 28)

Also once a kabarstan has been held to be a public graveyard then it vests in the public and constitutes a wakf and it cannot be divested by non-user but will always continue to be so whether it is used or not. (Para 31)

The following rules determine whether a graveyard is a public or private one :

(1) that even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user i.e. where corpses of the members of the Mahomedan community have been buried in a particular graveyard for a large number of years without any objection from the owner. The fact that the owner permits such burials will not make any difference at all ;

(2) that if the graveyard is a private or a family graveyard then it should contain the graves of only the founder, the members of his family or his descendants and no others. Once even in a family graveyard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public graveyard ;

(3) that in order to prove that a graveyard is public by dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mahomedan community had buried their corpses from time to time in the graveyard. Once this is proved, the court will presume that the graveyard is a public one ; and

(4) that where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive proof to show the public character of the graveyard. (Para 31)

On facts the mere fact that the defendants Labbais used to realise pit fees or other incidental charges would not detract from the nature of the dedication. It be held that the graveyard in question is a public graveyard and the Mahomedan community have a right to bury their dead subject to payment of pit fees and other charges that may be fixed by the defendants. (Para 32)

Ballabh Das v. *Nur Mohammad*, AIR 1936 PC 83, *relied on.*

Imam Bakhsh v. *Mandar Narsingh Puri*, AIR 1938 Lah 246 ; *Sheoraj Chamar* v. *Mudeer Khan*, AIR 1934 All 868 ; *Qadir Baksh* v. *Saddullah*, AIR 1938 Oudh 77 and *Mohammad Kassam* v. *Abdul Gafoor*, AIR 1964 MP 237, *approved.*

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of public worship any reservation or condition imposed by the owner would be deemed to be void and would have to be ignored. (Para 49)

On facts, held, that the agreement entered with the defendants' ancestor unmistakably evidences the clear intention of the founder to consecrate the mosque for public worship and amounts to a declaration of a public wakf. By providing for a separate entrance through doorway and windows the owner agreed to separate the mosque from the rest of the property, namely the dargah and the compound. Further, by allowing the entire Mahomedan community of the village to worship in the mosque and to perform other ceremonies the owner of the land gave delivery of possession to the mosque. Once the mosque was constructed, it stood dedicated to God and all the rights, title and interest of the owner got completely extinguished. This happened as far back as February 16, 1829, i.e. about a century and a half ago. Since then the mosque has been used constantly for the purpose of offering prayers. (Para 48)

The consequence is if the founder's descendants indulged in mismanagement of the mosque the plaintiffs as members of the Mahomedan community could take suitable action under the law against the defendants. (Para 49)

Again where any construction is made for the purpose of the mosque or for its benefit or by way of gift to the mosque, the same also becomes a public wakf. (Para 59)

So as regards the adjuncts which were built by the Mahomedan community from time to time for the purpose of the mosque or by way of a gift to the mosque, the question of the person who actually made the construction is wholly irrelevant because all the constructions made by any person used for religious purposes incidental to offering prayers in the mosque would be deemed to be accretions to the mosque itself and there is unchallenged evidence to show that all the constructions were used by the Mahomedan community for the purpose of offering their prayers in the mosque on special occasions. (Paras 49, 50 and 51)

The facts show that the additional constructions were used for religious purposes incidental to the offering of prayers and became accretions to the mosque so as to constitute one single entity. Similarly, the mats and loudspeakers were for religious purposes. (Para 58)

Hence the mosque as also its adjuncts constituted wakf properties and had been used as such for a long time so as to culminate into a valid and binding public wakf. (Para 62)

1. *Zafar Hussain* v. *Mohd. Ghias-ud-din*, AIR 1937 Lah 552; *Nawab Zain Yar Jung* v. *Director of Endowments*, (1963) 1 SCR 469: AIR 1963 SC 985 and *Jawaharbeg* v. *Abdul Aziz*, AIR 1956 Nag 257, *distinguished*.

As regards the right to act as imam, Mahomedan Law does not favour the hereditary right of being imam because an imam must possess certain special qualities and certain special knowledge of the scriptures before he can be allowed to lead the prayers. The evidence shows that the defendant Labbais have undoubtedly been acting as imams, though not for a continuous period. This, however, is a matter for the entire Muslim community to decide because an imam is normally chosen under the Mahomedan Law by the Muslim community. There is no clear evidence of any usage or custom by which the right to act as imam is hereditary in this case. In the peculiar facts of this case the court at the time of framing a scheme would consider the desirability of associating some of the defendants with the framing of the scheme and may even appoint a suitable person from among the Labbais to look after the properties on imposing such terms and conditions as the court thinks fit. But the primary consideration should be the welfare of the wakf properties. (Para 66)

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non-Muslims of that village. The saint was held in great respect and reverence by the Hindus and Muslims alike which is evidenced by the fact of a sale deed Ext. B-1 dated May 12, 1730 which forms the starting point of the existence of the properties in suit which have been the subject-matter of such a longdrawn litigation. Exhibit B-1 shows that a part of the site where the properties in dispute are situated and which was a *punja* land was sold to the saint Syed Sultan Makhdoom Sahib by Thirumalai Kolandai Pillai who was a resident of village Vijayapuram. The sale deed conferred absolute rights on the saint with powers to alienate by way of gift, exchange and sale etc. The sale deed also mentioned that there were no encumbrances in respect of the land, and if any were found, the vendor would discharge the same. The saint died and about sixty years later another sale deed was executed by Malai Kolanda Pillai in favour of Kaidbar Sahib who appears to be a descendant of the saint and an ancestor of the Labbais who are the defendants in the present suit. This sale deed also appears to be in respect of the land which forms part of the disputed properties. The sale deed was executed on May 22, 1797. This sale deed (Ext. B-2) gives an indication that it consisted of lands and gardens and could be used as a graveyard also. Thus the properties in dispute are situated on the lands sold to the ancestors of the Labbais by the two sale deeds referred to above. It may be pertinent to note here that in the second sale deed Rowther Syed Uddin who is ancestor of one of the plaintiffs was a witness. In course of time the saint and the descendants were buried on the lands in dispute and a dargah was set up which was managed by the descendants of the saint. Several years later, the Mahomedans of the village realised the necessity of having a mosque as no mosque existed in the village and inspired by this laudable objective, the Rowthers approached Masthan Ali Khader Sahib for permission to build a mosque on a part of the land in dispute. The permission having been granted, an agreement was executed in favour of Masthan Ali Khader Sahib which is Ext: B-4 and forms the sheet anchor of the dedication said to have been made by Masthan Ali Khader Sahib for the purpose of a mosque. Thereafter in course of time certain additional constructions in the shape of a platform, few rooms, a water tank, which form adjuncts to the mosque, were added obviously without any objection from the Labbais. The vacant land appears to have been used as a graveyard where members of the Muslim community buried their dead as a matter of right on payment of certain fees or charges to the defendants or their ancestors. Subsequently the defendants constructed new shops on a part of the graveyard which alienated the sympathies of the Muslims particularly the Rowther community who regarded the construction of the shops as desecration of the graveyard and accordingly a number of suits were filed for demolition of the shops. The defendants, however, claimed the entire properties as their private properties excepting the prayer hall which was admittedly used as a mosque. There also the defendants claimed that they had a right to manage the same and to lead the congregation at prayers. The present suit has been filed by the Rowthers who were the other section of the Muslim community and whose ancestors are alleged to have built the mosque and other constructions with the previous permission of the ancestors of the defendants. This suit was brought in a representative capacity under Order 1, Rule 8 Code of Civil Procedure after obtaining the sanction of the Advocate-General under Section 92 of the Code of Civil Procedure. According to the allegations made by the plaintiffs, there were three types of properties which were wakf properties of a public and charitable nature dedicated by the ancestors of the defendants. These properties consisted of:

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(1) a huge vacant piece of land consisting of two parts which is popularly known as burial ground. On the western part of the burial ground some shops had been constructed by the defendants and all attempts made by the plaintiffs or their ancestors to get the shops demolished had so far failed;

(2) towards the western portion of the graveyard there is a tomb of the saint Syed Sultan Makhdoom Sahib over which a dargah has been built;

(3) a prayer hall adjacent to the dargah which is known as the mosque or Pallivasal. There is also a covered platform, a pond and a thatched shed which appear to be adjuncts to the mosque.

According to the plaintiffs all the three properties were public trusts dedicated to God and the defendants could not claim any right of ownership over them. The plaintiffs alleged that these properties were dedicated for public worship and were used for offering prayers since a very long time and had become wakfs by immemorial user. It was further alleged that property no. (1) was a public graveyard and the defendants wrongly claimed it to be their private graveyard by refusing permission to the plaintiffs to bury their dead. It was also alleged that the defendants had been mismanaging the wakf properties as a result of which the mosque had fallen in a state of disrepair and the graveyard was being converted into shops and other places so as to lose its origin. Lastly the plaintiffs also contended that the dargah was also a public property dedicated to God and the defendants had no individual or personal interest in the dargah. The plaintiffs, therefore, filed the present suit for removing the defendants who were de facto managers and had been guilty of acts of mismanagement and misfeasance and for framing a scheme to administer the trust properties. The suit was contested by defendants 1, 2, 4 and 6 who contended, inter alia, that the entire property was acquired by their ancestor Syed Sultan Makhdoom Sahib who died four years after the purchase and was buried on a part of the land along with the members of his family. The defendants admitted that members of the Rowther community were allowed to offer their prayers in a raised platform in front of the dargah over which a prayer hall was built by them. The defendants, however, claimed that as the Rowthers were allowed to offer the prayers by leave and licence of the founder, the prayer hall was not a public mosque but a private property of the defendants. Even if the mosque was a public property the adjuncts thereto were the personal property of the defendants and were not used for any religious purpose. Similarly with respect to the graveyard it was alleged that this was a private graveyard and the defendants were entitled to charge pit fees and other charges from those Muslims who wanted to bury their dead. They further contended that the shops had been built by the ancestors of the defendants in order to increase the revenue of the dargah and for the proper administration thereof. Lastly the defendants pleaded that the present suit by the plaintiffs was clearly barred by res judicata in view of the previous judgments of the courts pronouncing upon the rights of the parties against the plaintiffs.

4. These were the facts pleaded by the parties in Original Suit Nos. 9 of 1956 and 71 of 1957 heard by the Court of Sub-Judge, Mayuram. It appears that one suit being O. S. No. 9 of 1956 was filed in the court of the Sub-Judge, Mayuram whereas suit no. 71 of 1957 was originally filed in the court of the District Munsif, Tiruvarur as O. S. No. 16 of 1957 but the same was transferred by the District Munsif to the District Munsif's court

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at Nagapattinam and was later transferred to the Sub-Judge, Mayuram to be tried along with O. S. No. 9 of 1956. The trial Court consolidated the two suits and decided them by one common judgment. It might also be mentioned that the present action was preceded by proceedings under Section 145 of the Code of Criminal Procedure wherein the possession of the properties in dispute was found to be with the defendants. In suit no. 9 of 1956 which was filed in the court of Sub-Judge, Mayuram, the court framed the following issues :

1. Are the Pallivasal, dargah, the burial grounds, prayer hall etc., set out in Schedule 'A' public trusts or are they private trusts belonging to the Labbais?

2. Is the suit for framing a scheme not competent?

2(1). If not, is it necessary or desirable to frame a scheme and if so to what trusts?

3. Is this suit barred by the decision in O. S. No. 304 of 1898, District Munsif's Court, Tiruvarur and O. S. No. 8 of 1937 Sub-Court, Tiruvarur?

4. Is this suit barred under Section 55 of the Muslim Wakf Act of 1954?

5. Is the Imamship and Muthavalli hereditary in the family of Labbais and the defendants?

6. Is the second defendant a Imam and Muthavalli?

7. To what reliefs, if any, are the parties entitled?

In suit no. 71 of 1957 where substantially the same pleas were raised, the following issues were struck by the court :

1. Whether suit, as framed, prayed for declaration that the order in M. C. No. 9 of 1955 and Cr. R. P. No. 784 of 1955 are void, is sustainable in law?

2. Whether the suit properties are properties of public trust as claimed by the plaintiffs?

3. Whether the Rowther community of Vijayapuram are entitled to be in management and possession of the suit properties as claimed in the plaint?

4. Whether the pleas, covered by issues 2 and 3 above are not barred by res judicata by the findings in the suits and appeals in O. S. No. 167 of 1893, O. S. No. 304 of 1898 and O. S. No. 8 of 1937 referred to in the written statement?

5. Whether it is open to the plaintiffs to plead that they are in possession and management in spite of orders in M. C. No. 9 of 1955 and Cr. R. P. No. 784 of 1955 and C. C. No. 120 of 1955, Sub-Divisonal Magistrate, Nagapattinam?

6. Whether the suit for declaration is maintainable?

7. Whether the suit is not properly valued for the purposes of court fees and jurisdiction?

8. To what relief are the plaintiffs entitled?

The trial Court dismissed the plaintiffs' suits deciding the main issues against the plaintiffs. Thereafter the plaintiffs of both the suits filed appeals before the High Court of Madras and the High Court reversed the decision of the trial Court in many respects and accepted the plaintiffs' case with respect to

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the mosque, its adjuncts and the graveyard but found that so far as the dargah was concerned it was the private property of the defendants and the plaintiffs had no cause of action with respect to the same. The High Court accordingly decreed the plaintiffs' suits with respect to the mosque, its adjuncts and the graveyard and remanded the case to the trial Court for framing a scheme for administration of the trust properties. The suit regarding the dargah was, however, dismissed. Both the plaintiffs and the defendants have filed appeals by certificate to this Court. Appeal No. 2026 of 1968 is by the plaintiffs regarding the adverse decision given by the High Court in respect of the dargah, while appeal no. 1223 of 1968 which is the main appeal is by the defendants 1, 2, 4 and 6 against whom the High Court decreed the suits with respect to the mosque, its adjuncts and the graveyard. Civil Appeal No. 1224 of 1968 has been filed against the decision of the Madras High Court which arises out of Original Suit No. 71 of 1957.

5. We have heard the learned Counsel for the parties. Mr. Krishnamoorthy Iyer appearing for the appellants has raised the following points before us:

(1) that the history of the litigation would clearly show that the previous judgments between the parties operated as res judicata and the High Court was wrong in not giving effect to the plea of res judicata which would have put a final seal to the disputes between the parties;

(2) that there is clear evidence of the manner in which the properties appear to have been dedicated and there is no clear declaration of dedication for the purpose of the mosque and the prayers offered in the mosque were only by leave and licence of the founder, and there was no public wakf of the mosque at all which was only a private mosque or a family mosque of the defendants. The learned Counsel submitted that the High Court has completely overlooked this legal aspect of the matter;

(3) that even if the mosque was wakf of a public character the defendants possessed the hereditary right to administer and govern the same and in these circumstances the plaintiffs had no right to dislodge them by asking the court to frame a scheme. On a parity of reasoning it was contended that the graveyard was also not a public wakf but the family graveyard of the defendants;

(4) that the suit was clearly barred by Section 55(2) of the Muslim Wakf Act, 1954; and

(5) that Section 92 of the Code of Civil Procedure had no application to the present case inasmuch as the defendants were not trustees within the meaning of Section 92 of the Code.

6. Mr. Asoke Sen appearing for the plaintiffs/respondents conceded that he would not press his claim so far as the dargah was concerned which has rightly been held as the private property of the defendants. On the other points, Mr. Sen repelled the arguments of Mr. Iyer by submitting that the plea of res judicata was totally unfounded inasmuch as the public character of the wakf never came up for decision before the courts which decided the previous litigation, where the question was confined only to certain rights claimed by the defendants with respect to leading the congregation and administration and management of the mosque. It was further contended that there is overwhelming evidence to show that the graveyard

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was a public trust by immemorial user and the defendants had no right to construct the shops thereon. On the question of the dedication it was argued that under the Mahomedan Law an oral dedication is enough to create a wakf and Ext. B-3 contains an intrinsic evidence of a clear dedication of the property for the purpose of the mosque along with its adjuncts, which were in fact used for the purposes connected with the performance of the prayers. Lastly it was submitted that Section 55 of the Muslim Wakf Act had no application because at the time when the suit was brought no Board was constituted under the Act. As regards Section 92 of the Code of Civil Procedure it was submitted that the defendants were undoubtedly trustees *de son tort* and would, therefore, fall within the ambit of Section 92 of the Code of Civil Procedure and as the trial Court had itself held that the defendants were guilty of gross negligence, the provisions of Section 92 of the Code of Civil Procedure could be clearly invoked.

7. In the light of these arguments of the parties and the history of the case, we would now proceed to decide the points in controversy in this case. We would first deal with the question of res judicata. In support of this plea the defendants have relied on Exts. B-5 to B-9, B-12, B-16, B-28, B-30, B-31 and B-73 in support of their case that these judgments constitute and operate as res judicata and particularly judgments given in those suits which were brought in respresentative capacity under Order 1, Rule 8 of the Code of Civil Procedure. Before we analyse these judgments, it may be necessary to mention that before a plea of res judicata can be given effect, the following conditions must be proved:

(1) that the litigating parties must be the same;

(2) that the subject-matter of the suit also must be identical;

(3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction.

8. In the instant case according to the plaintiffs/respondents the identity of the subject-matter in the present suit is quite different from the one which was adjudicated upon in the suits which formed the basis of the previous litigation. In our opinion the best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata. Unfortunately however in this case the pleadings of the suits instituted by the parties have not at all been filed and we have to rely upon the facts as mentioned in the judgments themselves. It is well settled that pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment. We would also like to note what the High Court has said on the question of res judicata. The High Court found that although the litigation between the parties lasted for a pretty long time it was never decided whether all or any of the suit properties constituted a public trust. Both the parties appear to have taken extreme stands but even despite the fact that the previous judgments contained an incidental finding that the mosque was a public property and so was the burial ground, the effect of these findings was nullified in 1939 when the High Court held that even if the properties in dispute were the exclusive properties of the Labbais, this expression was not meant to indicate that they were their private properties. This, in our opinion, clearly shows that the public character of the wakf or of the mosque was never in issue. The High Court on this point found as follows:

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> We are, therefore, of the view, that the issue as to whether the properties constituted a public trust having been never raised and decided between the parties in any of the prior suits O. S. No. 9 of 1956 on that question was not barred by res judicata. The finding of the court below in this regard is affirmed.

The trial Court had also negatived the plea of res judicata taken by the defendants.

9. With this background we would now proceed to analyse the purport and the effect of the previous judgments relied upon by the appellants. The first litigation between the parties started as far back as 1893 when the Labbais filed a suit against the defendants in the court of the District Munsif, Tiruvarur being O. S. No. 167 of 1893. This suit was decided by the judgment Ext. B-5 dated March 26, 1895. A perusal of the judgment will clearly disclose that the suit was confined to two points. In the first place the plaintiffs claimed certain rights for performance of ceremonies in the properties and to a share in the income accrued to the mosque from the disciples. Secondly, so far as the graveyard was concerned the claim was confined to receiving pit fees for the burials. Thus the court had decreed the plaintiffs' suit for injunction holding as follows:

> The result is that the plaintiffs will have a permanent injunction restraining the defendants from interfering with the plaintiffs' right of officiating at the *khutba*, the daily prayers and the *janaza* and in reciting *Mowlud*, *Khattam*, *Koran* and *Fathas* and, in the absence of a *Modin*, the *Vangu* (call for prayers) and of lighting the pallivasal and doing such other duties as pertain to the *Modin* (it being open to the Labbai plaintiffs to do the duties of the *Modin* when they pleased), during their turn of office of four months (5th to 8th months of the Hijri both inclusive) subject of course to their conducting themselves agreeably to the rules regulating their conduct as Labbais. Considering all the circumstances of the case, I think it only right that the plaintiffs should have their costs from the contending Rowther defendants in proportion to their success.

It is, therefore, clear that the munsif did not at all decide either the public character of the mosque or the mode and manner or even the effect of the dedication of the site for the purpose of the mosque or the graveyard. It is true that the plaintiffs had put forward the claim of hereditary owners of the mosque but that was only in a limited sense, namely, for the purpose of the management of the mosque. Once the dedication was complete, the property passes from the owner to God and it never returns to the owner and, therefore, the question of the mosque being private can never arise. In fact we might mention that the very concept of a private mosque is wholly foreign to the dedication of a mosque for public purpose under the Mahomedan Law. In these circumstances it is obvious, therefore, that as the public character of the wakf of the graveyard was not in issue in that suit, the subject-matter of the judgment was not identical with that of the present suit. In these circumstances, therefore, this judgment cannot operate as res judicata.

10. Exhibit B-6 dated March 16, 1897 is the judgment in appeal from the aforesaid decision where at p. 394 of the paper book the Subordinate Judge held that the Pallivasal or the prayer hall is public property and not descentible to the plaintiffs of that suit. Thus if at all there was any finding regarding the mosque it was against the defendants. In these circumstances,

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therefore, we are satisfied that this judgment does not appear to be of any assistance to the defendants.

11. Exhibit B-7 dated December 21, 1899 is the judgment given by the District Munsif, Tiruvarur in O. S. No. 304 of 1898. This was a suit filed by the members of the Rowther community regarding their right to offer prayers and bury the dead in the mosque compound and for managing the affairs of the mosque. In that case also while the dargah was found to be the private property of the Labbais i. e. the defendants, no finding was given regarding the public nature of the mosque although it was held that the Rowthers had a right to make repairs and manage the mosque and to offer prayers. On the vexed question regarding the public nature of the mosque, the court refrained from making any observation and stated as follows :

> I therefore studiously refrain from giving any decision on that vexed question about which the Labbais appeared to be particular. If their rights, if any, in that matter is invaded by the Rowthers, their proper remedy would be to seek compensation and get their rights declared against the community once for all in a suit properly framed for that purpose.

In fact it seems to us that although that judgment cannot operate as res judicata, the finding given by the learned Destrict Munsif was wrong on a point of law. Once the founder dedicates the site for the purpose of building a mosque and prayers are offered in the mosque the site and the mosque become wakf properties and the ownership of the founder is completely extinguished. Under the Mahomedan Law no Muslim can be denied the right to offer prayers in a mosque to whatever section or creed he may belong. Thus that judgment also does not appear to be of any use to the defendants.

12. Exhibit B-8 is the judgment of the District Judge dated November 13, 1902 in appeal against the aforesaid judgment which was dismissed. The appellate Court also held that the prayer hall was a public property although some of the rooms which formed adjuncts of the mosque belonged to the present plaintiffs i.e. the Rowthers. The ownership of the plaintiffs was inferred merely from the fact that they held the keys of the rooms. It is true that the graveyard was held to belong to the defendants but there also the principles of Mahomedan Law were completely overlooked.

13. Exhibit B-9 is the judgment of the High Court of Madras dated July 24, 1906 in Second Appeal Nos. 541 and 542 of 1903. Those appeals were dismissed with the modification that whereas the plaintiffs had the right to bury the corpses of the members of their community in the burial ground they had to pay the proper burial fees. Thus to a great extent the decision of the subordinate courts was modified by the High Court and the public character of the burial ground was in a way affirmed.

14. Exhibit B-12 dated September 4, 1923 is the judgment of the Subordinate Judge, Nagapattinam, in appeal against the judgment of the munsif in suit no. 579 of 1920. The suit was brought by some members of the muslim community for an injunction restraining the defendant Labbai from reciting prayers or conducting the worship in the prayer hall. The suit was dismissed on the finding that the defendant Labbai had the right to recite prayers and lead congregation in the prayer hall. The Subordinate Judge in appeal differed from the judgment of the learned Munsif and held that while an injunction could be granted with respect to the prayer hall alone,

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the defendants were entitled to officiate at the prayers in the adjuncts of the mosque. The decree of the trial Court was accordingly modified. Here we might mention that the judgment suffers from a serious legal infirmity arising from a complete ignorance of the essential principles of the Mahomedan Law. Once the founder dedicates a particular property for the purpose of a public mosque, the Mahomedan Law does not permit anyone from stopping the Mahomedan public from offering prayers and reciting Koran etc. Similarly the adjuncts to the mosque which are also used for religious purpose become as much a part of the mosque itself and in these circumstances no injunction should have been granted at all by the court. However, as here also the public character of the mosque was not at all involved either directly or indirectly this decision also cannot operate as res judicata. The question of the right to officiate in a public mosque has to be decided according to the principles of the Mahomedan Law and usage and we shall deal with this aspect when we consider the contention of the appellants regarding the public character of the mosque.

15. Exhibit B-16 dated September 13, 1926 is the judgment of the High Court of Madras against the aforesaid judgment of the Subordinate Judge in Second Appeal No. 1890 of 1925. This appeal was decided on September 13, 1926 and it upheld the judgment of the learned Subordinate Judge. This judgment is also confined only to the question whether public worship was carried on in portions marked B and C in the plan. Thus the limited question which fell for consideration of the High Court was not that the portions marked B and C formed parts of public mosque but whether there was right of prayers in those places.

16. Exhibit B-28 dated August 31, 1937 is a judgment of the Subordinate Judge in suit no. 8 of 1937 brought by the Rowthers against the Labbais. To begin with this suit also related not to the nature of the public mosque but only to the management thereof. The main question which arose for decision in that suit was as to who was entitled to manage the affairs of the mosque, whether the right of appointing Imam was hereditary. Learned Counsel for the appellants placed great reliance on the following observations of the Subordinate Judge:

> My finding on issue 1, in so far as it relates to O. S. No. 304 of 1898, will be that the decision therein operates as res judicata as regards the ownership and physical control of the suit mosque, but not as regards the person who is to appoint as Imam. That is to say, the plaintiffs are debarred from disputing the Labbais' ownership of the mosque and burial ground as a whole and from asserting that the plaintiffs themselves are anything more than licensees in respect of the mosque.

It was submitted that the court had clearly found that the question of the ownership and physical control of the mosque was finally adjudicated upon and operated as res judicata as held by the court. This observation made by the High Court has to be understood in the light of the pleadings of the parties. In fact the court was merely called upon to decide the limited question as to who was to manage the mosque. From a review of the previous judgments discussed above, it is absolutely clear that it was never disputed even by the Labbais that the mosque was not a public mosque where prayers were offered by Mahomedan public. The only question which arose before the Subordinate Judge was as to who was to manage the affairs of the mosque and whether the right to appoint imam was hereditary. The court itself found towards the end of its judgment that the plaintiffs could appoint a Muttavali

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to look after the affairs in the suit mosque but they could not appoint imam but the right to lead prayers as imam was a hereditary right vested exclusively in the defendants' family. We might hasten to add that once a mosque is held to be a public mosque, the Mahomedan Law does not favour the right of a person to officiate as imam to be hereditary in the absence of a custom or usage to the contrary. An imam must possess certain essential virtues before he can claim to lead the congregation at the prayers. The property having been dedicated to God, it is not open to the founder or his descendants to interfere with the performance of public prayers. In these circumstances, therefore, we are unable to regard this judgment as barring the suit of the plaintiffs regarding the public character of the mosque.

17. Exhibit B-30 dated February 26, 1941 is a judgment of the High Court in Original Suit No. 112 of 1935 brought in the court of the District Munsif against the Municipal Council, Tiruvarur praying for an injunction restraining the Municipal Commissioner from interfering with the plaintiffs' right of access to the graveyard. Here also the public character of the wakf was taken for granted and an injunction against the municipal council was granted by the High Court. This judgment is of no assistance in deciding either the question of res judicata or for that matter the question of public character of the mosque.

18. Exhibit B-31 dated November 13, 1941 is a judgment of the High Court in Second Appeal No. 252 of 1939, and appears to have been relied upon by counsel for both the parties in support of their respective cases. In our opinion, this judgment is really important in the sense that for the first time the judgment opens up the real and the vital issue which is to be decided in this case. Here also, the appeal arose out of a suit no. 8 of 1937 brought by the Rowthers against the Labbais and the main point in dispute was the right to officiate as imam. The suit was brought in a representative capacity and was dismissed by both the courts holding that the right to appoint imam lay with the defendants Labbais. The High Court held that there was overwhelming evidence in favour of the usage relied upon by the defendants to be the Pesh Imams. The Court further pointed out that the only remedy for these constant quarrels and fights between the two communities was a suit under Section 92 of the Code of Civil Procedure. In this connection, Somayya, J. as he then was, observed as follows:

> In this case I have found that there is overwhelming evidence in favour of the usage by which the defendants are to be the Pesh Imams. The only remedy for these constant quarrels and fights between the two communities is a suit under Section 92 of the Civil Procedure Code in which the court might frame scheme having sole regard to the best interests of the institution.

Learned Counsel for the appellants, however, relied upon the observations of the learned Judge where he had mentioned that the burial ground and other places were the exclusive properties of the Labbais. The learned Judge, however, was careful enough to add that by exclusive property he never meant that it was the private property of the Labbais but only that the Rowthers had no interest in the same. As, however, the suit was not for any declaration that the mosque was a public one the observations made by the High Court were purely obiter dicta and cannot put the present plaintiffs out of court.

19. These are the judgments of the various courts in the suits filed by one party or the other relied upon by the appellants in order to prove:

(1) that the judgments operated as res judicata; and

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(2) that both the burial ground and the mosque and its adjuncts were not wakfs of a public nature.

As discussed above, the judgments do not prove any of the points relied upon by the appellants. The question of the public character of the wakfs in any suit filed by one party or the other was never raised. The only questions that were raised from time to time were the questions regarding the performance of certain religious ceremonies, the question of officiation of the imam and so on. Even as regards the graveyard it was never claimed by the defendants in the suits which formed the subject-matter of the aforesaid judgments that the Mahomedan community had no right at all to bury their dead in the graveyard. All that was contended was that the graveyard was a family graveyard of the defendants and they allowed corpses of other Mahomedans to be buried only on charging pit fees and other amounts. As to what is the effect of this will be considered by us when we deal with the broader question as to whether or not the burial grounds shown in the sketch map could be presumed to be public graveyards by immemorial user.

20. Reliance was also placed on Ext. B-73 dated April 5, 1957 an order of the High Court in Criminal Revision Petition No. 443 of 1956, where the Rowthers had admitted before the court that they would not interfere with the rights of the defendants and on the basis of that admission they were acquitted. A perusal of the order would clearly show that the admission was not unqualified, but it amounted only to this that the Rowthers would not take the law into their own hands but would take recourse to legal remedies. This is clear from the following observations of the High Court :

> But that pretention is not persisted here by the learned advocate and it is stated that by reason of this reconstruction they do not claim any rights, title or interest which does not accrue to them from the various litigations and that this will not be a precedent and that they would not do in future any such interference without obtaining the orders of the appropriate authorities.

Furthermore, the admission was made in a criminal revision when the plaintiffs had been convicted and if the admission was not made their conviction would have been upheld by the High Court. The admission, therefore, being *in terrorem* loses much of its significance. At any rate, since the plaintiffs have filed the present suit under Section 92 of the Code of Civil Procedure for framing a scheme, they have not acted against the admission, because they have availed of a remedy which was open to them under the law. This is all the documentary evidence produced by the appellants/ defendants.

21. As against this the plaintiffs have produced a large number of judgments in suits, particularly relating to the public nature of the graveyard and the attempts by the plaintiffs to get an injunction from the courts directing the defendants to demolish the shops which they had built up in some parts of the graveyard. These judgments, in our opinion, clearly show that the burial ground was a public graveyard and the case of the defendants that it was their family graveyard has been completely negatived by the judgments relied upon by the plaintiffs which extend right from 1919 to 1932. We may now proceed to discuss these judgments.

22. Exhibit A-4 dated May 7, 1919 is a decision of the District Munsif, Tiruvarur in O. S. No.331 of 1915. This was a suit brought by the Rowthers for an injunction restraining the defendants Labbais from building shops on the burial ground in question and for a mandatory injunction directing the

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defendants to remove the shops erected on some parts of the burial ground. The suit proceeded on the basis that the graveyard was a public one and the defendants who were managing the same had no right to construct shops and thereby change the nature of the graveyard. The defendants resisted the suit on the ground that the graveyard was their private property and was at the most a family graveyard. It may be noted that in their defence the defendants did not contend that no member of the public was allowed to bury the corpses and that only the members of the family of the defendants could bury their dead. It was clearly alleged that the members of the public were allowed to bury their dead on payment of burial fees. This point is of very great legal significance in order to show the nature of the graveyard. However, the munsif found that although the burial ground consisted of two parts yet he found that there was no evidence to show that there was any distinction between the first and the second part. The court found as a fact that the property had been dedicated as a public burial ground, that the defendants were merely trustees in respect of the burial ground and not absolute owners. The court accordingly granted the injunction as prayed for. It appears that the decree of the learned Munsif was upheld by the Subordinate Judge and also by the High Court of Madras in Second Appeal No. 386 of 1921. The judgment of the High Court has not been produced, but this fact is clearly mentioned in Ext. A-6 which is the judgment of the District Munsif, Nagapattinam in another suit wherein the observations made by the munsif are as follows:

> The learned Subordinate Judge says in his judgment (copy Exhibit IV-a) as follows:
>
> > As there is no doubt that the suit land on which the shops are built forms part of the graveyards the Labbais have no right to put up the shops.
>
> Against this decree in A. S. No. 13 of 1920 there was a second appeal (S. A. No. 386 of 1921) to the High Court. But the High Court confirmed the lower appellate Court's decree.

It is, therefore, clear that suit brought by the plaintiffs in 1915 and the decree granted by the Subordinate Judge was confirmed by the High Court in second appeal and this undoubtedly operates as res judicata, because the same question has been raised in the present suit by the defendants.

23. Not being satisfied with the judgment of the munsif which was confirmed by the High Court, the defendants Labbais appear to have filed another suit being O. S. No. 53 of 1924 in the court of the District Munsif for a declaration that the decree in suit no. 331 of 1915 was not binding on them and for an injunction restraining the Rowthers from seeking to demolish the shops. The munsif by his judgment dated November 30, 1925 which is Ext. A-5 dismissed the plaintiffs' (Labbais) suit and held that the judgment and decree in O. S. No. 331 of 1915 Ext. A-4 was binding on the Labbais. Instead of obeying the decree of the civil court the Labbais seem to have made up their mind to obstruct the execution of the decree by filing suits after suits. Consequently another suit was filed by the Labbais being O. S. No. 146 of 1928 for an injunction restraining the Rowthers from demolishing the shops or using the burial ground as the graveyard. This suit was also dismissed by the trial Court by virtue of its judgment dated January 14, 1939 (Ext. A-6). The court clearly observed that the Labbais have tried to circumvent the effect of the High Court decree which could not be allowed. The Court also held that the previous judgments operated as res judicata.

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24. Thus it would appear that the three attempts made by the Labbais to prevent the shops from being demolished and to assert their private right to the graveyard resulted in grotesque failure. As the Labbais failed to get the previous judgments set aside either on ground of fraud or otherwise, they appear to have thought of another ingenious device to get rid of the decree passed against them. The Labbais then brought a suit being O. S. No. 49 of 1932 for setting aside the previous decrees, particularly the decree Ext. 4, on the ground that the graveyard was injurious to public health and, therefore, it should not be allowed to be continued. This suit was also dismissed with the finding that there was no question of any injury to public health and that the graveyard was a public one. The suit was decided by the District Munsif by his judgment dated December 14, 1934 which is Ext. A-10.

25. It may be mentioned that while the above suit was pending before the District Munsif an *ad interim* injunction was prayed for by the Labbais which was refused and the Labbais then filed an appeal against this order to the District Judge who dismissed the appeal by his order dated April 20, 1932 observing as follows:

> It appears to me that this is merely an attempt to get over the adverse result of the litigation, and that having failed in the higher courts the defendants have approached the health authorities and got something out of them by which they hope to circumvent the decree.

This judgment is Ext. A-86. Having failed to obtain an *ad interim* injunction from the District Court, the Labbais filed a Civil Revision Petition No. 741 of 1932 in the High Court which was also dismissed by the High Court observing that the Labbais wanted to circumvent the decree obtained against them. The High Court observed thus:

> The learned Judge in the court below was right when he said that the petitioners are merely trying to circumvent the decree obtained against them after contest. The revision petition should not be used for that purpose and this petition must be dismissed with costs.

26. This judgment is Ext. A-87 dated August 17, 1932. The Labbais then filed an appeal against the aforesaid judgment to the District Judge who by his order dated July 11, 1936 which is Ext. A-11, after allowing some amendments prayed for remanded the suit for fresh trial. Thereafter the defendants (Rowthers) filed an appeal to the High Court against the order of remand passed by the District Judge and the High Court in A. P. P. No. 386 of 1936 allowed the appeal, set aside the judgment of the District Judge and restored the judgment of the trial Court dismissing the suit. This judgment of the High Court is dated October 7, 1938 and is Ext. A-13. The High Court clearly held that the plaint did not disclose any cause of action and it was not open to a defeated litigant to reopen the subject-matter on one excuse or the other. In this connection, the High Court observed as follows:

> It is now argued before me in this appeal that the decision of the learned District Munsif is right viz. that neither the original nor the amended plaint discloses a cause of action. It seems to me that that argument must be upheld. It is obvious that there can be in general no right for a defeated litigant immediately to reopen the whole subject-matter of the litigation.

27. Thus the High Court put a stamp of finality on the frivolous suits brought by the Labbais to get out of the decree passed against them by

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Ext. A-4 in the suit no. 331 of 1915. A close and careful analysis of the judgments Ext. A-4 to Ext. A-87 as indicated above reveals two important facts:

(1) that the Labbais expressly pleaded that the graveyard in question was their family graveyard and the Mahomedan public had no right to interfere with the same; and

(2) that they had constructed some shops on a part of the graveyard and had been directed by the decree of the court to demolish them on the footing that the graveyard was a public one and several attempts made by them to get the decree vacated or circumvented failed.

These judgments, therefore, in the first place operated as res judicata so far as the graveyard is concerned, and secondly they constituted conclusive evidence to prove that the burial ground had been used as public graveyard from time immemorial and thus became a public graveyard by dedication. The Labbais, however, being the descendants of the founder had established a right by usage to charge pit fees and other charges. In these circumstances, therefore, the issue relating to the burial ground being a public graveyard does not present much difficulty and we would like to deal with this issue first.

28. The High Court has clearly held that the burial ground consisted of two parts as shown in the sketch map and has been proved to be a public graveyard by immemorial user. There is overwhelming oral and documentary evidence to prove this. In fact the defendants themselves have not denied that the Mahomedan public of the village used to bury their dead in this graveyard and they have only sought to protect their right to realise pit fees and other incidental charges which has been accepted by the High Court. The Mahomedan Law on the subject is very clear. Under the Mahomedan Law the graveyards may be of two kinds—a family or private graveyard and a public graveyard. A graveyard is a private one which is confined only to the burial of corpses of the founder, his relations or his descendants. In such a burial ground no person who does not belong to the family of the founder is permitted to bury his dead. On the other hand if any member of the public is permitted to be buried in a graveyard and this practice grows so that it is proved by instances adequate in character, number and extent, then the presumption will be that the dedication is complete and the graveyard has become a public graveyard where the Mahomedan public will have the right to bury their dead. It is also well settled that a conclusive proof of the public graveyard is the description of the burial ground in the revenue records as a public graveyard. In *Ballabh Das* v. *Nur Mohammad*[1], the Privy Council observed as follows:

> If the plaintiffs had to make out dedication entirely by direct evidence of burials being made in the ground, and without any record such as the Khasra of 1868, to help them, they would undoubtedly have to prove a number of instances adequate in character, number and extent to justify the inference that the plot of land in suit was a cemetery. . . . The entry "qabaristan" in the Khasra of 1868 has to be taken together with the map which shows the whole of plot 108 to be graveyard.

29. In *Imam Bakhsh* v. *Mandar Narsingh Puri*[2] a Division Bench of the

1. AIR 1936 PC 83: 1936 ALJ 480. 2. AIR 1938 Lah 246.

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High Court of Lahore observed as follows:

> From the fact that the whole area now mapped as nos. 3095 and 3096 was described as a graveyard in 1868, it is certain that the graveyard had been in existence a long time and the admitted fact that since then it has been a Kabaristan is by itself presumptive evidence that the land had been set apart for use as a burial ground and that by user, if not by dedication, the land is wakf: . . . . It is still used as a Mahomedan graveyard and the right of Mahomedans so to use it is admitted.
>
> * * * * *
>
> In my view, once it is found that a certain definite area of land has been dedicated for use as a graveyard it must be presumed, in the absence of any proof that the dedication was limited, that the whole of the land was set apart to be used solely for the purpose of burying the dead.

30. There is a decision of the Allahabad High Court in *Sheoraj Chamar* v. *Mudeer Khan*[3], where Sulaiman, C. J. observed as follows:

> But in cases where a graveyard has existed from time immemorial or for a very long time, there can be a presumption of a lost grant. It is open to a court to infer from circumstances that a plot of land covered by graves, which has been used as a graveyard, is in fact a graveyard and had been set apart as such by the original owners and made a consecrated ground even though a registered document is not now forthcoming.

This case was followed by the Oudh Chief Court in *Qadir Baksh* v. *Saddullah*[4].

31. In *Mohammad Kassam* v. *Abdul Gafoor*[5], the High Court of Madhya Pradesh, while trying to distinguish between a private graveyard and a public graveyard observed as follows:

> On this point suffice it to say that we are of the view that a Kabaristan cannot be a private Kabaristan unless it is used for the family members exclusively. Once the public are allowed to bury their dead it ceases to be private property. . . . There was no discrimination about the user.
>
> It was being used by the predecessors of the defendants as well as by the public. This will indicate that it was not a private Kabaristan.
>
> Under the Mohammadan Law if a land had been used from time immemorial for burial ground then the same may be called a wakf although there is no express dedication.

We are of the view that once a Kabaristan has been held to be a public graveyard then it vests in the public and constitutes a wakf and it cannot be divested by non-user but will always continue to be so whether it is used or not. The following rules in order to determine whether a graveyard is a public or a private one may be stated:

(1) that even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user i. e. where corpses of the members of the Mahomedan community have been buried in a particular graveyard for a large number of years without any objection from

3. AIR 1934 All 868; 1934 ALJ 809.
4. AIR 1938 Oudh 77: 1938 OWN 7.
5. AIR 1964 MP 227: 1964 MPLJ 404: 1967 Jab LJ 93.

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the owner. The fact that the owner permits such burials will not make any difference at all;

(2) that if the graveyard is a private or a family graveyard then it should contain the graves of only the founder, the members of his family or his descendants and no others. Once even in a family graveyard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public graveyard;

(3) that in order to prove that a graveyard is public by dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mahomedan community had buried their corpses from time to time in the graveyard. Once this is proved, the court will presume that the graveyard is a public one, and

(4) that where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive proof to show the public character of the graveyard.

Applying these principles, therefore, to the facts of the present case it would appear from the judgments Exts. A-4 to A-87 that right from the year 1915 to 1938 the public character of the burial ground had been established by those judgments. All attempts by the defendants who were the plaintiffs in the suits brought by them to get a declaration from the courts that the graveyard was a private one failed and all the courts have consistently held during the course of 22 years that both the parts of the present burial ground were a public graveyard where corpses of the Mahomedan community of the village were buried. The mere fact that the defendants Labbais used to realise pit fees or other incidental charges would not detract from the nature of the dedication. Apart from that there is a document Ext. A-8 dated March 3, 1932 which is a certified extract of the proceedings of Municipal Council, Tiruvarur which shows that the Labbais themselves had filed an application before the municipal council for registering the burial ground as a graveyard. This document appears at pp. 247-248 of the paper book. It appears from this document that Syed Muhammad Kasim Sahib and Syed Abdul Rahiman Sahib residents of Vijayapuram had applied to the municipal council for registering the plot in dispute as a burial ground and the municipal council by its resolution accepted the application and registered the plot in question as a burial ground. This, therefore, clearly shows that as early as 1932 the Labbais themselves treated the present burial ground as a public graveyard and got the same registered in the municipal council.

32. Apart from this, the oral evidence led by the parties clearly proves that the graveyard was a public one. PW 1 Mohamed Hanifa who is an old man of 65 years has stated in his evidence that before burial the janaza prayers are offered and after the prayer the dead body is taken to the graveyard and buried. Similarly PW 2 Hyder Ali has stated that there is no other burial ground where bodies of the Rowthers could be buried, implying that the Rowthers had been burying their dead in the burial ground in question. PW 3 Yehiya has also testified that the remains of the Muslims of Vijayapuram are buried in the burial ground attached to the mosque and that there is no other burial ground. The defendants who had examined only two witnesses, DW 1 Syed Mubarak and DW 2 Syed Mohamed Salia, have not denied that the Muslims of the village buried their dead in the burial ground. In this state of evidence, therefore, the conclusion is inescapable that the graveyard has been used for burying the dead of all the

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persons belonging to the Mahomedan community ever since the land was sold to the saint—the ancestor of the defendants. It is true that the burial ground contains the graves of the saint and the members of his family also, but that by itself would not show that the graveyard was a private one. On a consideration of the oral and documentary evidence and the circumstances of the case we find ourselves in complete agreement with the finding of the High Court that the entire burial ground as shown in the sketch map is a public graveyard and the Mahomedan community have a right to bury their dead subject to payment of pit fees and other charges that may be fixed by the defendants.

33. In the first place the question of the graveyard being public one is clearly barred by res judicata against the defendants in view of the previous judgments discussed above, but even assuming that there is no res judicata there is overwhelming evidence in this case to prove that the burial ground is a public graveyard. It was, however, faintly suggested by learned Counsel for the appellants that it would appear from the sketch map that the burial ground consisted of two parts—the eastern part and the western part—and as the western part is adjacent to the dargah it should be held to the defendants. There is, however, no legal evidence on the record to prove this fact. Both the parts constitute one single burial ground and there is nothing to show that in burying the dead any distinction has been made between the eastern part and the western part. In fact this aspect of the matter had been referred to in one of the judgments discussed above. In these circumstances it is not possible for us to accept the contention raised by learned Counsel for the appellants. For these reasons we find ourselves in complete agreement with the finding given by the High Court on this issue and we affirm the same.

34. This brings us to the second question, namely, regarding the mosque and its adjuncts being public wakfs. We have already found that the judgments relied upon by the appellants did not operate as res judicata and we now proceed to decide this issue on the facts and the evidence that have been led in this case. The parties admittedly belong to the Hanfi sect of the Mahomedans and are governed by the Hanfi (Sunni) School of Mahomedan Law. Before however, going into this question it may be necessary to enter into an exhaustive discussion of the law on the subject, particularly because we find that the civil courts before whom this question came up for consideration from one angle or the other have betrayed a profound ignorance of the Mahomedan Law (Hanfi School) of wakf relating to a public mosque. The word "wakf" means detention or appropriation. According to the well recognized Hanfi School of Mahomedan Law when a Mahomedan dedicates his property for objects of charity or to God, he completely parts with the corpus which vests in God and never returns to the founder. Mahomedan Law contemplates two kinds of wakfs—a wakf which is private in nature where although the ultimate object is public charity or God, but the property vests in a set of beneficiaries chosen by the founder who appoints a mutawalli to manage the wakf which are normally known as *wakf-alal-aulad*. We are concerned with public wakf i.e. dedication made for the purpose of public charity e.g. an Imambada, a mosque, a serai and the like. So far as the dedication to a mosque is concerned, it is governed by special rules and special equity in the light of which a particular dedication has to be determined. A mosque is obviously a place where the Muslims offer their prayers. It is well-known that there are certain formalities which have to be observed by the Muslims before they observe the prayers. These

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formalities are :

(*i*) *wazoo* i.e. washing of hands and feet in a manner prescribed by *shariat*;

(*ii*) the recitation of *azaan* and *ikamat* which is usually done by the *Pesh Imam* or the *Muazzin*;

(*iii*) there must be a person who possesses virtuous qualities and a knowledge of Koran and other religious rites who should lead the prayers.

This is necessary in case of prayers offered in congregation. A single Muslim can also offer his prayers with or without an imam but the prayers in a congregation of a jamaat are offered only behind an imam who leads the prayers. As Islam is an extremely modern and liberal religion, there is no question of any person being denied admission in a mosque for the purpose of offering prayers and that is why the law is so strict that the moment a person is allowed to offer his prayers in a mosque, the mosque becomes dedicated to the public. Finally, it is not necessary for the dedication of a public mosque that a mutawalli or a Pesh Imam should be appointed which could be done by the members of the Muslim community. All that is necessary is that there should be a declaration of the intention to dedicate either expressly or impliedly and a divestment of his interest in the property by the owner followed by delivery of possession. Here also the delivery of possession does not involve any ritual formality or any technical rule. For instance in the case of a mosque if the Mahomedans of the village, town or the area are permitted to offer their prayers either on the vacant land or in a mosque built for the said purpose that amounts to the delivery of possession and divestment and after the prayers have been offered the dedication becomes complete. Unfortunately the courts which decided the previous litigation between the parties do not appear to be aware of the considerations mentioned above.

35. In Baillie's *Digest of Moohummudan Law*, Second Edition, the following passage occurs at p. 615:

> If a man should make a musjid within his mansion and permit entrance to it and prayers to be said in it, the place becomes a musjid in all their opinions, if a way is made to it; but not otherwise according to Aboo Huneefa. According to the other two, however it becomes a musjid and the right of way follows, without any condition to that effect. And if a door were opened to it on the highway, it would become a musjid.

It was again observed at p. 616:

> When an assembly of worshippers pray in a musjid with permission, that is delivery. But it is a condition that the prayers be with imam, or the regular call, two times or more, and be public, not private. . . .
>
> When a man has an unoccupied space of ground fit for building upon, and has directed a *kowm*, or body of persons, to assemble in it for prayers, the space becomes a musjid, if the permission were given expressly to pray in it for ever, or, in absolute terms, intending that it should be for ever; and the property does not go to his heirs at his death.

It is also provided by the *shariat* that once a musjid has been established by dedication no condition can be attached by the founder and if any such condition is attached the said condition would be void: *Vide* the following

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observations of Baillie in his *Digest of Moohummudan Law*, 2nd Edn., at p. 617:

> When a man has made his land a musjid, and stipulated for something out of it to himself, it is not valid, according to all. It is also generally agreed that if a man makes a musjid on condition that he shall have an option, the wakf is lawful, and the condition void.

It was also pointed out by Baillie at p. 618 that where a person gives money for the repairs of a musjid or its maintenance it operates as a transfer by way of gift to the mosque and is valid. Baillie observed thus:

> A man gives money for the repairs of a musjid and for its maintenance, and for its benefit. This is valid; for if it cannot operate as a wakf, it operates as a transfer by way of a gift to the musjid, and the establishing of property in this manner to a musjid is valid, being completed by taking possession.

36. Ameer Ali in his book *Muhammadan Law*, Vol. I, 3rd Edn., has given several instances of a complete and irrevocable dedication made by the *wakif* or the founder and the consequences flowing from the same. Ameer Ali observed as follows:

> The proprietary right of the *wakif* in a building or ground set apart for prayers becomes extinguished either on the declaration of the *wakif* that he has constituted it a mosque or *musalla* or consecrated it for worship, or on the performance of prayers therein or thereon.

Thus the moment a building is set apart for offering prayers the proprietary right of the *wakif* is completely extinguished. Similarly the following observations of the author indicate the various contingencies in which a dedication can be made to a public mosque:

> So that when a person erects a building with the object of dedicating it as a mosque, and permits people to offer prayers therein, without declaring that he has constituted it into a mosque, and prayers are offered there *bi'l-jamaat*, the mosque becomes irrevocably dedicated.
>
> When a mosque is erected or set up inside a dwelling-house or residence (*dar*), and permission is granted to the public to come and pray, and a pathway is also made or set apart for their egress and ingress, the dedication is good by general consensus. If a pathway is not indicated, in that case, according to Abu Hanifa, the dedication is not sufficient. But according to Abu Yusuf and Mohammed, it is good, and the pathway will be implied by the permission to pray, and this is correct.
>
> At the same time, though the public may have no right in a private mosque, it may constitute a good wakf so as to exclude the rights of the heirs over it. Where prayers have been once offered, it is not necessary to prove an express dedication. The very fact of the prayers being offered in it will imply a valid and good dedication.
>
> Similarly, as the purpose of a mosque is that people should pray there is *jammaat*, it is required that where there is no express dedication, prayers should have been offered there with the *azan* and *ikamat*.
>
> If prayers are offered once in a mosque it is sufficient to constitute a good dedication.

According to Kazi Khan, "the delivery of possession as regards a musjid is complete when only one person has prayed in it with *azan* and *ikamat*". The view universally adopted is that prayers offered by one

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person in a mosque is sufficient to constitute it a public mosque devoted to the worship of God, for a mosque belongs to the Deity and there affixes to it a right of the Mussalmans in general, and one person can be a proxy for the establishment of the right of the Creator and the public.

Therefore, if a person creates a mosque and gives permission to people to pray therein, it is an absolute wakf and this opinion we adopt.

The observations of the learned author are based on *Radd-ul-Mukhtar* and other original religious books which contain law on the subject.

37. The entire law on the subject has been explicitly and adroitly elucidated by Tyabji in his book *Muslim Law*, 4th Edn., where at p. 609 the author observes thus:

> Under Hanfi law erecting or specifying a building for dedication as a musjid does not complete and effectuate the dedication of the land and building, nor cause the private ownership therein to cease until the owner divides them off from the rest of his property, provides a way to go to the musjid and either permits public prayers to be said therein, or delivers possession of it to a mutawalli, or to the judge, or his deputy.
>
> * * * * *
>
> For example, delivery in the case of a cemetery, is the burial of a person, and of a musjid, that people should pray there in *jamaat*. In the case of a mosque where there is no express dedication it is necessary that prayers should have been offered with the *azan* or *ikamat*.

It is also pointed out by the author in Section 550 at p. 612 of his book that a musjid cannot be consecrated for only a particular type of people or people belonging to a particular locality and if any such reservation is made it is void. In Section 551 it is pointed out that the site of a musjid never reverts to its original owner, or his heirs.

38. Similarly Saksena in his *Muslim Law*, 4th Edn., at p. 567 observes that under the Hanfi law a wakf for a mosque will be completed only when the *wakif* separates the land and the building from the rest of his property, so that his ownership completely ceases in it, and either he delivers possession of the musjid to a mutawalli or to the judge, or allows public prayers to be read in it. Similar observations are also found in Mulla's *Principles of Mahomedan Law*, 17th Edn., at p. 184.

39. It would thus appear that in order to create a valid dedication of a public nature, the following conditions must be satisfied:

(1) that the founder must declare his intention to dedicate a property for the purpose of a mosque. No particular form of declaration is necessary. The declaration can be presumed from the conduct of the founder either express or implied;

(2) that the founder must divest himself completely from the ownership of the property. The divestment can be inferred from the fact that he had delivered possession to the mutawalli or an imam of the mosque. Even if there is no actual delivery of possession the mere fact that members of the Mahomedan public are permitted to offer prayers with *azan* and *ikamat*, the wakf is complete and irrevocable; and

(3) that the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque.

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As regards the adjuncts the law is that where a mosque is built or dedicated for the public if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, those constructions would be deemed to be accretions to the mosque and the entire thing will form one single unit so as to be a part of the mosque.

40. We would now refer to some authorities on the points discussed above.

41. In *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*[6] the Judicial Committee explained the significance of the word 'dedication' and observed thus:

> According to the two disciples, wakf signifies the appropriation of a particular article in such a manner as subjects it to the rule of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that Aboo Yoosaf holds the appropriation to be absolute from the moment of its execution, whereas Mahomed holds it to be absolute only on the delivery of it to a mutwaly, (or procurator,) and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it. . . . 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.'

42. Similarly, in *Adam Sheik* v. *Isha Sheik*[7] a Division Bench of the Calcutta High Court pointed out that a mosque becomes consecrated for public worship either by delivery or on the declaration of the *wakif* that he has constituted it into a musjid, or on the performance of prayers therein even by one person. In this connection the Court observed as follows:

> According to all the authorities, a mosque becomes consecrated for public worship either by delivery to a mutwallia (see Baillie's *Digest*, page 616) or on the declaration of the wakif that he has constituted it into musjid or on the performance of prayers therein (*Raddul-Mukhtar*, Vol. III, p. 571). The prayers of one individual alone would be sufficient so long as it is accompanied by *azan*. In the Fatwa Kazi Khan the principle is thus stated: "The delivery of possession as regards a musjid is complete when only one person has prayed in it with *azan* and *ikamat*."
>
> The view universally adopted is that prayers offered by one person in a mosque is sufficent to constitute it a public mosque devoted to the worship of God, for a mosque belongs to the Deity and there affixes to it a right of the Mussulmans in general, and one person can be a proxy for the establishment of the right of the Creator and the public.
>
> Therefore, if a person create a mosque and give permission to people to pray therein, it is an absolute wakf, and this opinion we adopt. (See also *Fatwa Alamgiri*, Vol. VI, and Baillie's *Digest*, p. 616). The special purpose of a mosque is that persons should perform their devotions therein; and according to the accepted doctrine even where there is no evidence of an express dedication in words, if it appears that one single individual, (other than the *wakif*) has offered his prayers at the place after the usual summons or call to the public, the consecration is complete.

6. (1840) 2 MIA 390.
7. (1897) CWN 76.

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To the same effect is the decision of the Bombay High Court in *Saiyad Maher Husein* v. *Haji Alimahomed*[8] where the following observations were made:

> There are special rules in the case of mosques—Wilson's *Anglo-Mahomedan Law* Section 320; Ameer Ali's *Muhammadan Law*, Vol. I, p. 394; and Tyabji's *Principles of Muhammadan Law*, Section 514. When once a building has been set apart as a mosque it is enough to make it wakf if public prayers are once said there with the permission of the owner. . . . Dedication may be inferred from long user as wakf property.
>
> * * * * *
>
> In my opinion it must be presumed that the *roza* and the mosque have been duly dedicated and have become wakf by user, and the presumption may fairly be extended to the other building and the land enclosed within the compound wall which may be regarded as appurtenant to the *roza*.

43. In *Akbarali* v. *Mahomedally*[9] the Bombay High Court pointed out that even a vacant place may be dedicated as mosque without having the appearance of a mosque. The High Court observed as follows:

> The general law of Islam in regard to devotions is so broad and liberal that the mosque in question will, even if not endowed with an Amil, be capable of furnishing for any devout Muslim (at least of the Dawoodi Bohra community) a place where he may—with or without the ministrations of an Amil or authorised leader of prayers—five times every day of his life offer prayers.
>
> * * * *
>
> The books speak of an open space of building ground being consecrated as a musjid. Nor is it necessary for the purpose of consecrating a place or building as musjid that there should be an Amil or any other religious officer appointed.

44. It is also well settled that where a mosque has been in existence for a long time and prayers have been offered therein, the court will infer that it is not by leave and licence but that the dedication is complete and the property no longer belongs to the owner. In *Miru* v. *Ramgopal*[10] the High Court of Allahabad observed as follows:

> But where a building has stood on a piece of land for a long time and the worship has been performed in that building, then it would be a matter of inference for the court which is the judge of facts, as to whether the right has been exercised in that building for such a sufficiently long time as to justify the presumption that the building itself had been allowed to be consecrated for the purposes of such rights being performed. Where there is a mosque or a temple, which has been in existence for a long time, and the terms of the original grant of the land cannot now be ascertained, there would be a fair presumption that the sites on which mosques or temples stand are dedicated property.

To the same effect is the decision of the Nagpur High Court in *Abdul Rahim Khan* v. *Fakir Mohammad Shah*[11]. The same principles are legally deducible from the decisions in *Masjid Shahid Ganj Mosque* v. *Shrimani Gurdawara Parban-*

8. AIR 1934 Bom 257: 36 Bom LR 526.
9. AIR 1932 Bom 356: ILR 57 Bom 551.
10. AIR 1935 All 891: 1935 ALJ 1269.
11. AIR 1946 Nag 401: ILR 1946 Nag 518.

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dhak Committee, Amritsar[12]; *Musaheb Khan* v. *Raj Kumar Bakshi*[13] and *Maula Baksh* v. *Amiruddin*[14].

45. Similarly regarding the portions which are adjuncts to the mosque the Bombay High Court has clearly observed that the said adjuncts will form part of the mosque and would not be the private property of the founder. The Nagpur High Court has also made similar observations. These observations have already been quoted above. This Court also in *Mohammad Shah* v. *Fasihuddin Ansari*[15] observed as follows:

> After a careful survey of the evidence, we have reached the following conclusions:
>
> (1) that the old mosque as it stood in 1880 is proved to be wakf property but that nothing beyond the building and the site on which it stood is shown to have been wakf at that date;
>
> (2) that this property has been added to from time to time and the whole is now separately demarcated and that the additions and accretions form a composite and separate entity as shown in the plaintiffs map. This is the area marked ABCD in that map;
>
> (3) that this area is used by the public for religious purposes along with the old mosque and as the area has been made into a separately demarcated compact unit for a single purpose, namely, collective and individual worship in the mosque, it must be regarded as one unit and be treated as such. The whole is accordingly now wakf;
>
> (4) that the accretions were made by Gulab Shah and the defendant both of whom claimed to be mutwallis of the mosque;
>
> (5) that this area also includes the shops and *chabutra* shown to the west of the mosque in the plaint map on a triangular piece of land;
>
> (6) that the urinal, water pipe and bathroom were constructed for the use of the worshippers and so must be regarded as an adjunct of the wakf;.

46. Having discussed the law on the subject, we will now examine the question as to whether or not the mosque and the adjuncts thereof constitute a public wakf. We have already mentioned that the entire land in dispute consisting of the mosque, its adjuncts, the burial ground etc. was originally acquired by virtue of the documents Ext. B-1 dated May 12, 1730 and Ext. B-2 dated May 22, 1797 which have been referred to in an earlier part of this judgment. The land in Ext. B-1 was acquired by the Saint Syed Sultan Makhdoom Sahib who has been entombed in the land on which the dargah has been built. A part of the site has been used continuously as a public burial ground and has become a public graveyard as wakf as held by us. So far as the dargah is concerned the courts below have concurrently found as a fact that it was a private dargah of the defendants Labbais and that there was no evidence to show that it was ever constituted as a public wakf. Learned counsel for the appellants in Civil Appeal No. 2026 of 1968 has not pressed his appeal relating to the dargah. On a perusal of the evidence both oral and documentary we are satisfied that the dargah has not been proved to be public property, but is the private dargah

12. LR 67 I A 251: AIR 1940 PC 116.
13. AIR 1938 Oudh 238: 1938 OWN 937.
14. AIR 1920 Lah 384: ILR 1 Lah 317.
15. AIR 1956 SC 713.

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of the Labbais whose ancestor the original saint has been entombed therein. As Syed Sultan Makhdoom Sahib was a great saint and was held in great respect by all the villagers and as there was no mosque in the village at all it was only natural that the Muslims of the village would think of building a mosque in the village and they could find no better place to construct a mosque than the land in dispute, a part of which contained the dargah of the great saint where he was entombed. The entire land was acquired by Ext. B-1 which was executed by Thirumalai Kolanda Pillai in favour of the saint as far back as May 12, 1730. The rest of the land was acquired by another sale deed Ext. B-2 dated May 22, 1797 executed by Malai Kolanda Pillai in favour of Kaidbar Sahib who was a direct descendant of the saint. This is the origin of the lands in dispute. So far as the mosque and its adjuncts are concerned, it would appear from the sketch map as also from the evidence produced by the parties that this part of the land consists of the following constructions:

(1) the main prayer hall which is commonly known as the mosque or *pallivasal*;

(2) *mandapam* or Vang Madaias described by the witnesses which is a sort of a covered platform where according to the plaintiffs prayers are offered by the members of the Mahomedan public when the space in the main mosque is not sufficient to accommodate the big crowd;

(3) there is a small chamber in the nature of a store room adjacent to the mosque and a thatched shed. There is also a pond where water is pumped in through a pumpset which has been installed by the Mahomedans of the village, particularly the plaintiffs. There is also a latrine to the south of the burial ground and east of the mosque which is used for the persons who come to offer prayers in the mosque and the *mandapam*.

Apart from these constructions the evidence shows that a few years back the whole place was electrified and a tower was also built in the nature of a minaret in the mosque and a loudspeaker was also fitted for the purpose of reciting *azan* and *khutbas* etc. According to the defendants the mosque itself was a private mosque of the saint who had merely permitted the plaintiffs' ancestors to construct the prayer hall there, but there was no formal dedication of the property as a mosque. The defendants further averred that even if the prayer hall be regarded as a public mosque the other constructions which were made subsequently were the private property of the defendants and did not form part of the mosque.

17. We would first take up the question whether the prayer hall i.e. the *pallivasal* which is shown in the sketch map towards the south of the dargah was dedicated as a mosque. We have already pointed out that under the Mahomedan Law a dedication may be oral or in writing and no particular form or method for constituting a wakf has been prescribed by the Mahomedan Law. It is largely a question of the intention of the founder who after having made a declaration divests himself of his interest in the property and gives delivery of possession of the same in accordance with the manner in which it is capable of being delivered. In the case of a mosque his permission or the bare act of allowing the members of the Mahomedan public to offer prayers amouuts to a complete delivery of possession. In the instant case fortunately there is an important document Ext. B-3 a better translation of which is Ext. B-4 which clearly shows the intention of the founder and which in our opinion, on a

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proper interpretation of the terms thereof, amounts to a permanent and an irrevocable dedication to God constituting a valid public wakf. We would now examine the contents of this document, the relevant portions of which may be extracted thus:

> Whereas we are constructing a Pallivasal at the Durga MEDAI (raised platform) belonging to Karrath Sultan Makhdoom Sahib with the permission of the Sahib Avergal for the purpose of worship, after the completion of the said Pallivasal (mosque) by the Grace of Allah, we shall claim no right whatsoever in respect of the said Pallivasal except that we shall worship therein. At the time of Kanduri (annual festival) we shall act according to usual practices (mamool). We shall not require the income derived either from the Sultan Makhdoom Sahib Durga or from the Pallivasal we now build. In the Pallivasal we would build, we shall claim no other rights whatsoever except worshipping therein, we shall be lighting lamps and attending to the maintenance of the same. There shall be a doorway and two windows affixed on the southern wall of the said Pallivasal and one doorway on the eastern side with a wall around it. To this effect is this deed of agreement executed with consent by all of us living in this village in favour of Saheb Avergal.

Before analysing the terms of the above document, the following admitted facts may be reiterated:

(1) that the Mahomedans of the village sought permission of Masthan Ali Khader Sahib for erecting a building for the purpose of worship on the land belonging to him;

(2) that the evidence establishes that there was no mosque at all in the village of Vijayapuram which consisted of a substantial portion of the Muslim population;

(3) that the idea of constructing the mosque originated from plaintiffs' ancestors who constituted the bulk of the Muslim population in the village, the defendants' ancestors being a very small family in that village.

Against the background of these facts we might now analyse the terms and conditions of the agreement which shows the nature of the dedication. To begin with the agreement recites (*i*) that the Rowthers were constructing a *pallivasal* at the raised platform belonging to the Labbai Masthan Ali Khader Sahib with his permission; (*ii*) that after completion of the construction which is described as a mosque in the agreement, the Rowthers will have no claim or right except the right to worship therein; (*iii*) that the only rights which the Muslims would claim would be the right to worship, to light lamps and will also be responsible for the maintenance of the mosque; (*iv*) that the said construction was made purely for the purpose of worship; (*v*) that there shall be a doorway and two windows affixed on the southern wall of the mosque and one doorway on the eastern side so as to serve as entrances. In other words this important recital in the agreement clearly shows that the agreement was to make a separate entrance to the mosque in order to constitute it as a separate entity. The owner Masthan Ali Khader Sahib had given his tacit consent to all the terms of the agreement and in the eye of law he being a party to the agreement he allowed the mosque to be constructed not for the private members of his family but for worship of God by the entire Mahomedan public. The document thus unmistakably evidences the clear intention of the founder to consecrate the mosque for public worship and

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amounts to a declaration of a public wakf. By providing for separate entrance through dooway and windows the owner agreed to separate the mosque from the rest of the property namely the dargah and the compound Thirdly by allowing the entire Mahomedan community of the village to worship in the mosque and to perform other ceremonies the owner of the land gave delivery of possession to the mosque.

48. A perusal of the terms and recitals of the document Ext. B-4, therefore, manifestly shows that Masthan Ali Khader Sahib being a saint himself unequivocally and categorically divested himself of the entire interest in the mosque and made it a public wakf. We agree with the view that a place may be dedicated as a mosque or masjid without there being any building as held in *Akbarally's case* (supra). But in the instant case since the building in the nature of a mosque was built a clear case of dedication has been made out. Once the mosque was constructed, it stood dedicated to God and all the rights, title and interest of the owner got completely extinguished. This happened as far back as February 16, 1829, *i.e.* about a century and a half ago. Since then the mosque has been used constantly for the purpose of offering prayers. This fact has been proved by the documents which we have discussed above and also from the oral evidence led by both the parties which we will consider hereafte.·.

49. It is further contended that under the agreement, the plaintiffs clearly stipulated not to claim any right or interest in the mosque and, therefore, they cannot now be heard to say that the mosque was a wakf property. This argument appears to have found favour with the trial Court. But in our opinion it is based on a serious misconception of the Mahomedan Law on the subject. Once there was a complete dedication to the mosque as a place of public worship any reservation or condition imposed by the owner would be deemed to be void and would have to be ignored. Moreover we do not construe the so-called stipulation by the plaintiffs' ancestors at the time of erecting the prayer hall as an assertion that the mosque was not a public wakf. Reading the statements made in the agreement as a whole what the plaintiffs' ancestors meant was that the mosque would be undoubtedly a public wakf meant for the purpose of public worship and that they would not interfere with the management of the same. This does not mean that if the founder's descendants indulged in mismanagement of the mosque the plaintiffs as members of the Mahomedan community could not take suitable action under the law against the defendants. This argument is, therefore, negatived.

50. As regards the adjuncts of the mosque the details of which have been given by us, the same were built by the Mahomedan community from time to time for the purpose of the mosque or by way of a gift to the mosque. We would now refer to the oral evidence on the point.

51. PW 1 Mohamed Hanifa who is an old man aged 65 years and is one of the Rowthers states that there are 200 houses of Rowthers and only 7 to 8 houses of the Labbais in the village. The witness mentions the various adjuncts to the mosque, namely, the tank, pumphouse, installed pumpset, the latrine to the east of the pumphouse and a platform which he calls as *vang malai*. The witness further goes on to state that the mats and loudspeakers are kept in the storeroom. The mats are usually used by the Mahomedans for offering their prayers and the loudspeaker is used for reciting *azans* or reading *khutbas* (religious sermons) which are usually done after the prayers are over. This witness's evidence also shows that when the

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Muslims want to bury their dead they come to the mosque for performing *namaz-e-jannza* (special funeral prayers). According to PW 1 the corridor which connects the thatched shed with the platform was built by Ismail who was not a Labbai. The *vang medai* was built by Mustapha Rowther and this was constructed about 30 to 35 years ago and so was the verandah which is shown in the sketch map as the thatched shed. The witness also states that so far as the doorway is concerned it is there since a long time and it actually finds mention in Ext. B-4. According to the witness the platform the *vang medai*, was built when he was 10 to 12 years of age *i.e.* about 50 years from the date of his deposition. These facts do not appear to have been denied by DWs 1 and 2 who have appeared on behalf of the defendants except with respect to the persons who made these constructions. In our view the question of the person who actually made the construction is wholly irrelevant because all the constructions made by any person used for religious purposes incidental to offering prayers in the mosque would be deemed to be accretions to the mosque itself and there is unchallenged evidence to show that all the constructions were used by the Mahomedan community for the purpose of offering their prayers in the mosque on special occasions.

52. PW 2 Hyder Ali who is a Labbai admits that he acted as an Imam and that 300 to 400 of Muslims assemble for prayers and when so many persons assemble the entire space of the mosque right from the prayer hall to the corridor is fully occupied. The witness further says that after *khutbas*, Koran is read and explained.

53. Similar is the evidence of PW 3 Yehiya who also says that Muslims offer their congregational prayers when their number swells upto 400 to 500 and that mats and carpets are kept in the storeroom.

54. PW 4 Mohamed Meera Hussain who is aged 64 years affirms that prayers have been offered in the mosque for the last 50 years and that there is no other mosque in Vijayapuram. He also testifies to the fact that the mosque is administered by the Rowthers since last 30 years and the dargah was managed by the Labbais. He also states that on the occasion of Friday prayers about 300 persons assemble in the mosque right from the main hall to the corridor.

55. PW 5 Abdul Majeed says that *vang mandapam* and the corridor were constructed by Abdul Rahman sometime in 1931 and the people assemble right from the mosque to the corridor. This is all the evidence given by the plaintiffs.

56. DW 1 Syed Mubarak who is the contesting defendant admits that the *mandapam* was constructed by Syed Mohd. Hussain about 30 to 35 years ago and that the mosque was constructed by the Rowthers. He further admits that the defendants never objected or obstructed the Rowthers from offering their prayers. He further admits that a pumpset was installed to pump water into the tank. He also admits all Muslims gather and pray in the mosque.

57 DW 2 Mohamed Salia admits the *hauz* and the verandah were built by Abdul Rahman under the supervision of Qasim though the funds were supplied by Ismail.

58. Thus even the witnesses for the defendants clearly admitted the nature and character of the various adjuncts to the mosque. The DWs, however, have tried to minimise the number of people who assembled during Friday prayers by saying that it would be between 40 to 50. But that is

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obviously wrong. It is well known that on special occasions like Fridays, Id, Id-e-Milad and other auspicious occasions the entire Muslim community flock to the mosque for the purpose of offering prayers, because offering of prayers on such day is, according to the Islamic tenets, extremely auspicious and highly efficacious. It is also established from the evidence that the constructions referred to above had been made for the purpose of the mosque. Before a Mussalman offers his prayers he has first to wash his hands and feet in the prescribed manner and for this purpose arrangements are made in every mosque and *pallivasal* is no exception. Accordingly a tank or a *hauz* where water was pumped in was meant for the purpose of *wazoo* i. e. for washing hands and feet which is a prerequisite for offering the prayers. Similarly as a large number of Muslims assembled on special occasions as mentioned above, the entire space including the mosque, the *mandapam* and the corridor was used for the purpose of offering prayers. Thus these constructions were used for religious purposes incidental to the offering of prayers and have become accretions to the mosque so as to constitute one single entity. Similarly the mats are meant for the Mahomedans to be used at the time of offering prayers. Lastly the loud-speaker is used for reciting *azan* and delivering *khutbas*, i. e. religious sermons. Thus all the adjuncts of the mosque are meant for purely religious purposes connected with the offering of prayers in the mosque.

59. The case of the defendants was that these constructions were their private property, but there is not an iota of evidence to prove the same. The law on the point is well settled that where any construction is made for the purpose of the mosque or for its benefit or by way of gift to the mosque, the same also becomes a public wakf. The statement of the law on the subject as mentioned by Baillie in his *Digest of Moohummudan Law* has already been extracted by us. In these circumstances, therefore, the conclusion is inescapable that the mosque as also all its adjuncts referred to herein constitute one single unit and the entire thing a public wakf.

60. Mr. Krishnamoorthy Iyer appearing for the appellants submitted that although Ext. B-4 shows that a mosque in the shape of a raised platform was constructed by the Rowthers but there is no evidence of any formal dedication or dedication to the wakf. This argument fails to consider the essential requirements of a public wakf under the Mahomedan Law and particularly the rules which require dedication to the mosque. The act of permitting the Mahomedans to build a mosque itself amounts to a complete dedication or a declaration that the mosque is a public property. Further by giving delivery of possession of the site for the purpose of building a mosque and by allowing prayers to be offered in the mosque, the founder, namely Masthan Ali Khader Sahib made a complete public wakf in the shape of a mosque. Nothing, therefore, remained with the founder or his descendants. Mr. Iyer relied on a decision in *A. Zafar Hussain* v. *Mohd. Ghias-ud-din*[16]. This case is, however, clearly distinguishable because it was not a case of a mosque which is governed by special rules for dedication. In that case the property used was a *haveli* or a house and on the facts of that case the court held that there was no validly constituted wakf. Reliance was also placed on a decision of this court in *Nawab Zain Yar Jung* v. *Director of Endowments*[17]. This also was not a case of a mosque and this Court, on the facts of that case, held that the trust created was not a wakf but a secular public charitable trust. In the instant case, however, agreement Ex. B-4 clearly

16. AIR 1937 Lah 552: ILR 1937 Lah 276: 37 Punj LR 749.
17. (1963) 1 SCR 469: AIR 1963 SC 985.

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recites that the property being built on the land of the founder was a public mosque to be used for public purpose of offering prayers.

61. Lastly our attention was drawn to the decision of the Nagpur High Court in *Jawaharbeg* v. *Abdul Aziz*[18]. That case also is of no assistance to the appellants because while the court held a part of the property to be a mosque the other parts which had absolutely no connection to the wakf property were held to be the private property. For these reasons, therefore, the contention put forward by the appellants is overruled.

62. On a consideration, therefore, of the facts, circumstances and the evidence of the present case, we are satisfied that the mosque as also its adjuncts constituted wakf properties and had been used as such for a long time so as to culminate into a valid and binding public wakf. We have already held that as the public character of the wakf was not in issue in the previous judgments relied upon by the appellants, the said judgments did not operate as res judicata. We, therefore, affirm the finding of the High Court on this issue.

63. It was next contended by the appellants that the suit was barred by Section 55(2) of the Wakf Act, 1954, which runs thus:

> No suit to obtain any of the reliefs referred to in sub-section (1) relating to a wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board:
>
> Provided that no such consent shall be required for the institution of a suit against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules or orders made thereunder.

The High Court has dealt with this aspect of the matter and has pointed out that at the relevant time when the present suit was brought, no Board contemplated by the provisions of the Wakf Act had, however, been constituted and therefore the provisions of Section 55(2) were not at all attracted, nor were those provisions capable of being acted upon. In these circumstances, therefore, non-compliance with the requirements of Section 55(2) of the Wakf Act would not bar the maintainability of the present suit.

64. Lastly it was contended that even assuming everything against the appellants the conditions of Section 92 of the Code of Civil Procedure were not at all fulfilled in this case, because the defendants could not be called the trustees within the meaning of Section 92 of the Code of Civil Procedure and the Advocate-General committed an error of law in granting the sanction to file the present suit. It is true that the defendants have only been de facto managers of the properties in suit either as Pesh Imams or otherwise but that does not make any difference so far as application of Section 92 of the Code of Civil Procedure is concerned. It is true that Section 92 of the Code of Civil Procedure applies only when there is any alleged breach of any express or constructive trust created for a public, charitable or religious purpose. It also applies where the direction of the court is necessary for the administration of any such public trust. In the instant case the defendants have no doubt been looking after the properties in one capacity or the other and had been enjoying the usufruct thereof. They are, therefore, trustees *de son tort* and the mere fact that they put forward their own title to the properties would not make them trespassers. In *Abdul Rahim Khan's case*

18. AIR 1956 Nag 257 : ILR 1956 Nag 659.

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(supra) a Division Bench of the Nagpur High Court observed thus:

> The defendant's predecessors who were parties to that suit as defendants were in law not trespassers but trustees. They claimed to be so. They acted as such, but had wrongly begun to assert title to which they were not entitled to and therefore the suit against them. A suit under Section 539 (equivalent to the present Section 92) of the Civil Procedure Code does lie for removal of such de facto or constructive trustees, as has been laid down in ILR (1942) 1 Cal 211 at pp. 215, 219 and AIR 1940 Pat 425. The plaintiffs in their plaint never stated that the defendants were trespassers, and it is the allegations in the plaint that determine the nature of the suit and the jurisdiction. The defendant's denial in the pleadings will not in any way affect the nature of the suit under Section 92, as held in 11 Pat 288[19] and 63 Cal 74[20].

To the same effect are the decisions in *Mahomed Shirazi* v. *Province of Bengal*[21] and *Randas Bhagwat* v. *Krishna Prasad*[22]. In our opinion these decisions lay down the correct law on the subject. We, therefore, hold that Section 92 of the Code of Civil Procedure is clearly applicable to the case.

65. Counsel for the appellants lastly argued that there is no evidence to show that the appellants have committed any negligence in managing the trust properties. Even the trial Court which had dismissed the plaintiffs' suit had returned a clear finding of fact that the defendants were guilty of gross negligence in managing the properties. In this connection the trial Court found as follows:

> It was pointed out that there was mismanagement. That there is mismanagement cannot be disputed. For one thing, in spite of the decree of the court for removal of certain superstructures on the burial ground the Labbais evaded the issues for a period of over twenty years. The plaintiffs have proved that plaint B schedule property has been dedicated to the durga. But this property has been alienated by the predecessors-in-interest of the defendants. In exchange, they have obtained C schedule property . . . . The next contention was that the defendants have not maintained accounts. It is true that the evidence does not disclose that any accounts were maintained or being maintained by the Labbais defendants.

The learned Judge, however, tried to explain away these acts of misfeasance on the ground that as the Rowthers undertook not to interfere with the management or ask for the account, the negligence committed by the defendants, if any, was not actionable. In view of our findings, however, that the mosque, its adjuncts and the burial ground are public wakfs the question of negligence assumes a new complexion. Apart from the acts of mismanagement, there is definite oral evidence of the plaintiffs to show that the graveyard is not properly managed and maintained. The boundary wall has broken and cattle enter the graveyard leading to its desecration. The evidence of the plaintiffs also shows that even the mosque is in a state of disrepair and no attempt is made to repair or maintain it properly. Furthermore, the defendants have constructed shops on a part of the graveyard and in spite of several decrees of the courts to demolish those shops they have not yet obeyed the orders of the court to demolish the same. In these circumstances, therefore, there is overwhelming evidence on the record to show that

19. *Muhammad Kazim* v. *Abi Saghir*, AIR 1932 Pat 33.
20. *Abdul Majid* v. *Akhtar Nabi*, AIR 1935 Cal 805.
21. ILR (1942) 1 Cal 211: AIR 1942 Cal 343.
22. AIR 1940 Pat 425.

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the defendants were guilty of grave mismanagement, and therefore a clear case for formulating a scheme under Section 92 of the Code of Civil Procedure by a suit has been made out by the plaintiffs. The scheme, however, will be confined only to the mosque, its adjuncts and the burial ground and not to the durgah which has been held to be the private property of the defendants.

66. There is some dispute about the right to act as imam. We have already pointed out that the Mahomedan Law does not favour the hereditary right of being an imam because an imam must possess certain special qualities and certain special knowledge of the scriptures before he can be allowed to lead the prayers. The evidence shows that the Labbais have undoubtedly been acting as imams, though not for a continuous period. This, however, is a matter for the entire Muslim community to decide because an imam is normally chosen under the Mahomedan Law by the Muslim community. There is no clear evidence of any usage or custom by which the right to act as imam is hereditary in this case. Nevertheless we would like to observe that the defendants are after all the descendants of the founder of the entire premises which had been constituted as public wakf by their ancestors. Under the agreement Ext. B-4 the Rowthers on behalf of the Muslim community undertook not to claim any right in the mosque and although that would not act as an estoppel once the property becomes a public wakf, we think that the court at the time of framing a scheme would consider the desirability of associating some of the defendants with the framing of the scheme and may even appoint a suitable person from among the Labbais to look after the properties on imposing such terms and conditions as the court thinks fit. But the primary consideration should be the welfare of the wakf properties. In case the Labbais are not found suitable for being given any share in the administration of the mosque, the court will be free to withhold the right.

67. We, therefore, affirm the judgment of the High Court in all the appeals. The result is that the appeals filed are dismissed, but in the peculiar circumstances of the case there will be no order as to costs in this Court.

(1976) 4 Supreme Court Cases 815

[BEFORE V. R. KRISHNA IYER, A. C. GUPTA AND N. L. UNTWALIA, JJ.]

MADHAODAS ... Appellant;

Versus

COMMISSIONER, NAGPUR DIVISION, NAGPUR AND ANOTHER ... Respondents.

Civil Appeal No. 116 of 1975, decided on January 6, 1976

Ceiling on Land—Maharashtra Agricultural Lands (Ceilings and Holdings) Act, 1961—Section 45—Suo motu revision by Commissioner under not barred by proviso to Section 45(2) of the Act

Appeal dismissed M/3314/S

The Judgment of the Court was delivered by

KRISHNA IYER, J.—This appeal by special leave raises questions under Section 45 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961. One point urged before us was that the revision which was allowed by action suo motu by the Commissioner under that provision was

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MADRAS HIGH COURT

10th January, 1992/S.A.No.224 of 1984

Thangamani, J.

N.R.Abdul Azeez and 4 others
v.
E.Sundaresa Chettiar and another

Mahomedan Law – *Building of a mosque and consecration thereof by public worship – It ceases to be property of builder and vests in God – Every Mahomedan has the legal right to enter it – Concept of private mosque is unknown to Mohomedan Law.*

Adjuncts to a mosque used for religions purpose become part of the mosque and as such mosque itself.

Constituting of an endowment – Considerations

It is a fundamental principle of the Mahommedan Law of Wakf that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God. A mosque once so consecrated cannot in any case revert to the founder and every Mahomedan has the legal right to enter it, and perform devotions according to his own tenets so long as the form of worship is in accord with the recognised rues of Mahamedan Ecclesiastical law. A mosque, from its very nature, is dedicated for worship and is open to all Muslims, local and others. Once the mosque was constructed it stood dedicated to God and the owner is divested of his right, title and interest in the property. The very concept of a private mosque is unknown to Muslim Law. Once the founder dedicates a particular property for the purpose of a public mosque, no muslim can be denied the right to offer prayers therein on the ground that the mosque fell into dis-use long back.

Para 16

Under the Muslim law once the dedication was complete, the property passed from the owner to god and it never returns to the owner and therefore, the question of the mosque being private can never arise. The very concept of a private mosque is wholly foreign to the dedication of a mosque for a public purpose under Muslim Law. Under that system of law once the founder dedicates a particular property for the purpose of a public mosque, no Muslim can be denied the right to offer prayers in the mosque. The law is so strict that the moment even a single person is allowed to offer his prayers in a mosque, it becomes dedicated to the public. Also, any adjuncts to a mosque, which are also used for religious purposes, become as much a part of the mosque as the mosque itself. The argument that there was no formal dedication is unsound. The act of permitting the Mahomedans of the village to build a mosque itself amounts to a complete dedication or a declaration that the mosque is a public property.

Para 15

The rule of the Mahomedan Law on the subject is that when anyone has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as delivery, an endowment is immediately constituted. His act deprives him of all ownership in the property and to use the technical language of Mahomedan lawyers, vests it in god in such a manner as subjects it to the rules of divine property whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to His creatures. A mosque is an endowment of this kind, and the Mahomedan community, or any member of it has a right to enter the mosque and to pray there.

Para 14

1976-3-S.C.R.721:

7 Allahabad 178 (F.B.):

AIR 1934 Bombay 257:

Wakf Laws and Administration in India by Ansari and Khalid Rashid (1973) page 111;

35 Allahabad 197

AIR 1956 S.C.713;

(1935) 33 All.L.J.1269;

Principles of Mahomedan Law, Mulla (17th Edn) page 155;

Muslim Law, by Tyabaji (4th Edn) (1968) page 610-

Referred to.

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Appeal allowed.

Mr.A.A.S.Mustafa, for Appellants.

Mr.T.R.Rajagopalan, for Respondents.

JUDGMENT

There is dilapidated mosque like structure in S.No.187 of Sheik Manyam in Vanagaram village, Saidapet, Chingleput District. This building with the land appurtenant thereto measuring about 17,000 sq.ft. south of cart track, north of poramboke land, east of part of S.No.187 and west of tank is the subject matter of the second appeal. The entire S.No.187 before sub division comprised of an extent of 51 acres 17 cents. Ex.B3 the Extract from the Registrar of Inams in the village of Vanakaram discloses that this extent was originally granted to one Kayarunnisa as a personal Inam. Subsequently one Haji Mohammed Abdul Khadi Basha Sahib became the owner of this property. Under Ex.B4 dated 23.9.1898 he settled this land in favour of his minor son Mohammed Habibulla Basha Sahib. The donee sold away the property to one Anniah Naidu under Ex.B5 the registered sale deed dated 1.5.1917. Subsequently Anniah Naidu became insolvent and this property was sold by the Official Assignee of the High Court in favour of one Jaganathan under Ex.B6 the deed of conveyance dated 1.5.1919. Jaganathan also became insolvent and Elumalai Chettiar father of the respondent herein purchased this property from Official Assignee under Ex.B7 the deed dated 31.10.1935. After the demise of Elumalai Chettiar there was partition in the family under Ex.B8 dated 9.3.1960. There is no dispute that in this partition the defendant-respondent was allotted S.No.187/1 measuring 24 acres and 63 cents while an extent of 26 acres and 17 cents in S.No.187/3 came to the share of his brother. During the Sub division the remaining extent which is a channel was marked as S.No.187/2.

2. The appellants claiming that the decrepit structure is an ancient mosque of more than 200 years old wherein the muslims of that locality were offering worship, that in one part of the said mosque they bury their dead for the past 200 years and more and that all of a sudden the defendant-respondent has prevented them from saying their prayers in that place instituted O.S.674 of 1971 on the file of the District Munsif of Poonamallee on behalf of themselves and muslim worshipers for an injunction restraining the defendant/respondent from preventing their offering worship.

3. The respondent/defendant resisted the action contending that the appellants who are not the residents of Vanakaram Village have no *locus-standi* to maintain the suit. No muslim ever offered worship in the disputed building. There is no mosque as such in any part of S.No.187. Though there is a dilapidated structure therein, only after obtaining an exparte order of interim injunction, for the first time plaintiffs and their men made a pretention of offering worship in that place. The graves adjoining the building are not those of muslims. The respondent and his predecessors in title are in continuous and exclusive possession of the entire property and they have perfected title by adverse possession. After settlement proceedings under Ex.B9 a ryotwari patta has been issued to the respondent and his brother on 12.3.1970 for the entire land. The respondent alone has been using the disputed building for stocking agricultural implements and paddy. The private property of this respondent cannot be converted into mosque merely because it may have appearance of a mosque.

4. The trial Court found that the structure in dispute was not used by the muslims as a place of worship before the institution of the suit. The plaintiffs were not in possession of the property before the suit came to be filed. The adjoining site is not a public grave yard of the muslims. Accordingly it dismissed the suit with cost. The appeal preferred by the plaintiffs in A.S.51 of 1982 before the Subordinate Judge of Chingalput also met with the same fate. Having lost in both the Courts below the plaintiffs have come forward with this second appeal.

5. The only substantial question of law that arises for determination now is:-

"Whether the disputed structure in S.No.187 is a public mosque and if so whether the appellants-plaintiffs and other Muslims are to be protected from interference by the defendant in offering worship therein."

6. Ex.C1 the Commissioner's report and Ex.C2 the Commissioner's plan disclose that the disputed structure is at a distance of 5 to 6 furlongs

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away from Arcot Road, Kodambakkam. The building part of it is marked as ABCD and measures 30 feet North - South and 19 feet 6 inches East West. The construction is of bricks and the structure is dilapidated and not properly maintained. The building facing east comprises of three arches. There is a small arch in the western wall with some projection. On all sides of the building there is a barbed wire fencing marked as EFGH. While a channel runs on the south of the property, on the northern side there is a cart track of 10 feet width. There are some old tombs in front of the building and on the south eastern corner. There is also a well on the eastern side of the building. The cultivable land on the western side is at a distance of 54 feet from the wire fencing. The place occupied by the building and the surrounding area are all in a raised level than the cultivable land. The disputed place appears to be separate and distinct suitable for some particular purpose. From these physical features and the photographs Exs.A2 to A11 the possibility of the building having been erected initially to serve as a mosque could not be ruled out.

6.A. Ex.A1 is the village plans prepared in the year 1938 which indicates that there was a mosque originally in S.No.187. Ex.A12 plan has come into existence subsequent to the dispute. In fact even the lower appellate court has also concluded that there was a mosque in the suit property long time back. However it has negatived the appellants claim for injunction on the ground that they have failed to establish that it was a public mosque. The non-mention of the disputed mosque as a wakf property in Ex.B1 the gazette publication dated 17.12.1958 containing the list of wakfs existing at that time in Chengaleput District, the absence of reference to any mosque in Ex.B2 the Settlement Register Extract, Ex.B3 Inam Register Extract, Ex.B4 Inam Title Deed weighed with the lower appellate court in arriving at the decision that it was not a public mosque. Besides the lower appellate Court relied on the fact that during settlement proceedings which culminated in the issuance of patta as per Ex.B9 neither the appellants nor anybody representing the muslim community applied for patta. The absence of evidence regarding the dedication of the building for the purpose of mosque by the original founder was also taken into consideration by the learned Subordinate Judge. Further the lower appellate Court has pointed out that the evidence of P.Ws.1 to 4 do not establish that the suit property was ever used as a public mosque and the muslims in the surrounding village buried their dead there. There is also no evidence that either the appellants or any other muslims of the locality said their prayers in the disputed building prior to the institution of the suit. The lower appellate court also held that as the appellants are not living in the suit village they have no *locus-standi* to maintain this action

7. The learned counsel for the appellant argued that the existence of a mosque and graveyard at some point of time in the past in the disputed property is not in dispute. The appellants herein now claim right only to offer worship in the mosque and bury their dead. they do not claim any title to the land in dispute. simply because they have ceased to offer prayer, the property does not lose its character as a mosque. Once a mosque it is always a mosque. Further according to Muslim Law there is no such thing as a private mosque. Once a mosque is constructed and dedicated to the public it becomes the property of God.

8. On the other hand,it is the argument of the respondent that there is no evidence that Muslims of that village used to say their prayers in that disputed property when the suit came to be filed. There is no material on the side of the appellants to establish that from time immemorial this property was used as a mosque. Mere existence of a dilapidated structure which might have been used as a mosque earlier will not gave the appellants any right of worship therein if that mosque was not in existence on the date of suit. Since the place has ceased to be a mosque and nobody was offering prayers at the time of institution of the suit, the appellants cannot be given any right to go there and offer their prayers.

9. However we find that the law on the subject is different. After Hussain and Khalid Rashid in their Wakf Laws and Administration in India" 1973 Edition state at page 111 that a personance set apart an apartment for his own prayers but if he allows others to say their prayers in it, assumes a pubic character. The test whether a building is a mosque lies in the fact that once it

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was set apart as a mosque. It is enough to make it wakf, provided public prayers are even once said with the permission of the settlor. Tybaji in his Muslim Law Fourth Edition 1968 mentions at page 610 that when a person purports the public to enter there and say their prayers, then it becomes a masjid according to the opinion of all, provided that he gives the public a right of way. Mulla also mentions in his principles of Mohomedan Law 1990 Nineteenth Edition at page 155 that if land has been used from time immemorial for a religious purpose, example for a mosque or a burial ground then the land is by user wakf although there is no evidence of an express dedication. If a building has been set apart as a mosque it is enough to make it wakf if public prayers are said there with the permission of the owner. Both a mosque and a saint's tomb become wakf by user. If a mosque has stood for a long time and worship has been performed in it, the court will infer that it does not stand by leave and licence of the owner of the site but that the land is dedicated property and no longer belongs to the original owner. Once the mosque was constructed, it stood dedicated to God and all the right, title and interest of the owner got completely extinguished. Once there was a complete dedication of the mosque, as a place of public worship any reservation or condition imposed by the owner would be deemed to be void and would have to be ignored.

10. In *Mirn* v. *Ram Gopal*[1] it has been held that where the Court finds that a mosque has stood on a piece of land for a long time and worship has been performed in it by the public, though the structure is katcha, it is open to the court to infer that the site has become a consecrated and dedicated property.

11. In *Mohammad Shah* v. *Fasihuddin Ansari*[2] it has been laid down that a wakf normally requires express dedication but if land has been used from time immemorial for a religious purpose then the land is by user wakf although there is no evidence of an express dedication.

12 The decision of the Division Bench of the Allahabad High Court in *Ram Chandra* v. *Alimuhammad*[3] is to the effect that every Mohomedan who has right to use a mosque for purpose of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise.

13. In *Maher Husein* v. *Alimohomed*[4] it was held that to create a wakf there must be a declaration of dedication which should be made contemporaneously with the act of dedication. The wakf must divest himself of the ownership of the property, but special rules apply where mosques are dedicated as wakf. Where a building has been set apart as a mosque it is enough to make it wakf if public prayers are once said there with the permission of the owner. Though a declaration of dedication and completion by some act giving practical effect to it are essential, it is always not necessary that there should be any direct evidence of these things. Dedication may be inferred from long user that property was wakf property. Where for a considerable number of years the public have been offering prayers in a mosque close by a tomb belonging to momin sect of Mohomedans has been regularly held it must be presumed that the mosque and the tomb have been duly dedicated and have become wakf by user and that the presumption might fairly be extended to other buildings and land enclosed within a compound wall which might be regarded as appurtenant to the tomb.

14. In *Jawhran* v. *Akbar Husein*[5] an old dilapidated mosque intended for Mohomedan worship was protected and looked after by the plaintiff and other Mohommedans of the village. The defendants had enclosed a part of the land and converted the mosque into a place for strong storing.. The plaintiff had remonstrated with the defendants and asked them to remove the things, when they failed to do so plaintiff instituted the

1 1935 Allahabad Law Journal Volume 33 page 1269
2 AIR (43) 1956 Supreme Court 713.
3 I.L.R.35 Allahabad 197
4 AIR 1934 Bombay 257
5 I.L.R.Volume VII Allahabad 178 (F.B.)

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suit for declaration of his right to repair the old dilapidated mosque and sought injunction for the removal of the defendants interference. The defendants pleaded that the building which was the subject matter of the suit was not a mosque but an *patta* or fortress made for the purpose of shelter from robbers in former days'. No doubt the question referred to the Full Bench consisting of five Judges of Allahabad High Court was regarding the *locus standi* possessed by Mohommedans to institute the suit in view of the provisions of Ss.30 and 539 of the Civil Procedure Code of 1863. However the observations of the Full Bench made in the course of the judgment are important for our present purpose. The Full Bench has stated that according to Mohommedan custom,the property in a mosque and in the land connected with it is vested in no one. It is not the subject of human ownership, but all the members of the Mohomedan community are entitled to use it for purposes of devotion whenever the mosque is open. Everyone who has such a right is entitled to exercise it without hindrance, and has a right of action against anyone who interferes with its exercise. The rule of the Muhammadan Law on the subject is that when anyone has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as delivery, an endowment is immediately constituted. His act deprives him of all ownership in the property and to use the technical language of Muhammadan lawyers, vests it in god in such a manner as subjects it to the rules of divine property whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his Creatures. A mosque is an endowment of this kind, and the Muhammadan community, or any member of it has a right to enter the mosque and to pray there.

15. In *Syed Mohd.Salie Labbai* v. *Mohd.Hanifs*[1] the land in dispute was originally acquired by a Muslim saint about two hundred years ago. Some years later the predecessors of the respondents built a mosque therein with the permission of the ancestor of the appellants and the then owner of the land. The adjacent vacant land was used as a graveyard for the Muslims of the village. There was a scheme suit in respect of this property wherein it was contended that there was no public wakf of the mosque which was only a private or family mosque, that there was no declaration of dedication for the purpose of a mosque and that the prayers offered in the mosque by the respondents were only by leave and licence of the founder. The graveyard was also not a public wakf but the family graveyard of the appellants wherein corpses of other Muslims were allowed to be buried on payment of pit fees. Held that in the case of a mosque, the founder's permission or the bare act of allowing the members of the Mohomedan public to offer prayers amounts to a complete delivery of possession. The owner of the land has given his tacit consent when he allowed the mosque to be constructed jot for the private members of his family but for the worship of God by the entire Mohomedan public. By providing a separate entrance, the owner agreed to separate the mosque from the rest of property by allowing the entire mohomedan Community of the village to worship in the mosque and to perform other ceremonies. The owner of the land gave delivery of possession to the mosque. A place may be dedicated as a mosque or masjid without there being any building. But since the building in the nature of a mosque was built a clear case of dedication has been made out. Once the mosque was constructed it stood dedicated to God and all the right, title and interest of the owner got completely extinguished. Once there was a complete dedication to the mosque as a place of public worship any reservation imposed by the owner would be deemed to be void. Under the Muslim law once the dedication was complete, the property passed from the owner to god and it never returns to the owner and therefore the question of the mosque being private can never arise. The very concept of a private mosque is wholly foreign to the dedication of a mosque for a public is wholly foreign to the dedication of a mosque for a public purpose under Muslim Law. Under that system of law once the founder dedicates a particular property for the purpose of a public mosque, no Muslim can be denied the right to offer prayers in the mosque. The law is so strict

1 1976 3 S.C.R.721

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that the moment even a single person is allowed to offer his prayers in a mosque it becomes dedicated to the public. Also, any adjuncts to a mosque, which are also used for religious purposes, become as much a part of the mosque as the mosque itself. The argument that there was no formal dedication is unsound. The act of permitting the Mohommedans of the village to build a mosque itself amounts to a complete dedication or a declaration that the mosque is a public property.

16. So it is a fundamental principle of the Muhammadan Law of Wakf that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God. A mosque once so consecrated cannot in any case revert to the founder and every Muhammadan has the legal right to enter it, and perform devotions according to his own tenets so long as the form of worship is in accord with the recognised rues of Muhammadan Eccesistical law. A mosque from its very nature is dedicated for worship and is open to all Muslims local and others. One the mosque was constructed it stood dedicated to God and the owner is divested of his right title and interest in the property. The very concept of a private mosque is unknown to Muslim Law. Once the founder dedicates a particular property for the purpose of a public mosque, no muslim can be denied the right to offer prayers therein on the ground that the mosque fell into disuse long back. And from the mere fact that in Ex.A1 the village plan a mosque is shown to have existed in the year 1938, this disputed piece of land has become a wakf by user although there is no evidence of an express dedication and any attempt on the part of the respondents to prevent the appellants from coming over to the property and saying their prayers cannot be permitted.

17. In the result, , the appeal is allowed and the judgments and decrees of the courts below are set aside and the decree for injunction restraining the respondents from interfering with the appellants right to worship in the mosque described in the plaint schedule is granted as prayed for. And in the circumstances the parties are directed to bear own costs throughout.

RR/VCS

MADRAS HIGH COURT

2nd April, 1992/A.A.O.No.870 of 1985

Pratap Singh, J.

The Nagapattinam Import and Export Corporation,Nagapattinam, Thanjavur District

v.

K.Lakshmi

Appeal against theOrder of the Deputy Commissioner of Labour Commissioner for Workmen's Compensation Tiruchirapalli dated 14.10.85 W.C.Application No.37 of 1981.

Workmen's Compensation Act *(1923),Ss.10 and 23 – Delay of 8 years in preferring application excused – Order upheld on appeal – Receipt for payment in full quit – Failure to register the same as required in S.28(1) – Effect.*

Held: the order of the Commissioner for Workman's Compensation has considered the question of delay of 8 years and had found that it has been validly explained. The reasoning of the lower Authority is very fair and acceptable.

Para 6

Unless a reasonable interpretation is given regarding the purview of S.28 of the Act, the employers would offer a paltry sum to the dependant of an employer, who would be in dire need of money and get a receipt in full settlement of the claim and thwart the very object of this Act. Only to save the dependants from such contingency, S.28 of the Act has been incorporated in the Act. Unless such a receipt is registered under S.28 of the Act as per procedure laid in the said section, it cannot be used as an answer to the claim of the applicant.

Para 7

C.M.A.dismissed with modification.

Mr.G.Neelamegan for M/s.K.V.Venkatapathy, and S.Velmurugan, for Appellant.

ORDER

Opposite Party II in W.C.Application No.37 of 1981 on the file of the Deputy Commissioner of Labour - Commissioner for Workmen's Compensation,Tiruchirapalli, has filed this Civil Miscel-

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AIR 1956 SC 713

In the Supreme Court of India

(BEFORE VIVIAN BOSE, SYED JAFER IMAM AND N. CHANDRASEKHARA AIYAR, JJ.)

FAQIR MOHAMAD SHAH ... Appellant;

Versus

QAZI FASIHUDDIN ANSARI & OTHERS ... Respondents.

Civil Appeal No. 225 of 1952, decided on May 9, 1956

Advocates who appeared in this case :

M.C. Setalvad, Attorney-General of India. R.M. Hazarnavis, Advocate and S.N. Andley of Rajinder Narain & Co., Advocates, for the Appellant;

2, 4 and 6 to 8: Nur-ud-din Ahmad, Shaukat Hassain and Naunit Lal, Advocates, for the Respondents.

The Judgment of the Court was delivered by

VIVIAN BOSE, J.— This appeal marks the culmination of a series of acrimonious disputes that have been going on between a section of the Mahommedan community at Jabalpur and one Gulabshah and his son the defendant since the year 1880 about portions of land that adjoin a mosque in Jabalpur known as the Kotwali Masjid. It is now admitted that the masjid proper and the ground on which it is built is wakf property. At one time Gulabshah had claimed even the masjid as his own property but that was decided against him in the year 1881 and since then he, and after him, the present defendant, have admitted that the masjid proper is wakf; but the dispute about the rest continues.

2. The suit is supposed to be a representative suit under Order 1 Rule 8 of the CPC although it would be impossible to gather that from the plaint and the subsequent pleadings; and even now it is difficult to know exactly who the plaintiffs are supposed to represent; nor is there any order on record evidencing the permission of the Court. However, as the learned Additional District Judge of Jabalpur said in his judgment that the suit was filed in a representative capacity under Order 1 Rule 8, and as the other side did not challenge that in appeal, we must take it that they are satisfied on that point.

3. The present suit was filed on 12-8-1936 and the decision of the High Court was given on appeal on 28-9-1945. The certificate of admission was signed on 9-4-1945. The appeal here has taken eleven years to come on for hearing and it is twenty years since the suit was filed. Most of the delay after the decision of the High Court was in the Nagpur High Court, for the records did not reach this Court till 12-10-1953, but even here it has taken 3 years. This is most unsatisfactory.

4. The plaintiffs' case, as set out in the plaint, is that the masjid proper belongs to the Sunni community of Mahommedans of Jabalpur city and that the defendant was appointed its mutwalli by the District Judge of Jabalpur on 3-8-1927. The plaintiffs' case is that the lands and other properties that surround the masjid and are adjacent to it are also part of the masjid property, but the defendant claims them as his own personal property. Hence the plaintiffs sue for a declaration that the property is wakf property and not the defendant's and that the defendant is only a mutwalli or trustee of this property as well as that of the masjid proper.

5. The plaintiffs admit that the defendant is in possession of these properties but they assert that he is there as mutwalli and that his possession is on behalf of the Sunni Mahommedan community. For that reason, the plaintiffs say that a declaratory

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suit will lie and that they need not sue for possession. They also claim that no question of limitation or adverse possession can arise because, firstly, the possession is, and always has been, that of the community through the defendant; and secondly, because the defendant is a trustee under a trust for a specific purpose and so cannot set up a title hostile to the trust.

6. Neither side has any document of title. In their plaint, the plaintiffs rely solely on the following facts:

(*1*) that the masjid proper is now admitted to be wakf property;

(*2*) that these other properties surround the mosque and adjoin it; and

(*3*) on five specific acts of user that are set out in para 7 of the plaint.

7. There is also a general assertion that

> "these buildings and lands have always been used for the benefit of the community".

8. The first court found in favour of the defendant and against the plaintiffs and dismissed the plaintiffs' suit. On appeal the High Court reversed this and decreed the claim. The defendant appeals.

9. Now it is evident at the outset that the burden lies on the plaintiffs. The defendant is admittedly in possession and except for the fact that the plaintiffs claim that he is in possession on their behalf (a fact which the defendant denies) the plaintiffs are out of possession. Hence they must prove that the defendant is in possession *on their behalf*. The only way in which the plaintiffs can do that is by showing that the properties in suit are wakf property.

10. In their written rejoinder the plaintiffs admitted that:

> "they are unable to state since when and how the masjid and its adjacent land and houses became wakf property, that is to say, property dedicated for the worship of God *by the Muslim community*".

11. And also,

> "The plaintiffs do not know to whom the land belonged on which it" (the masjid) "was built".

12. They went on to pin their case down to a single assertion, namely:

> "But they do assert that these properties have been used and regarded as wakf from time immemorial."

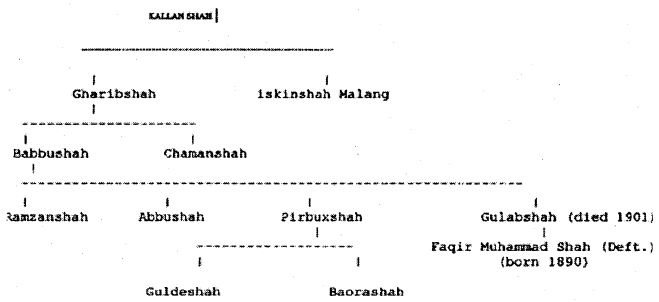
13. Broadly speaking, therefore, that is the simple and single issue to which we have to confine ourselves. All the other matters follow, almost as a matter of course, from that.

14. The earliest reference that we have on record to these properties is Ex. D-197, a plaint by the Anjuman Islamia on 23-9-1880 against three persons, Gulab Shah (the present defendant's father), his uncle Chaman Shah and his brother Pir Bakhsh, in a suit filed under Section 539 of the old CPC, corresponding to Section 92 of the present Code.

15. It will be convenient at this stage to set out the genealogical table of the defendant's family.

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16. That plaint states that the mosque belongs to the Sunni community and that in it there are a *takiya* and other public buildings. The plaintiffs stated that the three defendants live in that *takiya* as fakirs and that they have begun to assert their proprietary right over the buildings and compound of the mosque. The plaintiffs asserted that

> "The mosque and the buildings attached to it are all wakf and charitable endowments ... and do not belong to any individual."

17. The plaint prayed that the management of

(*1*) the mosque, and

(*2*) the buildings attached to it

be carried out properly and that the defendants be turned out and that trustees be appointed.

18. The dispute was referred to arbitration. The arbitrators differed, so the Sarpanch made an award on 8-3-1881. His award purports to set out the history of the mosque and, according to the Sarpanch, this history was given by the witnesses of both sides. He held that the mosque was built about 200 years before 1881, that is to say, about 1681. Before it was built the compound in which the mosque stands was the *takiya* of one of the defendants' collateral ancestors, Miskeen Shah Fakir. (It will be seen from the family tree that Miskeen Shah was the defendant's great-grand uncle). One of his disciples was a Hindu *patwa* Sukhlal. Out of reverence for the fakir Sukhlal constructed a mosque on the site of the *takiya*. Ever since its construction this *takiya* and the mosque have been in possession of Miskin Shah and the defendant's family as well as the house opposite the mosque (that is, the present imambara). The Sarpanch found that there was no proof of dedication either by Sukhlal or Miskin Shah or anyone else and so he do that the property belonged to the three defendants in that suit who were the heirs of Miskin Shah. He also found that when Miskin Shah died he was buried in front of the mosque.

19. These facts about the origin of the mosque were substantially accepted by the section of the Muslim community, whom the plaintiffs claim to represent, in a hand bill issued on 15-10-1925 (Ex. D-149). This hand bill was signed by the first plaintiff in the present litigation along with other persons. It says—

> "It is an admitted fact that a long time ago one Patwa constructed a small three arched mosque ... for Fakir Mohammad Shah's great grand-father Hazrat Sufi Miskin Shah Sahib. The tomb of the said Shah Sahib is in front of the mosque."

20. It can therefore be accepted that this was the origin of the mosque. It can also be accepted as a matter of law that a wakf normally requires express dedication but "if land has been used from time immemorial for a religious purpose ... then the land is by user wakf although there is no evidence of an express dedication". (*Mulla's Mahomedan Law*, 14th Edn., p. 173). It is evident that there was no proof of express dedication up to the year 1880 nor has any been produced since, therefore the only

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question is whether there is evidence of user and if so, user of what.

21. It will now be necessary to turn to the map filed with the defendant's written statement. It sets out the different stages of development of this property. In the year 1880, when the suit of that year was filed, the mosque proper stood on some open land. There were houses to the south and east of this open land and on a part towards the north. On the west was a drain and a road. Miskin Shah's tomb was to the east and in between the tomb and the mosque was a well. There was another tomb to the south of the mosque and there was an imambara still further south. The mosque was only 21′ × 13′9″ at that time. There is nothing to show that this land was fenced in or that these properties formed an integrated whole. Such demarcations as we have are of the compounds belonging to the surrounding houses and not of this open land in which these several structures stood dotted about. It is true this is the defendant's map but the point we are making is that the plaintiffs have not produced any evidence to show that those properties were an integrated unit in 1880 or even that they were regarded as such.

22. We now go back to the further stages of the 1880 suit. The award was placed before the trial Judge and he said that on reading it through it seemed that the masjid was erected by a Hindu for the special benefit of Miskin Shah Fakir and not for a *public* charitable purpose. The learned Judge therefore held that the suit did not lie under Section 539 of the CPC and dismissed it.

23. On appeal the learned Additional Commissioner set the dismissal aside because the ground on which the suit was dismissed had never been raised or tried. He therefore remanded the case for trial of those facts.

24. After remand, the trial Judge framed an issue asking whether the masjid was an institution used for public charitable purposes and he held that the *masjid* must "now" (that is in 1881) be considered an institution used for public charitable purposes because of the evidence of user produced before him. Despite that he accepted the award and, giving judgment in terms of the award, dismissed the plaintiffs' suit.

25. Now it will be remembered that this suit was not only in respect of the masjid but also about the buildings which, according to the then plaintiffs, were attached to the mosque. The complaint of the plaintiffs was that the three defendants claimed both sets of property as their private property. The Sarpanch held that the defendants offered no disturbance to the worshippers who came there to take a bath and say their prayers and also held that

> "In my opinion the land to which the plaintiffs assert as appertaining to the mosque *did not in fact appertain to the mosque* as would be clear from para 4."

26. "Para 4" sets out the history we have already outlined and embodies the opinion of the Sarpanch that the whole property, including the mosque, was not wakf property and that it was the personal estate of Miskin Shah and after him of Miskin Shah's heirs. This was the award that was upheld after remand and on appeal the appellate court affirmed the decree of the first court dismissing the plaintiff's suit. The appellate court dismissed the appeal and upheld this decree.

27. Despite this finding about the mosque, we find Gulab Shah and his family still calling, not only the surrounding property but also a part of the mosque itself, their private property. The first plaintiff admitted in the hand bill he signed on behalf of the Muslim community (Ex. D-149) that after Miskin Shah's death—

> "Gulab Shah Sahib, the father of Fakir Mohammad Shah Sahib, extended the mosque after spending thousands of rupees."

28. Part 2 of the defendant's map shows that the masjid proper was extended from 18 feet in length to 27⅔ feet and that a second hall 11⅓ feet deep was added in front of the old one; also that a room marked A and a verandah were added to the south of

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the old portion of the mosque. Gulab Shah and his family let out this room to tenants and took rent notes from them. Ex. D-17 dated 24-5-1886 is one of them and Ex. D-18 dated 20-11-1892 is another. In both the tenants the speak of "your Kotha" and in the second of "your Kotha adjoining the mosque". The first is in favour of Gulab Shah's uncle Chaman Shah and the second in favour of Gulab Shah and his two nephews Guldeshah and Baorashah.

29. Then there is a notice of demand for house tax in respect of the Imambara addressed to Gulab Shah: Ex. D-28 dated 2-1-1895. Ex. D-20 dated 5-2-1895 is the Municipal receipt for house tax given to Gulab Shah.

30. There is also a sale deed, Ex. D-199 dated 4-12-1894, executed by a stranger to these proceedings to another in which he has described the northern and eastern boundaries of the property sold as "the mosque of Gulab Shah".

31. The strongest evidence of all in these fourteen years is Ex. D-198 dated 3-5-1893. Some third party purchased an option for catching fish and taking *singhadas* (water nuts) from the Municipal Committee of Jabalpur. Gulab Shah stood security for this person and he offered as security Room A which he said was "owned by me personally". He called the eastern boundary of this "house" the "mosque of self" and said that its northern boundary was "mosque". The mosque on the north of room A was the old masjid which was declared to be public charitable property in the 1880 litigation. The "mosque" to the east, which Gulab Shah claimed was *his* mosque, comprised part of the extensions to the old mosque which admittedly Gulab Shah had made himself "after spending thousands of rupees". It is fair to assume from these documents that Gulab Shah made a distinction between the old mosque and the new extensions and that he claimed the extensions and room A as his own property. The fact that members of his family joined in the leases of room A places this beyond doubt.

32. It is to be noted that in all the documents up to that date Gulab Shah is addressed personally and not as Mutwalli. It is also to be noticed that down to this time (1895) there is no evidence of public user except of the mosque proper as it stood in 1880.

33. In the year 1896 Gulab Shah made an application to the Municipal Committee for permission to repair a *chabutra*. (Ex. P-14). The inspection note endorsed on the application shows that this was at the back of the mosque. Gulab Shah signs the application as "Gulab Shah, the mutawalli of the mosque," but in the application he refers to the *chabutra* as "the *chabutra* of masjid land". It seems to us that he is again drawing the distinction here that he had drawn in Ex. D-198, executed by him three years earlier, between the mosque proper and the rest of the land. Ex. P-15 is the notice issued by the Secretary of the Municipal Committee on Gulab Shah's application and so naturally addresses him in the terms in which he had signed, namely "Mutawalli of the mosque". He was ordered to demolish the *chabutra*. This has reference to the portion of the property that is immediately behind the mosque. It adjoins the mosque proper but lies behind it.

34. In 1898 Gulab Shah made another application in a document that was the subject of much discussion before us. The document is Ex. P-18. It ends as follows:

> "Application by
> the mutawalli of the Kotwali mosque,
> resident of Jubbulpore.
> Gulab Shah."

35. As regards the body of the document we will split it into paras because of the controversy that raged around it in this Court.

> "A. The beams of the ceiling of the mosque ... have become worn out. The same,

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and also an ordinary arched chabutra, are to be constructed on the drain for passage."

36. Then the document continues—

"B. And within the compound of the Imambara masjid the house of the Imambara is to be dismantled and built two storeyed high."

37. And next the document says—

"C. And the parchhi which is to be built within the compound of the Imambara near the tomb"

38. and it continues—

"D. and the tiled parchhi which stands built in the compound of the Imambara masjid, north south in the length of the mosque have become worn out, etc."

39. It is not possible to understand this application until we look at the map, Ex. P-19, which accompanied it. It will be observed that in the para which we have marked A Gulab Shah speaks only of the "mosque". His plan shows that in black colour and calls it the "Kotwali mosque". That part is confined to the old mosque which was 18 feet north to south in the year 1880. By this time the length had increased. But except for that the area is the same.

40. Next, we notice that in para C Gulab Shah speaks of a *parchhi* to be built in the compound of the "Imambara". The map shows that this *parchhi* does not join the Imambara but embraces the eastern end of Miskin Shah's tomb. This area is not referred to as the "Imambara masjid compound" but merely as the Imambara compound. It does not adjoin either the old portion of the mosque or any of its extensions.

41. Lastly, we have paras B and D. They speak of constructions in the "Imambara masjid compound". A reference to the map will show that the constructions to which these paras refer are attached to the *extensions* of the mosque proper but do not form part of the *old* mosque as it stood in 1880. The *chabutra* extends along the east of the mosque and is between the old mosque and the courtyard which by now has been demarcated and has been either fenced in or walled in; and the *parchhi* extends to the south of room A with its eastern extremity in continuation of the north-south boundary of the old portion of the mosque as it stood in 1880.

42. In our opinion, Gulab Shah was speaking loosely when he spoke of the "mosque" in one place, of the "Imambara compound" in another and of the "Imambara mosque compound" in a third. In view of his consistent assertions and conduct up to the date of this document, and in view of the confused expressions that he has used there, we are not able to regard this as a sudden abandonment of the position that he had consistently adopted before and continued to adopt after the document. It will be remembered that he claimed everything in the 1880 litigation. We have already set out a series of documents ranging from 1880 down to 1896 in which he and his family used, and he claimed, these properties as his own. Inadvertent expressions of dubious and ambiguous meaning cannot be twisted into admissions against the maker's interest when the surrounding circumstances indicate that he had been consistently asserting the contrary over a series of years. Something stronger than that would be required. Had the assertions been clear and unambiguous the matter would have been different but "Imambara mosque compound" is anything but clear.

43. Gulab Shah died in 1901 or 1902 and about that time the Municipal Committee granted him a receipt for house tax paid by him in respect of the Imambara for the year 1901/02. The document (Ex. D-24) is headed—

44. "Receipt granted to Gulab Shah owner of house 241 etc." So far as it goes, it shows that Gulab Shah claimed this as his own property. It is to be observed that he

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did not pay the tax as Mutwalli.

45. We think that a fair conclusion about the position as it existed at that date is this. First, Gulab Shah and his family claimed *everything* up to the year 1880. In that year they gave up their claims to the mosque as it stood in 1880 because of the judgment, Ex. D-2, after remand. There is no evidence of any demarcation of a compound to the mosque at that date, so it must be taken that all that was admitted to be public property was the mosque proper and the area on which it was then built. Gulab Shah and his family continued to claim the rest of the property as theirs.

46. After this Gulab Shah extended the mosque and by 1898 its boundaries were demarcated as shown in the map, Ex. P-19. Room A and a verandah appertaining to room A were added to the south of the old mosque. Some additions were made behind the mosque and to the west of it on a triangular strip of land, and a courtyard was added towards the east while the old mosque was extended by two feet north-south. But there is nothing to show that public as such had any hand in these extensions and it seems to us that Gulab Shah claimed these extensions to the mosque (as distinct from the old mosque as it stood in 1880) as his property. He also claimed all the property in this area as his.

47. There is no evidence at all of public user (apart from the old mosque) and still less of public user *for a religious purpose*. But we think that though there is no direct evidence about this it will be fair to assume that the public did use a *part* of the extensions, namely the courtyard in front of the mosque and the area covered by the *chabutra* to the east of the mosque when they used the mosque proper, and it will be a fair deduction that this was done for the same religious purposes as in the case of the mosque proper. But room A was cut off from the mosque and so were the constructions behind the mosque on the west. Room A was rented by Gulab Shah and his family and there is no evidence at all about user of the part behind the mosque towards the west. We cannot regard the renting of rooms to tenants for residential purposes as user by the public for religious purposes.

48. We now pass on to the next stage. When Gulab Shah died the defendant was a minor and his affairs were managed by his guardian Gharibullah Shah. At this stage, certain members of the Muslim community stepped in and began to assert a right to deal with a part of the property. Up to the year 1907 there was a urinal and a bathroom (detached from the mosque proper and its extensions, as also from the Imambara) to the south of the mosque and to the west of the Imambara. Certain members of the community wanted these to be shifted to another spot, so they made an application to the Municipal Committee for permission to do so. The application is Ex. P-11 dated 10-9-1907. Permission was granted on 29-10-1907 (Ex. P-12). But close on the heels of this followed an application by the defendant's guardian to make certain alterations and constructions. This application is Ex. D-42 and is dated 21-4-1908. It says that "*marzaz* and *kothas* etc. of my mosque.... are in a dilapidated condition". Ex. D-43 is the map attached to it and among the alterations for which permission was sought was the construction of a latrine and bathroom in the same position as shown in Ex. P-12.

49. We do not know which of the two made the construction. All we know is that notices were later sent to the defendant for failure to construct the latrine according to the proper pattern. These notices are Ex. D-59 dated 13-8-1910 and Ex. D-61 dated some time in 1913: and on 24-5-1914 the defendant was given permission to repair this latrine (Ex. D-44). The first notice speaks of the latrine in connection with "*your* house". We also know that the conservancy tax was paid by the defendant throughout: see Exs. D-107, 65, 108, 66, 70, 77, 83, 84, 86, 126, 91, 115, 96 and 119. These documents range from 24-8-1908 to 17-11-1935. We also know that the defendant was again allowed to repair the latrine on 24-5-1914 (Ex. D-44).

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50. As against this, there is nothing to show that any members of the Muslim community other than the defendant ever paid the taxes or actually made the alterations. Further, in the hand bill (Ex. D-149) put out by the first plaintiff and others, it is admitted that—

> "during the time of his (Fakir Mohmmad Shah's) minority his guardian Gharibullah Shah extended one part (of the mosque) only about 12 years ago at the most. And only about six or seven years ago, he (Fakir Mohammad Shah) made a considerable improvement in the courtyard, drain, water-pipe etc. by constructing the same"

51. This curious document does not state that the Muslim community ever did anything or paid for it, and in particular it is silent about the construction of the latrines.

52. The oral evidence about the removal of these latrines is not worth much. The defendant says as DW 1 that he made the most recent constructions in 1923-24 but says nothing about the earlier construction. The plaintiffs' evidence is to the effect that the construction of 1907 or 1908 was by the signatories to the application, Ex. P-11. But we do not think this matters much because the defendant admits as DW 1 that the

> "urinals and bathroom shown in the second stage must have been for the use of the persons who used to attend the masjid for prayers."

53. It is therefore evident that the worshippers at the mosque have been using the urinal and bathroom and that they were constructed for their use.

54. As regards the rest of the property, there can be no doubt that the defendant continued to lay claim to the Imambara, kothas and shops in the vicinity. He took a series of rent notes, issued notices and gave a lease deed. They all indicate that he was claiming those properties as his own. They range from May 1910 down to June 1935. The documents are Exs. D-178, 161, 102, 179, 177, 189, 163, 186, 188, 191,196,193 and 40.

55. There is no evidence, apart from some vague and worthless oral evidence, about any user of these properties by the Muslim community. So far as the kothas and shops are concerned, it can hardly be pretended that the user was *for religious purposes*, therefore, unless the plaintiffs can show that these properties appertained to the wakf, that is to say, to the original mosque and formed a part of its estate, or an accretion to it, they cannot succeed. As we have shown, their *sole* source of title so far as this Court is concerned is long continued public user for *religious purposes*. The *only* user they have been able to establish *for that purpose* is of the old mosque as it stood in 1880 plus certain extensions to it. We have therefore now to devote our attention to these extensions. But before we do that, we will examine the position about the two tombs, one of Miskin Shah and the other of Dara Shah, and of the Imambara.

56. So far as the Imambara is concerned, it was in existence in Gulab Shah's time and it is clear that he dealt with it as his own property. It is also clear from the various maps that in the beginning there was no compound or other demarcated areas around any of these structures. They merely stood as isolated entities on a piece of open land surrounded on three sides by bungalows of other persons. Even at the date of suit, the first witness for the plaintiffs, Abdul Salam, admitted that "the Imambara is separate from the mosque". It is also clear from the various documents to which we have referred that after Gulab Shah the defendant's guardian, and later the defendant, claimed and used this property as their own. They paid the taxes, they repaired it and they erected a second storey on the old one-storeyed building.

57. The documents show no public user of the Imambara and the only evidence from which public user is sought to be established is the statements of certain

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witnesses in this case. They prove, and that is admitted, that *tazias* are prepared there. But the defendant says he pays for this and there is nothing to refute that. The plaintiffs have not produced a single witness to say that he ever contributed anything towards it or that he collected money for the purpose. Muhammad Khan (PW 5) admits that the defendant prepares these *tazias* and says that he does not know where he gets the money from, while Abdus Samad (PW 13) admits that the defendant bears all the costs, and Haji Alabux (PW 15) admits that the Jamaat does not pay anything towards this. He says the cost is met from offerings but that is vague because even if it is true offerings may be to the defendant personally to help him make the *tazias.*

58. The only other evidence is that a school was once situate there. Qazi Fasihuddin (PW 2) says it was for "1½ or 2 years". Abdul Ghaffar (PW 4) says it was for "2 or 2½ years" while Sheikh Kalloo (PW 3) it was only for "2 or 4 or 6 months". That is not long continued public user.

59. The documents show that the extensions to the Imambara were carried out by the defendant and even the plaintiffs' witnesses admit that he paid for them and also that he has been letting out the upper portion and collecting the rent: see PWs 4 and 15. The latter admits that the Jammat has never had any of these rents over the last 40 or 45 years.

60. Some evidence was produced to show that the defendant used the beams from the roof of the old masjid for the Imambara when an arched roof was placed over the old masjid. But this evidence is vague and the important point is that nobody protested. Also the reason why the roof of the old masjid was turned into an arched roof was, because the beams of the old roof were worn out (see Ex. P-18). If that was the case, it is not likely that they would have been used for the Imambara.

61. The only question now is whether the Imambara was made an accretion to the old mosque or any of its later extensions. The only evidence in support of that is an inspection note dated 30-10-1938 made by the trial Judge in this case. He says that

> "the masjid and the adjoining places appear to be inter-connected with each other".

62. That observation is justified because the extensions that have been made to the various items of property in this area have brought them all so close together that they now adjoin each other. But the force of this is displaced when the plaintiffs' witness, PW 1, admits categorically that the Imambara is separate from the mosque.

63. In our opinion, public user of this item of the property is not satisfactorily proved nor is it proved that the Imambara is an adjunct of the mosque.

64. We turn next to the two tombs, one of Miskin Shah and the other of Dara Shah. Both are tombs of members of the defendant's family. There is evidence of public user so far as they are concerned and except for the fact that they are near the mosque, there is nothing to indicate that they are part and parcel of it. In the circumstances, we hold that the plaintiffs have not established their right to this. And this finding decides the dispute about the structures and rooms to the east of Miskin Shah's tomb. These structures were built by the defendant and he has been receiving rents for the shops and rooms situate there. There is some evidence to the effect that *gahwaras* are sometimes kept in the parchhi that is there. But that sort of user is not enough to indicate that the owner of the property divested himself of all interest in it and dedicated it to God or intended to make it an accretion to property already dedicated.

65. We now come to the shops and rooms and other structures in the triangular strip of land behind the old mosque and to the west of it. These were built by the defendant and he has claimed them as his own and has realised the rents. But though they are separate from the mosque in the sense that they do not lead into it there is a lot of evidence, which we see no reason to disbelieve, that proves (*1*) that the beams of these buildings rest on the masjid wall and have been inserted into it, (*2*) that the

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back of the mosque forms the back wall of these rooms, (*3*) that the minarets of the mosque have been scraped so as to make these rooms bigger, and (*4*) that there were some *pushtas* there that had been removed so as to enlarge the area for the rooms.

66. Now it is evident that the space on which the *pushtas* and the minarets stood was part of the mosque property. The defendant has therefore built on a part of the mosque estate and as he has not demarcated those portions from the rest we are bound to treat them as accretions to the mosque estate.' It is true that a stranger to the trust could have encroached on the trust estate and would in course of time have acquired a title by adverse possession. But a Mutwalli cannot take up such a position. Both Gulab Shah and the defendant have described themselves as Mutwallis of the mosque, therefore, if they choose to build on part of the mosque property in such a way as to integrate the whole into one unit (that is to say, the parts of each room that stand on the mosque property and the remainder that does not so as to form one composite room) then we are bound to regard this as an accretion to the estate of which they were trustees; and they will be estopped from adopting any other attitude because no trustee can be allowed to set up a title adverse to the trust or be allowed to make a benefit out of the trust for his own personal ends.

67. This applies equally to Room A. In its origin it was separate and severable from the mosque and so could have been regarded as distinct from it even though it was constructed by a Mutwalli. But the inside walls that separated it from the mosque were pulled down in 1908 and the old mosque was extended into it so that the room now forms an integral part of the old mosque. That made it an accretion to the mosque, and as the Muslim public have been using it ever since for religious purposes along with the mosque proper, dedication by the defendant must be presumed despite his claim that the old mosque was part of his private estate. He was making these claims as late as 1921 and 1927. In 1921 he sued a third party who claimed to be the Mutwalli for the key of the mosque and in 1927 he was the defendant in a suit instituted under Section 92 of the CPC in which he set up that claim as an answer to the suit. But his assertions in 1921 and 1927 cannot outweigh his conduct in 1908 so far as Room A is concerned.

68. The portion of the land marked A-1 in the plaint map is a yard. There is no evidence of public user of this part of the property for a religious purpose. All that can be said about it is that worshippers in the mosque pass over this plot to obtain ingress to the mosque. The map, Ex. D-43, shows that there is no other access. There is some oral evidence to the effect that prayers are occasionally offered there at a funeral but the same evidence shows that that is also done on the road, so that kind of user is not enough to indicate dedication.

69. The same applies to the portion marked A-6. The defendant has let this out to Government and in the lease (Ex. D-40 dated 25-6-1935) he claims to be the ostensible owner; and it is admitted that he collects and keeps the rent. There is no clear evidence of long and uninterrupted public user. Some witnesses say that the worshippers sometimes overflow into this land and that prayers are sometimes said there over dead bodies at funerals. We do not think that is enough to indicate dedication.

70. After a careful survey of the evidence, we have reached the following conclusions:

(*1*) that the old mosque as it stood in 1880 is proved to be wakf property but that nothing beyond the building and the site on which it stood is shown to have been wakf at that date;

(*2*) that this property has been added to from time to time and the whole is now separately demarcated and that the additions and accretions form a composite and separate entity as shown in the plaintiffs' map. This is the area marked

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ABCD in that map;

(*3*) that this area is used by the public for religious purposes along with the old mosque and as the area has been made into a separately demarcated compact unit for a single purpose, namely collective and individual worship in the mosque, it must be regarded as one unit and be treated as such. The whole is accordingly now wakf;

(*4*) that the accretions were made by Gulab Shah and the defendant both of whom claimed to be Mutwallis of the mosque;

(*5*) that this area also includes the shops and *chabutra* shown to the west of the mosque in the plaint map on a triangular piece of land;

(*6*) that the urinal, water pipe and bathroom were constructed for the use of the worshippers and so must be regarded as an adjunct of the wakf;

(*7*) that the rest of the property in suit is not shown to be wakf or accretions to the wakf estate. It is separately demarcated and severable from the wakf portion ABGD and the shops to the west of the mosque;

(*8*) that the worshippers at the mosque have a right of way as an easement over the plot A-1 to obtain ingress to and egress from the mosque, and also a right of way to the urinals, the water tap and the bathroom.

71. There remain for consideration the pleas of res judicata and limitation raised by the learned counsel for the defendant.

72. So far as res judicata is concerned, the argument is that the Muslim community sued Gulab Shah in 1880 for the whole of the present property and as their suit was dismissed in toto Explanation V to Section 11 of the CPC applies.

73. We need not go into this question because it is now admitted, and was so found in the 1880 litigation, that the old mosque was wakf property. It can be assumed that the rest was not wakf at that date and indeed that is also our conclusion on a review of the evidence. But much happened since the 1880 litigation and there have been subsequent additions and accretions to the original estate so that now the whole of those additions and accretions form part and parcel of the original wakf.

74. On the point of limitation, it was contended that Article 120 of the Limitation Act applies and that the cause of action accrued in 1880 and at several times thereafter beyond the six years contemplated by that article. The answer here is that Section 10 of the Limitation Act applies. The proviso says that—

> "For the purposes of this section any property comprised in a ... Muhammadan ... religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of any such property shall be deemed to be the trustee thereof."

75. Therefore, no question of limitation can arise in respect of those parts of the property in dispute which, according to our findings, are now comprised in the wakf estate.

76. The result is that the appeal succeeds in part. The High Court's decree will be modified as follows:

> "It will now be declared that the area ABCD in the plaint map together with the shops and *chabutra* on the triangular patch behind and to the west of the mosque are wakf property and that the urinal, water pipe and bathrooms are also part of the wakf estate. The rest of the plaintiffs' claim will be dismissed except that it will be declared that the worshippers at the mosque have a right of way as an easement over the portion of the property marked A-1 to obtain ingress to and egress from the mosque and its precincts and to and from the urinal, water tap and bathroom shown on the plaint map."

77. As success and failure in the litigation is almost equal, each side will bear its

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own costs.

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* (On appeal from the judgment and order dated 28th day of September, 1945 of the Nagpur High Court in First Appeal No. 96 of 1939 arising out of the decree dated 30th day of June, 1939 of the court of the Additional District Judge, Jabalpur in Suit No. 4-A of 1939)

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1912

KIRPAL SINGH v. BALWANT SINGH.

Rs. 3,350. With that conclusion of the Chief Court their Lordships agree.

The result that their Lordships will humbly advise His Majesty that the appeal should be dismissed and the decree of the Chief Court be affirmed. The appellant must pay the costs of this appeal.

J. V. W. *Appeal dismissed.*

Solicitors for the appellant: *Barrow, Rogers & Nevill.*
Solicitor for the respondents: *Edward Dalgado.*

PRIVY COUNCIL.

P.C.°

1912
Oct. 31;
Nov. 26.

COURT OF WARDS
v.
ILAHI BAKHSH.

[ON APPEAL FROM THE CHIEF COURT OF THE PANJAB, AT LAHORE.]

Mahomedan law—Endowment—Creation of endowment—Wakf by dedication or user—Graveyard, land used as—Presumption of ancient origin of shrine and burial place—Panjab Land Revenue Act (XVII of 1887), s. 44—Entry of ownership in record-of-rights at settlement.

In this case the Judicial Committee (affirming the decision of the Chief Court of the Panjab) *held*, on the evidence, that the land in suit (known as the Mai Pak Daman graveyard) which had been used from time immemorial by the Mahomedan community of Multan for the purpose of burying their dead, formed part of a graveyard set apart for the Mahomedan community, and that by user, if not by dedication, the land was *wakf*.

In the record-of-rights of the last settlement an area of land, which comprised the land in suit, was entered as "in the possession of Mahomedans," and was described as *kabristan* or *ghair-mumkin kabristan* (graveyard or unculturable land forming portion of a graveyard); and in the ownership column the name of the defendant (now represented by the Court of Wards) was entered as owner. Their Lordships said: "It

° *Present*: LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

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would seem that he was properly entered as owner, being trustee and custodian of the shrine of the saint Mai Pak Daman, and being or claiming to be the recognised head of the Mahomedan community in Multan;" and *held*, that, under section 44 of the Panjab Land Revenue Act (XVII of 1887), the entry not having been disproved must be presumed to be correct.

APPEAL from a judgment and decree (16th December 1907) of the Chief Court of the Panjab, which reversed a judgment and decree (15th April 1907) of the District Judge of Multan.

The defendant (the Court of Wards representing the estate of Makdum Hassan Bakhsh) was the appellant to His Majesty in Council.

The suit giving rise to this appeal was brought by the respondents, as representing the Mahomedan community of the city of Multan, for a declaration that certain land was in possession of the Mahomedan community as *wakf*, and was in fact a graveyard which had been used from time immemorial by them for the burial of their dead, and for an injunction restraining the appellant (the Court of Wards) from transferring any part of the said land.

The occasion for the suit being instituted was that in August 1905 the defendant, who claimed to be the owner of the land, gave notice by beat of drum of his intention to sell by auction portions of the area of land in dispute which were free from graves. The main contention of the plaintiffs was that the whole of the land in suit was the graveyard known as Mai Pak Daman, the origin of which was very ancient; and that it was *wakf* and therefore inalienable. The suggested origin of it is given in a passage cited by their Lordships of the Judicial Committee in their judgment from the judgment of the Chief Court.

The main defence, so far as material to the present appeal, was that whilst the land actually covered with

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graves may be inalienable, the portion of the land to be sold was not shown to belong to Mai Pak Daman, and that the defendant had a right to alienate it.

It appeared that in 1858, up to which time there was practically no restriction on burials, the Mahomedans of Multan and the neighbourhood held a public meeting to consider the question of suitable sites for burial grounds; and a resolution having been arrived at, an application to the Commissioner of the Division was drawn up and presented by the father of Makdum Hassan Bakhsh and one Haji Ghulam Mustafa Khakwani that the owners of *khankahs* should keep open graveyards in their own *khankahs*; that four old graveyards (of which Mai Pak Daman's was one) should be kept open for the whole Mahomedan community; that three new graveyards should be started; and that all other graveyards should be closed. This proposal was sanctioned. In 1867 a somewhat similar application was made to the Deputy Commissioner by the Mahomedans of Multan City that the graveyard of Pir Umar (one of the four old graveyards above mentioned) should be demarcated and protected from encroachment, and that certain other graveyards, among which was Mai Pak Daman's, should be kept open. On 22nd August 1867 there was a *robkar* of the Deputy Commissioner which recited the order of the Commissioner in 1858 sanctioning the proposals then made, and showed that all graveyards, except the seven mentioned and the *khankah* graveyards should be kept closed. And on 22nd September 1867, a *robkar* sent by a Revenue Officer to the Deputy Commissioner, intimated that a parwana on the subject had been issued to the Tahsildar (a copy of which was sent to the District Superintendent of Police) that if any Mahomedan buried a

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corpse outside the authorised places, it should be exhumed and re-buried in one of those places.

The District Judge found that the defendant had never treated the land in dispute as *wakf*; that within the land in suit were scattered graveyards with clear spaces between; that the defendant had sold from time to time any clear spaces for building, though the numbers they bore were in the settlement of 1880 shown as *ghair-mumkin kabristan* (unculturable land occupied by a graveyard) notably the land sold to Government for a railway station; that he had leased others "and had realised a miscellaneous income from the whole and had asserted his rights as landlord by exacting a due of 3 pies per grave from those burying their dead with his permission"; that these transactions had not in the past been objected to by the Mahomedan community or the general public; that there had been no dedication of the whole land as *wakf*, nor any declaration that the whole was *wakf*; that so far from its being shown that the Mahomedan community was in possession, the evidence proved that the defendant was in possession, though he did not wish to interfere with actual graves; that the defendant had a right to alienate at will the clear spaces; that the plaintiffs had not shown that they were individually affected, nor that their families were affected by the proposed sale, nor that they have the right to bury their dead in the lands to be sold.

The District Judge therefore dismissed the suit. On appeal, the Chief Court (CHATTERJI AND JOHNSTONE JJ.), after stating the facts and giving the origin of the Mai Pak Daman graveyard as quoted in the judgment of their Lordships of the Judicial Committee, continued :—

"Then in 1858 this status of *wakf* was fully recognised as we have seen. No doubt user, as such, does not deprive the owner of his title, but the title remains subject to the user of the land as *wakf*.

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"This disposes of the more general question; and the next point is, what area was *wakf*? Our view is that at least all the area in suit was. The area in suit is between 50 and 60 acres in extent. At no time has the whole of it been at once covered with palpable graves; but this does not any the less make the whole a graveyard. One clan or family would bury their dead one by one in one spot, and another in another. The graves in those clusters of graves would grow in numbers as the clan increased, but continually old graves would be forgotten and would be levelled with the ground by the weather; and if a family died out, its cluster of graves would in a few years become effaced. There would naturally be spaces clear of graves (or of known graves) between the clusters of graves of this clan and of that clan, providing room for new burials; and hence we find the state of affairs, which is used by the defendant's counsel as an argument in favour of his client, *viz.*, that in the area in suit are very many separate graveyards, one occupied by butchers, one by zamindars, and so forth. In reality these are not separate graveyards, but only separate clusters of graves in one big area forming a single graveyard. These clusters are not known to the Revenue authorities or to the people by distinctive names. Further, it is peculiarly necessary that the clear spaces should not be appropriated for other purposes, inasmuch as all burying of bodies outside of the seven authorised areas aforesaid has been prohibited. This was fully recognized in 1867 (*vide* the application of that year by the *raises* of Multan, mentioned above). To hold that the clear spaces are at the disposal of the defendant would amount to a closure of the graveyard as a whole, for such spaces are necessary if any more burials are to be made. Again, there is evidence that in more than one clear space on digging up the soil human bones have been found, showing that these spaces have in past centuries been used for burials. We would hold, then, that the whole area intended in 1858 to be reserved as a graveyard under the name of Mai Pak Daman is *wakf* by user, if not by dedication, and that even the clear spaces in that area are inalienable by defendant; but Mr. Parker goes on to argue that none of the land proposed to be sold is really within that area. In the Revenue records none of the land in suit is called after Mai Pak Daman, which name does not seem to have been used at all; but all the *khasra* numbers are described as *kabristan* or *ghair-mumkin kabristan*. In our opinion this is sufficient. In 1858 it was settled that the only *kabristans* (outside of *khankahs*) were to be the seven aforesaid. It is not pretended that the land proposed to be sold is in any *other* one of those seven, and the land in suit generally is admitted to be in the Pak Daman cemetery. The land to be sold adjoins the land admittedly in Pak Daman; and thus the conclusion is irresistible, unless the Revenue records are incorrect, that the lands to be sold also belong to the Pak Daman lands. Mr. Parker's

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reference to Exhibit P-13, extract from Settlement map of 1880, is useless. It is only an extract, and the mere fact that it only shows land between the two roads and excludes some of the land in suit proves nothing ; for it is not authoritatively a map showing the exact limits of Pak Daman cemetery. Indeed no map exists, so far as we know, which does show those limits as such : all we know is that the Settlement map of 1880 clearly shows that each and every *khasra* number in suit has graves in it, though of course not all over it. It may be that Exhibit P-13 was put forward by plaintiffs as showing the Pak Daman cemetery ; but it was an incomplete extract, and plaintiffs are not bound by it.

"The onus being thus on the defendant to show that, as a matter of fact, the land to be sold is not *kabristan*, I am unable to see that he has discharged that onus.

"Only two further minor arguments used by Mr. Parker need be noticed. He contends that such land has been left for extension, and only some 11 acres are to be sold. This is immaterial in our opinion. The whole is *wakf*. Again, he argues that the Makdum and his father have in the past made repeated alienations of portions of land included within Pak Daman, and, the Mahomedan community having raised no objections, plaintiffs cannot now contest the present proposed sale. Mr. Shafi has fully satisfied us that illegal acts by defendant in the past do not deprive plaintiffs in such cases of their rights : the community may from apathy or because of some countervailing advantage have acquiesced in alienations being made in and in buildings being erected upon the land of the cemetery, and yet it does not lose its right to object to further alienations. In this connection we need only refer to Ameer Ali's Mahomedan Law, 3rd edition, p. 375 last para., and p. 381. As regards another part of this argument, *viz.*, that the alleged levy by the Makdum of 1 pice per burial as a fee shows exercise of dominion over the land, we need only remark that the evidence seems to show that *fakirs* take these fees and not the Makdum ; and if these men take the fees as *mujawars*, as Mr. Parker suggests, then the income goes to the shrine and not to the Makdum in person and therefore no inference in defendant's favour can be drawn from the circumstance."

In the result the decision of the District Judge was reversed, and the plaintiffs' claims decreed in full.

On this appeal,

De Gruyther K.C. and *G. Considine O'Gorman*, for the appellant, contended that the land had never been treated as *wakf*. On the finding of the District Judge it appeared that the person whose estate was

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represented by the Court of Wards was the owner of the land, and that was not denied; that he had treated it without any objection as his private property, and had charged a fee for burials there. The vacant spaces where there were no graves would remain the private property of the appellant and be part of his estate. The Chief Court had wrongly placed the onus on the appellant; but it being conceded that he was the owner of the land, the burden of proving a dedication of the whole of the land as *wakf* lay, it was submitted, upon the respondents, and they had failed to prove it. The appellant being in possession, the respondents were not, under section 42 of the Specific Relief Act (I of 1877), entitled to the declaration they sought, and their suit should have been dismissed.

Arthur Grey, for the respondents, contended that the whole of the land in suit was shown in the Revenue records as in the possession of the Mahomedan community for use as a graveyard; and those entries raised a presumption in favour of the respondents which the appellant had not rebutted. Reference was made to the Panjab Land Revenue Act (XVII of 1887), section 44; and it was suggested that, judging from the entries in the record-of-rights, Makdum Hassan Bakhsh was the trustee and custodian of the shrine of Mai Pak Daman to which the respondents alleged the land in dispute appertained as a graveyard. There was also a presumption that land in such possession, as this was shown to be, for the specific purpose of burying the dead, had been properly dedicated as *wakf*; and was consequently inalienable. Even if no express dedication could be proved, the reservation of the ancient Mai Pak Daman in 1858, together with the entries in the Settlement record, showed that the land had become *wakf* by user. The decision of the

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Chief Court was right, and the appeal should therefore be dismissed.

De Gruyther K. C., in reply, said that it had never before during the case been even hinted at that Makdum Hassan Bakhsh was a trustee, or held the land in any other capacity than as owner.

Nov. 26.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In the immediate neighbourhood of the City of Multan there is a large tract of unculturable or uncultivated land generally known as the Mai Pak Daman or the Pak Daman graveyard. From time immemorial it has been used by the Mahomedan community in Multan for the purpose of burying their dead. But there is no evidence to show when or how it was originally set apart for the purpose of a burial ground.

In the judgment of the Chief Court in this case there occurs the following passage giving, as their Lordships think, a very probable account of the origin and early history of this graveyard :—

"Bahawal Hakb, the famous saint, was born in the 12th century of the Christian era. He had a son, Sadr-nd-din, whose wife was called Mai Pak Daman. She was revered as a saint, and her body was buried in a shrine within the area in suit. No one can tell when the surrounding land was definitely set aside as *wakf*; but we can safely conjecture that in the first instance Mussalmans began to bury their dead here and there in the waste land about her tomb, because of the desire to be buried near the body of a saint. There can be no doubt that for hundreds of years the land about her tomb has been used as a burial ground, and though there is no direct proof of dedication as *wakf*, we can safely conclude that long before 1858 it had become *wakf* at least by user."

The year 1858 referred to in the above passage is the date of a representative public meeting of Mahomedans called by the authorities for the purpose of considering the question of Mahomedan graveyards for the city. At that meeting a resolution

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was passed apparently in accordance with the suggestion of the Government to the effect that owners of *khankahs* or shrines should keep open graveyards in their own *khankahs*, that four old graveyards, of which Mai Pak Daman was one, should be kept open for the whole Mahomedan community, that three new graveyards should be provided, and that all other graveyards should be closed. The predecessor in title of the person, for whom the Court of Wards is now acting, took part in giving effect to this resolution.

The resolution was sanctioned by Government, and in 1867 a *robkar* was published giving notice that if any Mahomedan buried a corpse outside the authorised places, it would be taken up and buried in one of those places.

In the record-of-rights of the last settlement an area of land which comprises the land in this suit is entered as "in the possession of the Mahomedans," and is described as *kabristan* or *ghair-mumkin kabristan*, that is "graveyard or unculturable land forming portion of a graveyard." In the ownership column Makdum Hassan Bakhsh, now represented by the Court of Wards, is entered as "owner." It would seem that he was properly entered as owner, being trustee and custodian of the shrine of the saint Mai Pak Daman, and being or claiming to be the recognised head of the Mahomedan community in Multan.

In this state of things the appellant, the Court of Wards for the property of Makdum Hassan Bakhsh, advertised for public sale a piece of ground lying within the area of the graveyard as described in the settlement papers.

Thereupon certain Mahomedan residents in Multan of different classes and various occupations combined together and brought this suit as co-plaintiffs, claiming an injunction to restrain the proposed

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sale, and also asking for a declaration that certain lands described in the settlement records as graveyard, and comprising an area considerably larger than that now in suit, was inalienable as *wakf*. It appeared in the course of the suit that on part of the land described as "graveyard" in the settlement papers there had been encroachments, that part had been acquired for public purposes, and that some lots had been, as it was alleged, sold by the Makdum for his private purposes. So, in order to avoid all questions which might be raised with regard to land which had been so dealt with, the plaint was amended, and the area for which protection was claimed was limited to a piece of ground measuring 437 kanals and 4 marlas, or something between 40 and 50 bighas.

The District Judge dismissed the suit with costs. On appeal, the Chief Court granted the relief asked for by the plaintiffs, but without costs. From this order of the Chief Court the Court of Wards has appealed to His Majesty in Council.

The only substantial ground of appeal urged before the Board was that the area known as the Pak Daman graveyard was not one continuous burial ground, but merely an area of uncultivated ground in which here and there there were to be found graves or clusters of graves, and the defence set up was that vacant ground unoccupied by graves remained the private property of Makdum Hassan Bakhsh, and that the Court of Wards was bound or entitled to deal with it for the benefit of his estate without regard to the claim advanced by or on behalf of the Mahomedan community in Multan.

The Panjab Land Revenue Act, 1887 (Act XVII of 1887), section 44, enacts that "an entry made in a record-of-rights in accordance with the law for the time being in force . . . shall be presumed to be

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true until the contrary is proved or a new entry is lawfully substituted therefor."

Their Lordships agree with the Chief Court in thinking that the land in suit forms part of a graveyard set apart for the Mussalman community, and that by user, if not by dedication, the land is *wakf*. The entry in the record-of-rights seems conclusive on the point. It is obvious that if it were held that within the area of the graveyard land unoccupied or apparently unoccupied by graves was private property and at the disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government in setting aside land as an open graveyard for the Mahomedan community in Multan would be frustrated.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

J. V. W. *Appeal dismissed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Ranken Ford, Ford & Chester.*

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APPELLATE CIVIL.

Before Shadi Lal C. J. and Gordon-Walker J.

1931

Jan. 21

MEHRAJ DIN (DEFENDANT) Appellant

versus

GHULAM MUHAMMAD AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 1231 of 1926.

Muhammadan Law—Waqf—*long user*—*only evidence of*—*Second Appeal*—*whether competent on finding that the property is* waqf.

Held, that it is a well-recognised principle of the Muhammadan Law that a *waqf* may be established by the evidence of user, and when a long period has elapsed since the origin of the alleged *waqf*, user can be the only available evidence to show whether the property is or is not *waqf*.

Makhdum Hassan Bakhsh v. *Ilahi Bakhsh* (1), relied upon.

Held also, that the finding of the lower Appellate Court, on an appreciation of the evidence, that the property in dispute is *waqf* is one of fact and cannot be disturbed in second appeal.

Irshad Hussain v. *Makut Manohar* (2), referred to.

Second appeal from the decree of Rai Sahib Lala *Topan Ram, Additional District Judge, Lahore, dated the 26th April 1926, varying that of Mr. E. Mukerji, Subordinate Judge, 1st Class, Lahore, dated the 23rd December 1925, and granting the plaintiffs a decree.*

BADRI DAS and MEHR CHAND, for Appellant.

MUHAMMAD HUSSAIN, for Respondents.

SHADI LAL C.J.

SHADI LAL C. J.—The learned Additional Judge has concurred with the trial Judge in holding that

(1) 27 P. R. 1913 (P. C.). (2) (1927) 100 I. C. 626.

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MEHRAJ DIN
v.
GHULAM MUHAMMAD.

SHADI LAL C.J.

the plaintiffs have succeeded in proving that the property in dispute is *waqf* and the only question, which requires determination, is whether any ground has been established which would justify our interference in second appeal.

The property consists of a mausoleum of a saint called Pir Balkhi, who died two or three hundred years ago. There is no evidence to show how and when the alleged *waqf* was created, but it is a well-recognised principle of the Muhammadan Law that a *waqf* may be established by the evidence of user, *vide inter alia, Makhdum Hassan Bakhsh v. Ilahi Bakhsh and others* (1). When a long period has elapsed since the origin of the alleged *waqf*, user can be the only available evidence to show whether the property is or is not *waqf*.

Now, the lower appellate Court points out that Pir Balkhi was a reputed and devout saint, and that the Muhammadans of the locality, in which the mausoleum is situate, have been burning *divas* (lamps) in the niches of the mausoleum and saying their prayers and reciting *fathias*. The defendant, who claims to be the owner of the property, has wholly failed to establish his claim, and the evidence produced by the plaintiffs leaves no doubt that his father, Ghulam Muhammad, was appointed to be the caretaker of the mausoleum. Having regard to these and other circumstances, including the physical features of the building, the learned Additional Judge has declared the property to be *waqf* and this finding proceeds upon an appreciation of the evidence and does not involve any question of law. The conclusion reached by him cannot, therefore, be disturbed in

(1) 27 P. R. 1913 (P. C.).

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MEHRAJ DIN v. GHULAM MUHAMMAD.

GORDON-WALKER J.

second appeal, *vide Irshad Hussain* v. *Makut Manohar and others* (1).

The appeal is accordingly dismissed with costs.

GORDON-WALKER J.—I agree.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

1931

Jan. 26.

Before Shadi Lal C. J. and Gordon-Walker J.

GANPAT RAI AND OTHERS (DEFENDANTS) Appellants

versus

SAIN DAS AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 2493 of 1929.

Injunction—Party-wall—Erection on wall by one tenant-in-common—Suit by co-tenant—whether lies.

The plaintiffs and defendants were owners of two adjoining houses separated by a wall which belonged to both the parties as owners-in-common. The defendants raised the height of the wall, with a view to building a superstructure on their tenement, and did so without the permission of the plaintiffs. It was contended for the defendants, that, as they had not occupied the whole of the width of the top of the wall, but confined themselves to that moiety of it which is on the side of their own house and left the other moiety to the plaintiffs, the latter had no cause for complaint.

Held, that as the parties were "tenants-in-common," the wall could not be treated as a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners. The plaintiffs were, therefore, entitled to the use of the whole width of the top of the wall subject to a similar right of the defendants, and the construction of the new wall on half the width, amounted to an ouster, in so far as the width occupied by the defendants was concerned.

And, that the plaintiffs had been rightly granted a mandatory injunction requiring the defendants to demolish the structure raised on the joint (or "party") wall.

(1) (1927) 100 I. C. 626.

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1930 SCC OnLine Oudh CC 102 : AIR 1930 Oudh 245

Oudh Chief Court
(BEFORE SRIVASTAVA, J.)

Abdul Ghafoor ... Defendant Appellant;
Versus
Rahmat Ali and others ... Plaintiffs Respondents.

Second Appeal No. 345 of 1929
Decided on February 12, 1930

JUDGMENT

1. This is a defendant's appeal. It arises out of a suit for a declaration that a plot of land 374 situate in Mohalla Nayagaon, Lucknow, is a public graveyard and that the defendant is not entitled to make any constructions on the aforesaid plot, other than those contemplated by the wakf. The defendant denied the existence of the alleged public graveyard and set up title in himself by adverse possession.

2. The trial Court held that the plaintiff had failed to prove that the plot in suit was a pubic graveyard and dismissed the suit accordingly. On appeal the learned Subordinate Judge has disagreed with the finding of the trial Court and held that it was sufficiently proved both by documentary and oral evidence that the plot in suit is a public burial ground.

3. He has also found that the defendant has failed to establish any title in himself and has accordingly given the plaintiff the declaration claimed.

4. The learned counsel for the defendant-appellant has questioned the correctness of the finding of the lower appellate Court about the land in suit being a public graveyard on two grounds. He has pointed out that admittedly the graveyard in question was closed to the public under orders of the Municipal Board about 40 years ago and that no burials had been made in the said land during the last 40 years. His first contention is that in these circumstances the land cannot he regarded as a public graveyard. His argument is that if any land is to be held as a public graveyard on the ground of user, the user must be proved to have continued up to the time when the controversy arises. His second contention is that as the land has admittedly ceased to be a graveyard, it must be deemed to have lost its character of a public wakf and should now be regarded as private property which could be the subject of transfer. In my opinion both these contentions are without force. It is well settled that a wakf may, in the absence of direct evidence of dedication, be established by evidence of user. The land in suit was recorded at the time of the first regular settlement as a qaburistan but there is no direct evidence to establish the dedication. In the lower Court emphasis was laid upon the entry of the name of one Wazirunnissa in the settlement khasra in the column containing the names of persons owning the property. The learned Subordinate Judge has discussed this entry, at considerable length and in the light of the evidence of a number of witnessess examined on behalf of the plaintiffs, whose evidence he has believed has come to the conclusion that the

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Mahomedan public used the land as their burial ground until the Municipal Board prohibited further interments in that land about 40 years ago. Thus in the present case the finding about the land in suit being a public graveyard is based upon the evidence of long user. The learned counsel for the appellant has failed to cite any authority for the proposition that in order to establish the land as public wakf on the ground of user, there must be evidence of continued user upto the present day. The rule which allows evidence of user to take the place of dedication is a rule of necessity. In the case of old wakf it is not possible to secure direct evidence of dedication and so it has been ruled that even in the absence of such direct evidence, a Court can hold a wakf to be established on evidence, of long user. In the case of a wakf like the present in which interments were stopped under the orders of the Municipal Board no less than 40 years ago, it is very difficult to secure direct evidence of dedication, and if there is evidence to establish long user continuing right up to the time of the prohibition made by the Municipal Board I fail to see any reasons for rejecting this evidence in proof of the wakf. In the absence of any authority, in support of the contention, I must overrule it.

5. Next as regards the argument that the land no longer retains the character of a public wakf because it has ceased to be used as a graveyard, reliance is placed upon a decision of the late Court of the Judicial Commissioner of Oudh in *Mt. Bismilla Khanam* v. *Abdul Hasan Khan*[(1)]. In this case Mr. Daniels, First Additional Judicial Commissioner remarked as follows:

> "There is one interesting point raised by counsel for the appellants which it is perhaps unnecessary to decide and that is the

effect of the land having ceased to be capable of being used as a burying ground. There is a passage from *Baillie's Digest* reproduced in *Amir Ali's Mahomedan Law*, Edn. 4, Vol. 1 p. 403 to the following effect:

> "When a woman has made a cemetery of part of her land, divesting herself of the property and has buried her son in it, but the piece of land is unfit for a cemetery by reason of an overflow of water upon it, and she wishes to sell the land, if it be still in such a state that people desire to bury their dead in it, she cannot sell it, but if they have no such desire she may. The effect of this appears to be that if the land has become incapable of being used as a burying ground and no one any longer desires to use it as such it becomes capable of alienation. The particular circumstance which senders it unfit for such use, whether an overflow of water as in the example given or the fact of its being in the inhabited part of a populous city, is immaterial."

6. The remarks contained in the first sentence of the extract quoted above would show that they were unnecessary or the decision of the case. Apart from this the passage quoted from Amir Ali's Mahomedan Law refers to a case of land which was unfit for use as a cemetery. It is a case in which the object of the wakf had failed. This is very different from a case like the present in which the land has been used as a cemetery for a long period and has been closed to the public under orders of the Municipal Board presumably because there was no vacant land left for further interments or because for considerations of the health further internments in that locality were considered undesirable. It may be useful to point out that the passage from *Baillie's Digest* which has been reproduced in his judgment is preceded by another passage which runs as follows:

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"And being asked with regard to a cemetery, in a village where it had gone to decay and there remained in it no traces of the dead, not even bones, whether it was lawful to sow the land and take its produce, answered "No" for in legal effect it is still a cemetery."

7. This seems to show clearly that once land has been dedicated for the purpose of a cemetry it must always be regarded as a cemetry unless for any reason the land turns out to be unfit for use as a cemetry. Once a wakf is established either by evidence of dedication or by evidence of user it is an essence of the wakf that it should be permanent. I am not therefore prepared to hold that the land can be regarded as private property because it has ceased to be used dor purposes of a graveyard now.

8. Lastly, it was also contended that the plaintiff was not entitled to the declaration granted to him by the lower appellate Court as he had not asked for consequential relief, namely demolition of the building and possession of the land. This is a new plea which was not raised in the pleadings or in any of the two Courts below. The reply made by the learned counsel for the plaintiff is that he did not ask for a decree for possession because the constructions have been made by the defendant during the pendency of the suit. He has pointed out, by reference to para. 2 of the plaint that the foundations of the house were dug by the defendant on 8th July 1923 and that he instituted a criminal complaint on the day following, namely, on 9th July 1928. The present suit was instituted shortly after on 14th July 1928. There is no evidence before me to show that the defendant's house was in existence at the time when the present suit was instituted. In the absence of such evidence it is not possible for me to hold that the plaintiff was entitled to ask for any consequential relief in relation to the said building at the time when the present suit was instituted. I must therefore overrule this contention also.

9. The result therefore is that the appeal fails and is dismissed with costs.

J.M./R.K.

10. *Appeal dismissed*.

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(1) First Appeal No. 15 of 1921.

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1933 SCC OnLine Bom 124 : AIR 1934 Bom 257 : (1934) 36 Bom LR 526

Bombay High Court
(BEFORE BAKER AND BROOMFIELD, JJ.)

Said Maher Husein ... Defendant Appellant;
Versus
Haji Alimahomed Jalaludin and others ... Plaintiffs Respondents.
First Appeal No. 216 of 1928
Decided on November 27, 1933

The Judgment of the Court was delivered by

BROOMFIELD, J.:— These appeals arises in a suit under Section 92 of the CPC, relating to an institution known as the Pir Mushayak roza at Ahmedabad. Pir Mushayak was a Mahomedan saint who flourished in the seventeenth century. He originally belonged to Kadi but settled in Ahmedabad and died there. He was a notable religious teacher who gathered numerous disciples and wrote books which are the main foundations of the Momin sect of Mahomedans. He was buried outside the Sarangpur Gate at Ahmedabad where he had acquired some property. His tomb is an object of veneration to the devotees of the Momin faith and an uras is held every year on the anniversary of his death to which pilgrims come from Bombay and various parts of Gujarat. Apparently, there are no Momins to speak of in Ahmedabad itself. Defendant 1 is the present head of the Momins and is a direct descendant of Pir Mushayak. He resides at Palanpur and occasionally visits Ahmedabad. The Momin community is divided into groups called after certain villages. The plaintiffs who belong to the Patanwada group are in the position of dissenters. They have challenged the orthodxy of the present pir and oppose his claim to be regarded as a hayat or living pir. Consequently, they have suffered some-kind of excommunication, and at one time it was contended that they were disqualified from instituting this suit. That contention, however, has been given up.

2. The details of the pleadings have been given in the judgment of the lower Court. Briefly, the plaintiffs' case is that several properties were dedicated to Pir Mushayak which he in turn dedicated to God; that five survey numbers specified in the plaint have been dedicated to the pir or to the dargah and; are wakf; that defendant 1 has claimed these properties as his own and has granted a permanent lease of one of them to defendant 2 and has thereby been guilty of a breach of trust which makes it necessary that he should be removed from management; and that a scheme should be framed for admistration of the trust properties. The reliefs prayed for in the plaint are a declaration that the roza of Pir Mushayak is a public charitable religious trust, that the properties described in the plaint-belong to the said trust, the removal of defendant 1 from his office as Pir Jada or manager, the cancellation of the permanent lease granted by defendant 1 in respect of one of the properties, and the drawing up of a scheme for the administration of the trust properties. The gist of the written statement, apart from certain technical defences, is that, the suit properties are not the subject of any public, charitable or religious trust but the private property of the

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pirs and now of defendant 1. And, in the alternative, without prejudice to that contention, that there has been no breach of trust, and there is no necessity for the

removal of defendant, nor for any scheme. The trial Court has found In favour of the plaintiffs that the suit properties are subject to a trust created for public purposes of a religious nature, and that the defendant has been guilty of a breach of trust inasmuch as he has asserted a private title to the properties and granted a permanent lease of one of them. It has found in favour of the defendant that there is no necessity to remove him from management or to frame a scheme. Accordingly, it has been declared that the foundation situated in survey No. 136 consisting of the roza of Pir Mushayak and the adjoining mosque together with other buildings Is the subject of a trust created for public purposes of a charitable and religious nature, viz., for use as a mosque and a shrine by the Momin community. It has also been declared that survey Nos. 137 and 138 and survey No. 105, plot No. 1, are properties attached to and belonging to the trust. It has been declared also that the right of management of the said trust and properties is solely vested in defendant 1 and his successors in the office of the religious headship of the Momin community, but is to be subject to certain directions contained in the judgment. Appeal No. 216 is by defendant 1. Appeal No. 217 is by the plaintiffs. The only point seriously argued in the latter appeal is that a scheme ought to have been framed. Certain points of law were discussed at the end of Mr. Thakor's argument for defendant 1 in the main appeal. They are really preliminary points and may be dealt with first. In November 1922, the Collector, acting on the report of the Prant Officer, declined to grant a certificate, under Section 93 of the CPC, for the filing of a suit. On 10th January 1923, after fuller consideration, he sanctioned the suit for reasons set out in his order (Ex. 51). It has been contended that he was precluded from giving sanction by reason of his previous refusal. But no reason has been suggested why that should be so.

3. The law requires that the Collector should sanction the filing of the suit. He has done so. The fact that at one time he was not satisfied as to the propriety of giving sanction is immaterial. It was quite open to him to change his I mind on further consideration. Then Mr. Thakor has referred to *Prem Narain* v. *Ram Charan* [1], where the Privy Council has held that the sanction of Government under Section 92 of the CPC must be given specifically in the case of each particular suit and pointed out that it does not appear that this was done in this case. This point, however, was not and could not be pressed in view of Act 11 of 1932 which validated all pending suits. The third preliminary point and the only one seriously argued is this: it has been held by the Privy Council in *Abdur Rahim* v. *Mahomed Barkat Ali* [2] that only suits claiming reliefs specified in S. 92 must be instituted in conformity with the provisions of that section and that a prayer for a declaration that the property in suit is wakf property is a prayer for a relief not covered by the section. The point arose in this way. There was a suit properly filed in the Court of the District Judge with the sanction of the Advocate -General under S. 92 claiming reliefs specified in that section. Subsequently an application was made for amendment of the plaint by adding strangeis to the trust as parties and a prayer for a declaration that the property was wakf, and this was done. The sanction of the Advocate-General was not obtained for the amendment, and the question arose whether it was necessary.

4. The Privy Council held that it was not, because the relief claimed by the amendment was not one of the reliefs specified in the section. It was also held in connexion with a question whether the compromise decree which came to be passed

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in the suit amounted to res judicata, that in so far as the nature of the suit was changed by the amendments, viz., by adding strangers to the trust and by prayers for relief not covered by S. 92, the suit ceased to be one of a representative character. Mr. Thakor, relying particularly on the latter finding, has argued that the District Court in a suit under S. 92 has no jurisdiction to grant any reliefs except those which are specified in the section itself,

that a declaration that the suit property is wakf cannot be asked for nor granted, and that S. 92 has no operation except where the existence of a public charitable and religious institution is admitted. The proposition that S. 92 is to be confined to the case of admitted trusts was negatived in *Jafarkhan* v. *Daudshah* [3] where it was pointed out that it has always been the practice to inquire into and determine the nature of the institution, if disputed, in a suit under S. 92. The other view would in a great many cases necessitate two suits, one before a Subordinate Judge and one in a District Court. Mr. Thakor contends that the case of *Jafarkhan* v. *Daudshah* [3] is impliedly overruled by the Privy Council. I am unable to agree with him. The question whether the Court in a suit sanctioned in its entirety by the Advocate-General or the Collector can make a declaration that the property is wakf in addition to granting the raliefs specified in the section was not before their Lordships. As for Mr. Thakor's contention that the decree in this suit is without jurisdiction, I can find no support for it whatever in the Privy Council judgment. The only doubt—if there were any doubt at all—would be as to whether a declaration that the property is wakf is binding on persons other than the parties to the suit.

5. I now come to the main issue in these appeals—the question whether the suit properties or any of them are wakf. First of all, it will be desirable to give a brief description of the suit properties. They consist of four survey numbers, viz. Nos. 136, 105/1, 137 and 138. Survey No. 136, with which most of the evidence in the case is concerned, contains a number of buildings. In the centre is the roza or shrine which contains the tomb of Pir Mushayak and seven other tombs of membere of the defendant's family. To the south of the roza there are buildings containing other tombs. On the west there is a mosque. The survey number also contains an old how or water cistern. This is at present empty and has been so within the memory of all the witnesses, but presumably at one time it contained water. Water is at present provided by a well and a water-pipe. In the south are a number of residential buildings occupied by the defendant and his predecessors on their visits to Ahmedabad. Along the north side there is a large covered verandah for the accommodation of persons visiting the shrine. The whole number containing these buildings is enclosed by a compound wall. Survey No. 105 is on the south of survey No. 136. It now contains a number of chawls for mill hands which were built in 1921 by defendant 1 at a cost of nearly Rs. 40,000 which came from his private funds. Survey No. 137 is an ordinary field adjoining survey No. 136 on the north. Survey No. 138 is on the east of survey No. 137. This, number was permanently leased in 1906 by defendant 1's father. That lease was cancelled in 1913, but the land was leased again by defendant 1 in 1919 and mill chawls have been erected on it. The first two numbers are shown in the Record-of-Rights asdevasthan; the other two are ordinary ryotwari lands.

6. The history of these properties, so far as it can be ascertained, is briefly this. Pir Mushayak left property of the value of about Rs. 9,000, as appears from the fact that his son Abdulla Saheb purchased his grand-mother's one-sixth share for Rs. 1,500 in 1704 (Ex. 174). Between 1704 and 1731 Abdulla Saheb purchased a number of small

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houses and small plots of land in the neighbourhood of Pir Mushayak's residence. Several of these sale-deeds have been produced. It is not necessary to refer to them in detail. The most important is one of the year 1707 (Ex. 180), and its importance consists in the fact that in the description of boundaries it refers to the roza of Pir Mushayak and also to a khankah, which means a kind of monastery. In the year 1736 disputes arose between Abdulla Saheb and his brother and nephew. There was litigation which was ended by a compromise, the results of which are recorded in Ex. 181. The income derived from the followers of Pir Mushayak was estimated to be Rs. 5,000 a year, and this was divided between Abdulla Saheb and his brother in the proportion of 5 to 4. As regards the other property, the arrangement was that half the roza on the eastern side was to belong to Abdulla Saheb and the other half on the west to his brother and nephew. The two brothers were

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declared to have an equal share in the mosque and other places so that each of them sitting in the roza might perform the uras ceremony of Pir Mushayak. It has been suggested in the argument that these documents especially the partition deed indicate that the buildings and lands were private property and dealt with as such. But the partition deed does not necessarily show anything more than a division of the management, and in any case private acquisition in the first instance would not be very important for the purposes of determining the character of the properties now. All this evidence apparently relates to what is now survey No. 136 only. There is no evidence at all as to the time at which, or the manner in which, survey No. 105 was acquired. Survey Nos. 137 and 138 were acquired in quite modern times as I shall show. Between 1736 and 1857 there is an almost complete gap in our information, and the little that is known as to this period has been set out by the trial Judge in para. 22 of his judgment.

7. I must next refer to the information which is contained in the Government records. The earliest document relating to No. 136 is Ex. 40 which is a survey tippan of the year 1857. The land is described as talpad sarkari. There is a rough sketch showing two buildings containing tombs. Ex. 55 is an extract from the kayam kharda of the year 1874-1875. The land is here described as sanadi dewasthan and shown as held on payment of quit-rent. Pir Mushayak is mentioned as the owner, and Ahmed Hussein alias Abdulla Saheb (i.e., defendant's father) as the vahivatdar. There is a note in the remarks column that 1,000 yards of the land are occupied by a roza. Ex. 60 is a jamabandhi fasal patrak of the new survey in 1888-1889. Here the land is again described as devasthan sanadi, owner Pir Mushayak, and vahivatdar Ahmed Hussein alias Abdulla Saheb as before. Ex. 63 is the first extract relating to the Record-of-Rights. In column 4 the entry is Pir Mushayak, owner, and Abdulla Saheb vahivatdar. The same entry is repeated in column 9 and in column 10 the nature of the holding is given as inam. In column 12, which is for the name of the tenant, the entry is Ali Mahomed Vajir, mujawar, and there is a note in column 13 that he was to hold the land so long as he continued to worship the pir. This note has been misunderstood by the learned trial Judge who says in para. 23 of the judgment: "There is a remark that the inam was to continue so long as pir's worship is done." The remark has no reference to the continuance of the inam but merely recites that the tenant held the land on condition of due performance of his duties as mujawar.

8. The next document to be referred to is Ex. 116 which is a register of transfer, Village Form No. 7. It shows No. 136 as devasthan inam. The owner is Pir Mushayak, and the vahivatdar Pir Saiyad Maher Husein, i.e., the defendant. 11 is recorded that

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his name was entered on the death of his father in 1919. In Ex. 37, which is the latest extract from the Record-of-Rights, No. 136 is still shown as devasthan, but in column 9 in which is to be entered the occupier of inam land the entry is: "The owner of Pir Mushayak's Roza Pir Sayed Meher Husain." The defendant therefore in this entry is no longer shown as vahivatdar but as owner, and there is a note in the remarks column that this change was made on his application claiming the land as his private property by reason of the fact that the Collector had refused sanction to file a suit under S. 92. Coming to survey No. 105, the first document is Ex. 39 which describes the land as talpad pasayatu salami. The date is 3rd June 1857. One Fakir Karimad is shown as the owner. There is no evidence to show who this person was. As the learned Judge points out, he was evidently not a member of the defendant's family, being a fakir. In all probability he was a mujawar of the roza. In the kayam kharda (Ex. 55) the land is shown as "Sanadi Dewasthan permanent." The owners are the Pirs Mushayak, Bakarsa and Kasamsa; the vahivatdars, defendant's father Abdul Hasan Ali, Utam Pragji and Kamal Karim. The fact that one of the vahivatdars is a Hindu is curious. Probably he must have been only a tenant of the land. In Ex. 60, dated 1888-1889, the description is the same as before and again there is an entry of a Hindu vahivatdar along with defendant's father and another Mahomedan. In the Record of Rights (Ex. 62) we find Survey No. 105 divided into three parts. Plot

No. 1—the only one with which we are concerned in this suit—is shown as belonging to Pir Mushayak; the vahivatdar is the defendant's father. Pir Kasamsa and Pir Bakarsa are shown as the owners of the other two portions and the names of other vahivatdars are given. Mr. Thakor laid some stress upon the entry in column 14, "Separated Brothers." But as this entry obviously refers to the Pirs who had been dead for centuries, the meaning of it is, to say the least of it, obscure. The later entries in the Record of Rights are the same as in the case of No. 136.

9. The meaning of the terms used in the earlier records is thus given in Robertson's Glossary. Talpad means the Government share in certain villages as opposed to the wanto or alienated portion. Talpad pasayatu means talpad lands alienated by gift. Pasayatu means lands held for the maintenance and support of religious and charitable institutions or for the maintenance of village officers. Salami means tribute or quit-rent. As to Survey Nos. 137 and 138, we have more or less a complete history. The old number which corresponds to the present No. 137 was purchased by Jamalbhai Aliji Momin, who was the mujawar of Pir Mushayak's roza in 1876, for Rs. 87—see Ex. 34. In 1887 this land stood in the name of Allauddin Fate. In the Record of Rights the number was divided into two parts: Plot No. 1 stood in the name of Allauddin Fate and Plot No. 2 in the name of Valibhai Fate and afterwards of his son Nurbhai. Survey No. 138 was purchased by the same mujawar, Jamalbhai Aliji, in 1883 for Rs. 299 (Ex. 35). This land also stood in the name of Allauddin Fate in 1887. Both these numbers were transferred to the name of defendant 1 as owner of the roza of Pir Mushayak in 1919—see Ex. 37. This was done with the consent of the former holders Allauddin and Nurbhai as noted in the record. There is no very definite evidence as to who these various holders were, but in all probability they were mujawars or managers.

10. There is a good deal of oral evidence, relating mainly to the uras and the use of the mosque in Survey No. 136. Four plaintiffs have given evidence themselves and they have examined eleven witnesses. For the defence seven witnesses gave evidence in Court, and five were examined on commission. Stress has been laid on the fact that defendant 1 did not go into the witness box himself, but he does not reside in

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Ahmedabad and has no personal knowledge of the suit properties prior to 1919 when he succeeded his father as pir. He has examined his manager (Ex. 198) and his accountant (Ex. 200), and has produced all documents in his possession. The oral evidence is very largely partisan in character. Most of the plaintiffs' witnesses are members of the dissenting faction; most of the defendant's are among his own particular adherents. There has probably been a good deal of exaggeration and perversion of facts on both sides, but the evidence certainly justifies the following conclusions:

11. Every year on the anniversary of Pir Mushayak's death some hundreds of devotees assemble at the roza for the uras. [The plaintiffs' witnesses say that the numbers run into thousands. But the most reliable witness on that point is a Police Sub-Inspector (Ex. 204). As Sub-Inspector in Ahmedabad he has attended the uras every year from 1915-1926 to maintain order and keep the peace. According to him the believers (by which he means apparently Momins belonging to defendant's party) number from 200 to 1,000; those belonging to the other party number from 100 to 150.] The pilgrims are mostly Momins, but some other Mahomedans also attend. Of these occasions all those attending offer prayers publicly in the mosque without let or hindrance. The defendant has entirely failed to prove that there is anything private about the mosque. It is a building of some size capable of holding 150 to 200 people. There is no reservation of it for the defendant's family or even for the party amongst his followers who support his claims to be the hayat pir.

12. The dissenters have been admitted as of right, and though in recent years it has been necessary to have police supervision, it has been merely for the purpose of maintaining order. The defendant's witnesses prefer to call the building an ibadatkhana or a prayer house instead of a mosque, and have made an attempt to distinguish it from a public mosque. One of the witnesses examined on commission has deposed

that the difference between a mosque and an ibadatkhana consists in the fact that in a mosque there must be a muezzin to call to prayer, prayers must be offered five times a day, and a moulvi or preacher must be maintained. In the cross-examination of plaintiff's witnesses it was elicited that the five calls to prayer are not observed. There is no moulvi: there is also no pulpit. These things however are not necessary to constitute a mosque, as was pointed out in *Akbarally* v. *Mahomedally* [4]. Even the defence witnesses have to admit that there is no real restriction on public worship in the mosque. The same witness, to whom I have just referred, who made the distinction between a mosque and an ibadatkhana, has deposed:

> "At the time of uras when we go there we offer prayers in the ibadatkhana. Two hundred, four hundred or five hundred persons would attend."

13. And then in reply to a specific question: "Do all offer their prayers there?" he said, "Those who want to offer prayers may offer them there."

14. It also appears that the mosque is used for prayer by persons visiting the shrine at other times and not only on, the occasion of the uras. Offerings of flowers and cocoanuts are made at the shrine. Gifts of money also appear to be made. But on this latter point the evidence is most conflicting and unreliable. The plaintiffs have made a strenuous effort to show that until recent years, i.e., until the schism began, there used to be a galla (i.e., a money-box) in which were placed contributions for the upkeep of the institution. The money so contributed amounted, according to some of

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the witnesses, to several thousads of rupees a year. According to the defence witnesses, there never was any galla and the pilgrims never did more than present a small coin or two to the mujawar. One thing is clear. There certainly has been no galla there ever since the Sub-Inspector (Ex. 204) has been in attendance.

15. In view of the very unsatisfactory nature of the evidence on this point, I think it would be unsafe to hold either that any considerable amount of money has been contributed in this way or that any money that may have been contributed must necessarily have been intended for the upkeep of the institution. It must be remembered that most of the people who visit the roza are the disciples of the pir for the time being as well as the disciples of Pir Mushayak, and therefore even in the case of offerings at the shrine there is no presumption that they would be made for the benefit of the shrine only. A rather feeble attempt was made to show that the affairs of the roza had been managed by the jamat, though what jamat is referred to is not clear, since, admittedly, there is none at Ahmedabad. The trial Judge has disbelieved the evidence as to this—I think quite rightly. It does not appear that anything much in the way of management has ever been required. What was needed was no doubt done by the vahivatdars appointed by the pir and the mujawar. The old accounts produced by the defence contain entries of considerable sums of no Day remitted to Jamalbhai, the mujawar already mentioned in connexion with survey Nos. 137 and 138, for the expenses of the uras and other purposes (Exs. 206 to 212).

16. One or two minor points may be mentioned. The plaintiffs' witness (Ex. 150), who is a Bombay Victoria driver, has deposed that his grandfather was buried near the roza. Another witness (Ex. 152) says that his sister's son was buried there. Witness (Ex. 151) who is a con tractor says that he presented stones for the construction of a pavement in front of the roza. All these statements are denied by the defendant. But, I think, they are probably true. In 1914, it appears that the roza required certain repairs and an appeal for contributions was issued by the pir (see Ex. 54). Plaintiff 1 says that he subscribed Rs. 250 and witness (Ex. 155) claims to have subscribed Rs. 200. Witness (Ex. 159) says that he sold some cotton and gave the proceeds (Rs. 100 to Rs. 150) to the mujawar. The defendant says that the appeal fell upon deaf ears and the repairs which cost over Rs. 3,000 were paid for out of his own pocket. There is little doubt that the bulk of the money came from the pir himself. But probably a certain amount was contributed by the devotees, and in any case the fact that a public appeal was issued is not without significance. These are the facts from which it has to

be determined whether the suit properties are wakf. In the course of the very thorough and learned arguments in this case, we have been referred to numerous authorities as to the manner in which a wakf can be constituted under the Mahomedan law. It is not necessary however to refer to these authorities in any detail, for this reason. Although it was asserted in the plaint that the properties were dedicated to Pir Mushayak and were by him dedicated to God, there is, not unnaturally having regard to the lapse of time, no direct evidence of any dedication at all. These properties could not possibly have been dedicated to God by Pir Mushayak for, with the exception of a small part of survey No. 136, they were all acquired after his death-some of them centuries after his death. If it is to be held that there has been any dedication at any time, it can only be by presumption from long use for public purposes, and the presumption, if it can be made at all, presupposes due compliance with the legal forms whatever they may be. I shall therefore deal very briefly with the law.

17. The authorities cited show that there must be a declaration of dedication which

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should be made contemporaneously with the act of dedication: *Banubi* v. *Narsingrao* (5). The wakif must divest himself of the ownership of the property: *Muhammad Yunus* v. *Muhammad Ishaq Khan* (6). Physical delivery is not essential, but such possession as is possible must be given: *Abadi Begum* v. *Kamiz Zainab* (7). There are special rules in the case of mosques—Wilson's Anglo-Mahomedan Law, S. 320; *Amir Ali's Muhammadan Law*, Vol. 1, page 394 ff.; and Tyabji's *Principles of Muhammadan Law*, S. 514. When once a building has been set apart as a mosque it is enough to make it wakf if public prayers are once said there with the permission of the owner. But though a declaration of dedication and completion by some act giving practical effect to it are essential, it was not always necessary that there should be any direct evidence of these things. Dedication may be inferred from long user as wakf property: see *Court of Wards* v. *Ilahi Bahhsh* (8) and *Muhammad Hamid* v. *Mian Mahmud* (9); and other cases cited in Tyabji's Principles, S. 458. There can be no doubt as to this principle which is recognized in all the text books.

18. Now, in the case of survey No. 136 there is evidence of long user user which may reasonably be presumed to date from the time the land was acquired centuries ago—for purposes recognized by Mahomedan law as proper; subjects of wakf. The tomb of a recognized saint is such an object see Tyabji, S. 484. A mosque, of course, is, and this mosque, which is referred to in the partition deed of 1736, must have been built in Pir Mushayak's time or soon after his death. In my opinion it must be presumed that the roza and mosque have been duly dedicated and have become wakf by user, and the presumption may fairly be extended to the other buildings and the land enclosed within the compound wall which may be regarded as appurtenant to the roza. So far as this survey number is concerned, the trial Judge is clearly right.

19. But, in the case of the other survey numbers, there is no evidence of any user from which a dedication for public or religious purposes could possibly be presumed. There is in fact practically no evidence as to the manner in which these lands have been used for the purposes for which they have been used until we come to the present century. In 1906 we find survey No. 138 permanently leased by the defendant's father for the erection of mill chawls. The rent-received is credited to the Pir Musnayak's private account. In 1921 we find the defendant erecting chawls on survey No. 105 at his own expense—apparently as a private transaction quite independent of the roza. (I do not think any importance can be attached to the statement of the plaintiffs' witness Ex. 151 about certain tombs being removed before the chawls were built in this land. There is no corroboration of what he says on the point, and there is no reference in any of the records to this land as kabrasthan).

20. If the lands other than survey No. 136 are to be heldto be wakf, it must be upon considerations quite different from those which apply in the case of that number. As far as I have been able to gather from the learned trial Judge's judgment, he holds that No. 105 must be taken to form part of the wakf estate because the entries in the records justify the conclusion that it must at some time or other have been the subject of a grant for the benefit of the institution. The description of the land as devasthan and the fact that it has been partially exempted from payment of assessment from before 1874 are important items of evidence. When considered in conjunction with such evidence of public user as we have in the case of No. 136, they help to build up a convincing case. But considered by themselves, they are far from being convincing. Devasthan properties are not necessarily public. There may be private as well as public

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wakfs and the revenue records do not always distinguish between them. There are of course numerous kinds of inam grants carrying total or partial remission of assessment. Moreover, the Courts have never held that entries in the old survey records kept primarily for fiscal purposes are in themselves sufficient evidence of title. The entries in the Record of Rights stand on a rather different footing, at any rate since the Land Revenue Amendment Act of 1913. But the plaintiffs can hardly rely on any presumption arising from the Record of Rights since, as those entries now stand, they purport to show that the defendant is the owner of the properties and not manager or trustee. It is also a point to be remembered in connection with this part of the evidence that defendant 1's father was a minor when the land was first shown as devasthan in 1874, and that he and the defendant never resided in Ahmedabad. In my opinion there is no sufficient evidence to justify the lower Court's finding that survey No. 105 belongs to the trust.

21. The grounds on which survey Nos. 137 and 138 have been held to form part of the estate appear to be these. They were purchased by Jamalbhai who was mujawar of the roza. There is nothing in the defendant's accounts to show that the purchase money came from the pir's private funds. The lands were in the occupation of persons who were probably connected with the roza as mujawars or managers until they were transferred to the defendant's name, and they were transferred to him as owner of the roza. Until 1907 (i.e., after the lease of survey No. 138) there is nothing to show that the pir derived any income from them. These facts in the learned Judge's opinion justify the conclusion, that they must have been purchased out of the funds of the institution for the benefit of the institution, and, therefore belonged to it. But the reasoning is not very convincing when all the facts are considered. Jamalbhai was no doubt a mujawar, but he also held a power-of-attorney which constituted him the general agent of the pir (Ex. 182). The defendant's accounts show that considerable sums of money were remitted to him from time to time and, though it is impossible to trace the money with, which these lands were purchased, it appear that money was sent to him for secular purposes besides what was sent for the purpose of the uras. There is-nothing to show that he purchased for the pir. There is equally nothing to show that he purchased for the roza. But the principal difficulty in the plaintiff's story is the one I have already indicated.

22. It is an admitted fact that the pir has a large private income. He receives something like Rs. 50,000 a year from various presents and taxes and also has land at Palanpur (see Exs. 129 to 200). But there is no reliable evidence to show that the roza on the other hand had any income to speak of. The plaintiff's witnesses speak vaguely of income derived from flowers, cocoanuts, weighing of children, auction of the right to hoist a flag, and cash offerings at the shrine. It is doubtful, however, to say the least of it, whether what was received in this way was ever more than enough to defray the expenses. It is certainly not proved that there ever has been any galla fund such as that referred to in *Advocate-General of Bombay* v. *Yusufalli* [(10)]—the case relied on by the learned trial Judge—from which it would be possible to purchase property for the roza. The Collector's order granting sanction to the suit (Ex. 51)

mentions the fact that in the mutation proceedings in 1919 the defendant said that those lands were purchased out of the roza funds. But the statement has not been proved. We do not know exactly what it was he said, and it is difficult to see what personal knowledge he can possibly have of transactions which took place before he was born. As for the fact that these lands appear to have been occupied at first by the

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mujawars, no great importance can be attached to that, since no separate account of income and expenses of the roza has ever been kept in the pir's books. It may well be that the persons in charge as mujawars and managers were allowed to enjoy the income such as it was, and the pir sent what further amount was necessary for expenses and maintenance. Very, probably the mujawars were allowed to occupy the neighbouring lands in lieu of wages. It would not be justifiable to infer from that these lands belonged to the roza. For these reasons, I am unable to agree with the trial Court's view that survey Nos. 137 and 138 any more than survey No. 105/1 form part of the wakf estate either because they were purchased out of the trust funds or for any other reasons.

23. The result is that appeal No. 216 succeeds so far as these three survey numbers are concerned, but fails as to survey No. 136. All references to survey Nos. 105/1, 137 and 138 must be deleted from the decretal order which however will be otherwise confirmed. As regards the cross appeal, it might have been difficult to accept the lower Court's reasons for not framing a scheme if we had agreed with its view that all the properties in suit are wakf. But now that the wakf is confined to survey No. 136, we see no necessity for any scheme. As regards costs in the main Appeal No. 216 each party has partly succeeded and partly failed. We consider that the proper order as to costs will be that the plaintiffs and defendant 1 will bear their own costs both in the suit and in the appeal. Defendant 2 will also pay his own costs. The trial Judge pointed out that it was unnecessary for him to employ separate counsel as his defence was identical with that of defendant 1. The same applies in the appeal. Defendant 2 will therefore pay his own costs throughout. Appeal No. 217 is dismissed with costs.

24. BAKER, J.:— I agree and have nothing to add to the exhaustive judgment delivered by my learned brother.

25. There is no direct evidence of dedication in this case. In fact, although the arguments have lasted several days, the evidence on the whole is of a somewhat nebulous character. But there is evidence that the mosque in survey No. 136 has been used for purposes of worship, and that an annual uras is held there which is attended by a large number of devotees, and this being so, the evidence leads to the conclusion that this particular number must be regarded as wakf. But, so far as the other numbers, are concerned, there is no evidence either of dedication or of their being purchased out of funds of a religious institution or indeed of any connection between them and the land on which the mosque and the roza stand, except that they belong to the person who is the religious head of the institution. In these circumstances, I agree with the judgment which has been pronounced and the order consequent thereon.

R.K.

26. *Appeal allowed in part.*

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1. AIR 1932 PC 51 : 136 IC 461 : 59 IA 121 : 53 All 990 (PC).

2. AIR 1928 PC 16 : 108 IC 361 : 55 IA 96 : 55 Cal 519 (PC).

3. (1910) 9 IC 358.

4. AIR 1932 Bom 356 : 138 IC 810.

5. (1906) 31 Bom 250 : 9 Bom LR 91.

6. AIR 1921 All 103 : 62 IC 896 : 43 All 487.

7. AIR 1927 PC 2 : 99 IC 669 : 54 IA 33 : 6 Pat 259 (PC).

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[8] (1912) 40 Cal 297 : 17 IC 744 : 40 IA 18 (PC).

[9] AIR 1922 PC 384 : 77 IC 1009 : 50 IA 92 : 4 Lah 15 (PC).

[10] AIR 1921 Bom 338 : 84 IC 759.

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8

1961 SCC OnLine Ori 45 : AIR 1962 Ori 95

Orissa High Court
(BEFORE S. BARMAN, J.)

Khati and others ... Appellants;
Versus
Mirza Hossain Beg and others ... Respondents.

Second Appeal No. 164 of 1959
Decided on March 31, 1961

JUDGMENT

1. The defendants are the appellants, in this second appeal, from a confirming decision of the learned First Additional Subordinate Judge of Cuttack whereby he affrmed a decision of the learned Additional Munsiff of Cuttack and decreed the plaintiffs' suit for a declaration that lots 1, 2 and 3 of the suit properties are Wakf properties and that the mortgage and the execution are collusive. The facts, shortly stated, are these: The suit properties were purchased by one Kamiruddin Khan being the predecessor-in-title of the defendants appellants in execution of a mortgage decree in T.S. No. 244 of 1927. On October 10, 1929

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the said Kamiruddin Khan took delivery of possession in execution of the decree. In 1953 the present suit was filed by the plaintiffs, being members of Muslim Community in their respective capacity, for a declaration that the suit property belongs to Mohamadan public and not the defendants and further that the mortgage in favour of the said Kainiruddin Khan (husband of defendant No. 1), the mortgage decree, the execution proceedings are illegal, fraudulent and inoperative; against the public and for possession.

2. The defence taken in the suit, is that none of the suit properties are Wakf properties though no doubt there is a Masjid in lot No. 1, originally meant for prayers to be offered by the mortgagors family; hat lots 2 and 3 are not part and parcel of the Masjid though they are adjacent vacant plots; that in the Provincial and Revision Settlements the said lots are not recorded as Masjid or Wakf property; in the current settlement lot No. 1 is shown in the name of the mortgagor mentioning a Masjid Ghar therein.

3. The trial court held that the suit property is Wakf property that lot No. 3 is the Khela Padia where Moharum feats are shown; that the mortgage is collusive and accordingly decreed the suit in favour of the plaintiffs. The said findings were affirmed by the learned lower appellate Court in appeal. Hence this Second Appeal.

4. The point,—urged by Mr. M.S. Rao, learned counsel for the defendants appellants' is that there is no documentary evidence of dedication. The learned counsel contended that it must be shown that there was dedication by somebody for the purpose of Wakf. The learned Counsel, by reference to authorities cited by him, relied on the undisputed position in law that what is required to be established is the intention on the part of the owner to dedicate a particular property for religious or charitable purposes or, in other words, the intention of the owner to create a wakf of the property; that, such intention may be established by declaration or may be

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inferred from user; feat the circumstances,—that the property had been mortgaged and that a mortgage decree was obtained and thereafter the property was sold,—are facts which militate against the inference of dedication for religious or charitable purposes.

5. On this point the learned counsel relied on a decision of the Nagpur High Court in *Jawherbeg Umraobeg* v. *Abdul Aziz*, AIR 1956 Nag 257 at p. 259. The point is that the dealing with the property by way of mortgage is on the basis that it was secular property and not Wakf property. This argument is repelled on behalf of the plaintiffs, submitting that on the facts of this case, the Nagpur decision has no application here.

6. In the present case, the alleged mortgage which was in 1919 was found to be collusive and accordingly it is to be treated as breach of trust on the part of the person dealing with the property. In 1927 the mortgage suit was filed. Still, in 1929 in the current settlement record-of-rights — which was published on May, 18, 1929.—it was recorded as containing a Masjid; notwithstanding such entry in the record-of-rights of the current settlement, the delivery of possession was made in execution of the mortgage decree. Thus, the mortgage, was clearly a breach of trust, and therefore is not binding on the plaintiffs. With regard to the proceedings in the mortgage suit, the concurrent finding of the Courts below; is that there was no delivery of possession in the execution case, because the two witnesses — the alleged attestors to the delivery of possession,—denied the alleged delivery of possession. That apart, the alleged mortgage document was never produced in Court The entry in the record-of rights made as early as 1929, mentioning Masjid,—is conclusive of the point. This disposes the aspect of the mortgage, on which the defendants strongly relied in support of their contention that the suit properties are secular properties and not wakf properties.

7. A Wakf normally requires express dedication, but if it had been used from time immemorial for religious purpose, then the and is by user wakf although there is no evidence of express dedication. In the present case, it is evident that there is no proof of express dedication; therefore the only question is whether there is evidence of user and if so user of what. Wakf, as defined in Wakf Act, means the permanent dedication by a person professing the Musalman faith of any property for any purpose recognised by the Musalman law as religious, pious or charitable; the legal meaning of Wakf, according to Abu Hanifa, is the detention of specific thing in the ownership of the Wakf or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects" (Principles of *Mahomadan Law by Mulla*, 14th Edition, Article 173).

8. When we talk of user from time immemorial, it means that it has to be established by long user, beyond which memory of man cannot trace. The mere fact,—that a person describes himself as Motawalli of a private mosque or Imambada,—will not make that property his own, if there is evidence on record to prove that the property was wakf by user; nor will the mere fact that in certain applications the person uses expressions like "my mosque" or "my Imambada" make the Imambada or the mosque his own, when to his knowledge the property was held to be Wakf. When a long period has elapsed since the origin of the alleged wakf, user can be the only available evidence to show if the property is or is not wakf; where there is no evidence to show how and when the alleged wakf was created, the wakf may be established by evidence of user; if land had been used from time immemorial for religious purpose, such as a Masjid, the land is constituted wakf, though there is no evidence of express dedication; the title of the original owner is extinguished and the ownership of the property vests in God and accordingly the public character of the institution may be presumed. *Abdul Rahim Khan* v. *Fakir Mohammad Shah*, AIR 1946 Nag 401; *Mehraj Din* v. *Ghulam Mohammad*, AIR 1931 Lah. 607; *Ramzam* v. *Dasarath Raut* AIR 1953 Pat 138.

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9. In the present case, it is nobody's case that there is any written wakf. Therefore, the whole question is to examine the other evidence adduced herein. Indeed when a land forms part of a Masjid or graveyard set apart for Mussalman community,

and that by user, if not by dedication, the land is wakf; the entry in the record of rights seeing conclusive on the point; it is obvious that, if at were held that within the area of the Masjid or grave-yard land unoccupied or apparently, unoccupied by Masjid or graves was private property and at the disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government in setting aside land for a Masjid or as an open grave yard for the Mahomadan community would be frustrated: Court of Wards for the property of *Mokhdum Hassan Baksh* v. *Illahi Buksh*, 40 Ind App 18 at p. 23 (PC).

10. Keeping the above, in view, as the undisputed position in law the three lots contained in the suit property in the present case, may be conveniently examined seriatim as follows:

11. With regard to lot No. 1, the finding of the learned lower appellate Court is that it refers to plots Nos. 2119 and 2120; plot No. 2120 has been recorded as Masjid Ghara and plot No. 2121 has been recorded as Gadia (pond) in the current settlement (Ex. B). The excavation of the pond adjacent to the Masjid Ghar is significantly indicative of the purpose of purification of the body before the Mahomadans sit for prayers in the Masjid. On this point the Mahomadan Law is that every Mahomadan is entitled to enter a mosque dedicated to God, whatever may be the sect or school to which he belongs, and to perform his devotions according to the ritual of his own sect or school, although it is not certain whether a mosque appropriated, exclusively by the founder to any particular sect or school can be used by the followers of another sect or school. In view of the entry in the record of rights mentioning "Masjid Ghara",—which is conclusive,—it leads to the only inference that it is wakf property.

12. With regard to lot No. 2 which is embraced in the same compound, it is clearly a part and parcel of the Masjid having regard to its location adjacent to the Masjid.

13. Then with regard to lot No. 3 it is Khela Padia meant for exhibition of feats during Moharum which is a public festival of the Mahomadans. As is well known. Moharum is an important religious function of the Mahomadans and accordingly a lot of land meant for exhibition of feast on such religious occasion is an essential part of the Masjid itself. Thus, all these lots taken together, constitute wakf property. In this view of the case, the decision of the learned Courts below is upheld. This appeal is accordingly dismissed with costs.

JE/L/V.B.B.

14. *Appeal dismissed.*

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APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

MAHAMAYA DEBI

v.

HARIDAS HALDAR.*

1914

July 6.

Palas or turns of worship—Mortgage—Transferability of palas—Custom—Kalighat Temple—Estoppel of mortgagor, even if trustee—Essential attributes of valid custom—Public policy, contravention of—Onus probandi—Civil Procedure Code (Act V of 1908), O. XXXIV—Chattels—Intangible property, foreclosure of mortgage of—Pledge.

Per MOOKERJEE J. (BEACHCROFT J. reserving opinion). A mortgagor, even when acting in a public capacity and not for his own benefit, is estopped to deny his title, and cannot set up as a defence for himself against the mortgagee that the property so mortgaged is trust property which he had no right to mortgage.

Doe v. *Horne* (1) followed.

This principle is inapplicable where the mortgage is void as contrary to Statute.

Barrow's Case (2) followed.

Trustees for a public purpose are not, by the nature of their office, protected from the operation of estoppel as against the assignees of the original parties to the deed in question.

Doe v. *Horne* (1), *Webb* v. *Horne* (3) and *Higgs* v. *Assam Tea Co.* (4) referred to.

[View indicated by BANERJEE J. in *Mallika* v. *Ratanmani* (5) not accepted.]

Per MOOKERJEE and BEACHCROFT JJ. "A custom to be valid must have four essential attributes: (i) it must be immemorial; (ii) it must be

* Appeal from Appellate Decree, No. 1185 of 1911, against the decree of T. W. Richardson, District Judge of 24-Parganas, dated Feb. 3, 1911, modifying the decree of Pramatha Nath Chatterjee, Subordinate Judge of 24-Parganas, dated Aug. 16, 1910.

(1) (1842) L. R. 3 Q. B. 760; 61 R. R. 397.
(2) (1880) 14 Ch. D. 432, 441.
(3) (1870) L. R. 5 Q. B. 642.
(4) (1869) L. R. 4 Ex. 387.
(5) (1897) 1 C. W. N. 493.

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reasonable; (iii) it must have continued without interruption since its immemorial origin; and (iv) it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect".

Tyson v. *Smith* (1) followed.

A custom cannot be enlarged by parity of reasoning.

Arthur v. *Bokenham* (2), *Pradyote* v. *Gopi Krishna* (3) referred to.

"A custom originating within time of memory, even though existing in fact, is void at law."

Mayor of London v. *Cox* (4) followed.

Evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption, though only a rebuttable one, as to the immemorial existence of the custom.

Bastard v. *Smith* (5), *Mercer* v. *Denne* (6) followed.

If the existence of the custom has been proved for a long period, the *onus* lies on the person seeking to disprove the custom to demonstrate its impossibility.

If a custom be against reason (*i.e.*, artificial and legal reason warranted by authority of law) it has no force in law.

When a custom is said to be void as being unreasonable, the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence, and not from any rights conferred in ancient times

Salisbury v. *Gladstone* (7) followed.

The period for ascertaining, whether a particular custom is reasonable or not, is the time of its possible inception.

The Tanistry Case (8) followed.

In practice, the Kalighat Temple *palas* have been transferred during at least 90 years, though in a limited market which those alone can enter who are qualified to become shebait by birth or marriage, the time when this custom originated being unknown.

Proof of the existence of a custom need not be carried back by direct evidence to the year 1773 when the Supreme Court was established, or even to 1793 when the first Regulations were passed by the Indian Legislature.

(1) (1838) 9 Ad. & El. 406.
(2) (1708) 11 Mod. 148, 161.
(3) (1910) I. L. R. 37 Calc. 322, 326.
(4) (1867) L. R. 2 H. L. 239, 259.
(5) (1837) 2 Moo. & R. 129, 136.
(6) [1904] 2 Ch. 534, 556.
(7) (1861) 9 H. L. C. 692, 701.
(8) (1608) Davis 29, 32.

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The customary right to make a sale, mortgage, gift or lease of a *pala* in favour of persons within a limited circle (the transferee being under precisely the same obligation to the endowment as the transferor himself), is closely associated with and possibly developed out of the heritable, devisable, and partible character of a *pala*.

Janokee v. *Gopaul* (1) referred to.

A custom of this description clearly cannot be characterised on any rational grounds as unreasonable or opposed to public policy.

Foreclosure, as a remedy of the mortgagee, is not confined to mortgages of *land*; it is equally applicable to mortgages of *chattels*.

Harrison v. *Hart* (2) followed.

A mortgagee of *intangible* property is entitled to foreclose the mortgagor quite as much as a mortgagee of *chattels*.

SECOND appeal by Srimatee Mahamaya Debi, the plaintiff.

On the 16th August 1905, the defendant No. 1, Haridas Haldar, one of the Kalighat Temple shebaits, and his mother Srimatee Kumudini Debi, the defendant No. 2, executed in favour of the plaintiff Srimatee Mahamaya Debi a mortgage by way of conditional sale of three *palas* or turns of worship held by the mortgagors in the Temple of the Goddess Kali at Kalighat for Rs. 2,200 carrying interest at 6 per cent. This mortgage was in renewal of two previous conditional mortgages, dated 8th October 1900, and 9th December 1901, for Rs. 1,400 and Rs. 800, respectively. The mortgage money not having been repaid on 16th August 1908, the due date, the plaintiff, on the 13th September 1909, brought this suit in the Court of the Subordinate Judge, 24-Pergannas, to recover the sum and prayed for a foreclosure decree in default.

The plaintiff alleged in the plaint that the *palas* were transferable (according to immemorial custom) to a possible shebait, such as the plaintiff, entitled to take one or more *palas* by inheritance. The plaintiff

(1) (1877) I. L. R. 2 Calc. 365, 372. (2) (1726) 1 Comyn. 393; 2 Eq. Cas. Abr. 6.

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was the widow of one Jnanendra Nath Mookerjee, who was the son of the daughter's son of a member of the senior branch of the Haldar family, who are the hereditary shebaits of the Kalighat Temple. The husband of the plaintiff was also the son of a daughter of a Haldar, consequently the plaintiff's husband was descended from the Haldars on the paternal as well as the maternal side. Further, the sister of the defendant No. 1 had obtained a *pala* under the will of her father, and two of the *palas* in suit were acquired by the father of the mortgagor (the defendant No. 1) by purchase. Besides, there was an express declaration of the mortgagors in the fourth paragraph of the mortgage deed, that "no objection on their part or on behalf of their heirs or representatives shall be maintainable." The evidence proved that 83 *palas* out of 360 had changed hands permanently, the earliest transaction being a mortgage by way of conditional sale of a *pala* which was executed on the 4th October 1819, and was foreclosed in due course: and as early as 1840 the Court found that the custom of transfer was fully established. The plaintiff adduced overwhelming evidence that these transfers for the last 90 years had been confined to co-shebaits or to the members of families to whom a shebait could bestow his daughter in marriage, *i.e.*, those who were qualified to become shebaits by birth or marriage. The first defendant alone contested the suit on the grounds, *first*, that *palas* were not transferable by custom; and, *secondly*, that, even if the alleged custom was proved, no Court should recognise and enforce it, as it was unreasonable and opposed to public policy. On the 16th August 1910, Babu Pramatha Nath Chatterjee, Subordinate Judge, 24-Pergannas, decreed plaintiff's suit holding that *palas* were transferable by custom though in a limited market, and that the custom was

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neither unreasonable nor opposed to public policy, and that the plaintiff was accordingly entitled to a foreclosure decree. On appeal, the District Judge of 24-Pergannas, on the 3rd February 1911, reversed this decision and gave the plaintiff a personal decree against the defendants, being of opinion that the custom of transferability of *palas* was opposed to public policy and unenforceable in a Court of justice.

Hence the plaintiff preferred a second appeal to the High Court.

Dr. Rashbehari Ghose (with him *Babu Mahendra Nath Roy*, *Babu Biraj Mohan Mozumdar*, *Babu Hari Bhusan Mookerjee*, *Babu Mohini Mohan Chatterjee* and *Babu Sarat Chandra Mookerjee*), for the appellant. I submit that the decision of the District Judge is wrong in law, on the following grounds:—*First*, the mortgagors are estopped to deny the validity of the mortgage on the ground that the property given by way of security was inalienable. As no man is allowed to dispute a title which he himself has granted, the mortgagor cannot set up against his mortgagee the title of a third person, even where the mortgagor is a trustee acting in a public capacity and not for his own benefit: see *Doe* v. *Horne* (1). *Secondly*, the custom of transferability of *palas* is reasonable, so that it may be recognised and enforced by a Court of justice. I do not dispute the proposition, that in the absence of a custom or usage to the contrary or any provision to that effect in the deed of endowment, a religious trust, or the right of management of a religious or charitable endowment, or a religious office attached to a temple cannot be alienated by the holder. Even assuming that a *pala* or turn of worship is not alienable except by custom, my

(1) (1842) L. R. 3 Q. B. 760; 61 R. R. 397.

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contention is that the custom which has been proved in this case should be recognised by the Court, as it satisfies all the requisites of a valid custom. Though the time when the custom in question originated is unknown, still it has been found to exist as far back as the evidence can be carried. I further submit, that as the plaintiff is entitled only to a foreclosure decree, this case is distinguishable from those cases where it has been laid down that *palas* or turns of worship cannot be sold at a public auction where persons professing other religious faiths, *e.g.*, Mahomedans and Christians, may bid for them. The case of *Lakshmanaswami* v. *Ringamma* (1) referred to by the District Judge is distinguishable, as the decree therein was one for *sale*: and the next case cited by him, *Ramanathan* v. *Murugappa* (2) has no bearing on the question. *Thirdly*, I submit that the plaintiff (mortgagee) is entitled to a foreclosure decree, in view of the nature of the property given by way of security; as this is a remedy of the mortgagee which is not confined to mortgages of land only, it is equally applicable to mortgages of chattels and intangible property.

Babu Atul Krishna Roy (with him *Mr. C. R. Das*), for the respondents. Though admitting the passing of consideration, and the execution of the mortgage deed, the respondents (mortgagors) are fighting on a question of principle, and I must contend that the *palas* of the Kalighat Temple are not transferable for the pecuniary benefit of the shebaits who are mere trustees of a public temple, the office of shebait being *extra commercium* inasmuch as it is a religious office stamped with a trust.

[MOOKERJEE J. Take the question of estoppel first.]

(1) (1902) I. L. R. 26 Mad. 31. (2) (1903) I. L. R. 27 Mad. 192.

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It does not arise at all. A former abuse of trust cannot be pleaded against a trustee who seeks to prevent a repetition of that abuse, even if he were formerly implicated in the same indefensible course against which he is seeking to protect the trust property: *Juggut Mohini* v. *Sokheemoney* (1) and *Mallika* v. *Ratanmani* (2).

[MOOKERJEE J. What do you say as to the case of *Doe* v. *Horne* (3)?]

In that case the mortgagors were empowered to raise money on mortgage, while here the *palas* cannot be alienated.

There was no issue on estoppel; that question has been raised here for the first time.

Here the transfer is void under Statute, *i.e.*, Scripture of Hindu Law. For the principle against estoppel, see Bigelow p. 544, Ch. 17, s. 1.

Next, as regards the second contention of the appellant, I submit that the custom of transferring a *pala* or selling the office of a shebait even to a person of the same caste or sect can never be reasonable and valid: see *Kuppa* v. *Dorasami* (4), *Juggurnath* v. *Kishen* (5) and *Raja Vurmah* v. *Ravi Vurmah* (6).

To validate such a custom would tend to public mischief in inducing needy incumbents of hereditary religious offices who desire to sell them to give a dishonest recognition to qualifications, which in fact were not the qualifications demanded by the nature of the office. I submit that no custom can validate an act which is clearly against public policy. The offerings made by Hindus to a public shrine constitute a

(1) (1871) 14 Moo. I. A. 289; 17 W. R. 41, 44.
(2) (1897) 1 C. W. N. 493.
(3) (1842) 3 Q. B. D. 760, 766; 61 R. R. 397.
(4) (1882) I. L. R. 6 Mad. 76.
(5) (1867) 7 W. R. 266.
(6) (1876) I. L. R. 1 Mad. 235; L. R. 4 I. A. 76.

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public trust, in which the trustee can never have any beneficiary interest, and any appropriation by them of the same would be a clear breach of trust; no custom recognising such appropriation can alter the character of such a transaction, or validate the same.

See *Rajeshwar* v. *Gopeshwar* (1), which lays down the rule that shebaits cannot bequeath their office by will to non-shebaits. See also *Mitta Kunth* v. *Neerunjun* (2). Even if the owners of private temples may alter the character of the trust to a certain extent by family arrangement, still the trustees of the Kalighat temple can never do so, because, as both the Courts below have found, it is a public temple.

[BEACHCROFT J. Then you have been abusing your trust, and you now want the Court to put you in a position to continue doing so.]

Further, the alleged custom of transferability of *palas* does not bear the requisite characteristics of a valid legal custom. For it is not certain, reasonable, immemorial, legal or moral. The earliest instance of transfer of a *pala* goes back only to 4th October 1819 or about 90 years before the institution of this suit; not even to the beginning of the establishment of regular Courts of Record in British India, while the foundation of this Trust is lost in the oblivion of mythical ages.

The transfer of *palas* is an abuse of trust, and by implication, mis-appropriation: *Raja Vurmah* v. *Ravi Vurmah* (3). For the personal debt of a shebait, trust property cannot be sold; *cf.* the position of the manager of an infant heir.

[MOOKERJEE J. There is great danger in developing superficial analogies.]

(1) (1907) I. L. R. 35 Calc. 226, 229. (2) (1874) 14 B. L. R. 166.
(3) (1867) 7 W. R. 266.

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If this custom be upheld, extravagance among shebaits will be encouraged. Public policy must be vindicated, whether the plaintiff lose her money or not.

[MOOKERJEE J. But you have not got beyond extravagance encouraged by any possible decision of ours.]

Misappropriation does not alter the character of the trust. Even a *mourasi mokurari* lease of landed property granted to a co-shebait has been held to be void. Regarding the Baidyanath Temple case, is *pala* or turn of worship the same as *charao*? No custom was pleaded there: *Girijanund* v. *Sailajanund* (1).

[MOOKERJEE J. The contention of the other side is not that the Kalighat temple *palas* are transferable, as a matter of right under Hindu Law, but that they are so by custom.]

Even if such a custom is proved, it is bad in law: see *Mallika* v. *Ratanmani* (2).

Instances of continued abuse of trust for 90 years will not make the custom valid.

Kuppa v. *Doraswami* (3); custom was not pleaded there. See also Golap Ch. Sastri's Hindu Law, p. 486, 491.

The custom found by the District Judge to be in existence relates to private and not public endowments: *Janokee* v. *Gopaul* (4). See also K. K. Bhattacharyya on Hindu Law, p. 453. A turn of worship, cannot be called a share. [Mayne's Hindu Law paras. 437, 438.]

As to a foreclosure decree, I submit that a *pala* or turn of worship has been held in all the reported cases to be moveable property. As a foreclosure decree can only be made with respect to mortgages of immoveable property, the provisions of the Transfer of

(1) (1896) I. L. R. 23 Calc. 645.
(2) (1897) 1 C. W. N. 493.
(3) (1882) I. L. R. 6 Mad. 76.
(4) (1877) I. L. R. 2 Calc. 365.

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Property Act which refer to foreclosure of mortgages of immoveable property only, and Order 34 of the Civil Procedure Code of 1908 (applying also to mortgages of immoveable property) are inapplicable to mortgages of *palas*. There is no provision of Indian Law for granting a decree for foreclosure in the case of pledge, or mortgage of moveables.

Babu Mahendra Nath Roy, in reply. It has been urged, that we cannot have a foreclosure decree because a *pala* is not immoveable property. See Fisher on Mortgage, 6th Edition, Art. 985, p. 505. A pledge presupposes delivery of possession. (Contract Act, ss. 172, 148.)

For the difference between a pledge and a mortgage, I refer to pages 107 and 320 of Ghose's Mortgage. A pledgee can realise his money by sale of the pawn: *Harrold* v. *Plenty* (1). Regarding foreclosure of a mortgage of moveables, see Coote on Mortgages, 7th edition, Ch. 49, para 1; p. 1019.

[*Babu Atul Krishna Roy*. See Halsbury's Laws of England, Vol. I, p. 123. Section 58 of the Transfer of Property Act refers to mortgages of immoveable property.]

Cur. adv. vult.

MOOKERJEE J. This is an appeal by the plaintiff in a suit for foreclosure of a mortgage by way of conditional sale, executed in her favour by the defendants on the 16th August 1905, in renewal of two previous conditional mortgages, dated the 8th October 1900 and 9th December 1901. The earlier mortgages had been granted to secure loans of Rs. 1,400 and 800, respectively. The mortgage now in suit was given to secure the sum of Rs. 2,200 which was to carry interest at the moderate rate of 6 per cent. per annum

(1) [1901] 2 Ch. 314.

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and was made repayable on the 16th August 1908. The subject-matter of the security consisted of three *palas* or turns of worship held by the mortgagors in the temple of the goddess Kali at Kalighat. The mortgage money was not repaid on the due date, and the paintiff commenced this action on the 13th September 1909, to recover the sum with interest and costs. The plaintiff alleged in the plaint that the *palas* were transferable according to immemorial custom. The first defendant, who alone contested the claim, set up in his written statement the case that the *palas* were not transferable by custom, and that even if the alleged custom was proved, no Court should recognise and enforce it, as it was unreasonable and opposed to public policy. The Subordinate Judge held that the *palas* were transferable by custom in a limited market, that the custom was neither unreasonable nor opposed to public policy, and that the plaintiff was accordingly entitled to a foreclosure decree. On appeal, the District Judge has reversed this decision and has given the plaintiff, only a personal decree against the defendants, as in his opinion the custom of transferability of *palas* was opposed to public policy and unenforceable in a Court of Justice. On the present appeal by the plaintiff, three substantial grounds emerge for consideration, namely, *first*, are the mortgagors estopped to deny the validity of the mortgage on the ground that the property given by way of security was inalienable? *secondly*, is the custom of transferability of *palas* reasonable so that it may be recognised and enforced by a Court of Justice? and, *thirdly*, is the plaintiff entitled to a foreclosure decree, in view of the nature of the property given by way of security? Before I deal with these questions, it is necessary to define the custom which, the Courts below have concurrently

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found, does exist in respect of this particular religious foundation.

The Courts below have found that *palas* are ordinarily transferred by sale, mortgage, lease and gift, and that they are also the subject of partition and of testamentary devise. This is proved, not merely by oral evidence, but also by evidence of concrete instances in which such transactions have come before Courts and have been upheld as legal. One of the earliest transactions of which we find mention is a mortgage by way of conditional sale of a *pala*, which was executed on the 4th October 1819 and was foreclosed in due course. We have other instances of conditional mortgages, dated 11th April, 1831 and 29th June, 1831 which were both foreclosed in 1837. We have further a conditional mortgage of the 18th February, 1835, which was foreclosed on the 8th August, 1840, after contest in a suit in which the mortgagor unsuccessfully pleaded that the *pala* was non-transferable. A more modern instance is a conditional sale of 1864 which was foreclosed on the 16th December, 1867. Instances of sales of *palas*, specially in recent years, are quite numerous, and it is not disputed that two of the *palas* in suit were acquired by the father of the first defendant, mortgagor, by purchase. Instances have also been adduced in which *palas* have been sold in execution of decrees; have been leased out for longer or shorter periods, have been bequeathed like other property, and have, in fact, formed the subject of transfer in some form or other. One of the most recent instances on the record is a decree of this Court, dated 30th August, 1900, which directed possession to be delivered of a *pala* which had been mortgaged by way of conditional sale, followed by a decree for foreclosure. It has been conclusively proved that 83 *palas* out of 360 have changed hands permanently

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These facts amply justify the concurrent finding of the Courts below that the custom of transfer of *palas* of the Kalighat shrine has been established beyond the shadow of a doubt; the existence of the custom has been traced back almost to the time of the first establishment of British Courts in this country, and even as early as 1840, the Court found that the custom of transfer was fully established. The evidence, at the same time, establishes that these transfers have not been unrestricted, but have been confined to co-shebaits or to the members of families to whom a shebait can bestow his daughter in marriage; in other words, there is undisputed and overwhelming evidence, oral and documentary, that in practice *palas* have been transferred during at least 90 years, though in a limited market which those alone can enter who are qualified to become shebait by birth or marriage. Only one instance has been traced in which a transfer, in favour of an absolute stranger not connected with the hereditary shebaits by blood or marriage, has been recognised, but the transferee in that case was the hereditary pujari or priest whose function, it must be observed, is entirely distinct from that of a shebait. The plaintiff is the widow of one Jnanendra Nath Mookerjee who was the son of the daughter's son of a member of the senior branch of the family of Haldars who are the hereditary shebaits of the goddess Kali. The husband of the plaintiff was also the son of a daughter of a Haldar, in other words, the husband of the plaintiff was descended from the Haldars on the paternal as also on the maternal side. The plaintiff is, consequently, a possible shebait; in other words, the contingency might have happened which would have entitled the plaintiff to take one or more *palas* by inheritance. The plaintiff is plainly entitled to the benefit of the custom, and this conclusion does

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not in any way contravene the well-established rule that a custom cannot be enlarged by parity of reasoning: *Arthur* v. *Bokenham* (1), *Pradyote* v. *Gopi Krishna*(2). The plaintiff is conclusively proved to belong to a class of persons to whom *palas* have hitherto been transferred and the transfers have been recognised as valid. Consequently, if the validity of the custom is established, there is no conceivable reason why the plaintiff should not by foreclosure become entitled to the three *palas* in dispute.

As regards the *first* question, it has been argued on behalf of the mortgagee that as no man is allowed to dispute a title which he himself has granted, the mortgagor cannot set up against his mortgagee the title of a third person: this cannot be disputed: *Doe* v. *Pegge* (3), *Goodtitle* v. *Bailey* (4), *Doe* v. *Vickers* (5), *Doe* v. *Clifton* (6), *King* v. *Smith* (7), *Debendra Nath* v. *Mirza Abdul Samed* (8). The rule has been held applicable where the mortgagor is a trustee, acting in a public capacity and not for his own benefit [*Doe* v. *Horne* (9), notwithstanding the contrary dictum in *Fairtitle* v. *Gilbert*(10), *Doe* v. *Hares*(11)], and the principle has been repeatedly approved and applied in the Courts of the United States that a mortgagor is estopped to deny his title, and cannot set up as a defence for himself against the mortgagee that the property so mortgaged is trust property, which he has no right to mortgage: *Bush* v. *Marshall* (12), *Strong* v. *Waddell* (13), *Jones* v. *Reese* (14), *Farris* v.

(1) (1708) 11 Mod. 148, 151.
(2) (1910) I. L. R. 37 Calc. 322, 326
(3) (1785) 1 T. R. 758.
(4) (1777) 2 Cowper 597, 601.
(5) (1836) 4 A. & E. 782.
(6) (1836) 4 A. & E. 809, 813.
(7) [1900] 2 Ch. 425.
(8) (1909) 10 C. L. J. 150, 163.
(9) (1842) L. R. 3 Q. B. 760, 766; 61 R. R. 397.
(10) (1787) 2 T. R. 169, 171.
(11) (1833) 4 B. & Ad. 435, 440.
(12) (1848) 6 Howard 284.
(13) (1876) 56 Ala. 471.
(14) (1880) 65 Ala. 134.

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Houston (1), *Boisclair* v. *Jones* (2), *Usina* v. *Wilder*(3), *McLeon* v. *Smith* (4). The reason for the rule is concisely put by Collier C. J. in *Stewart* v. *Anderson*, (5): "by the mortgage, the mortgagor professes to convey, and thus declares that he has an interest co-extensive with what he undertakes to transfer; and he will not be heard to say, in contradiction of his own deed, or in opposition to a claim founded thereon, that he was guilty of a falsehood and had no estate or interest therein". This principle has been held inapplicable where the mortgage is void as contrary to Statute [*Brewster* v. *Madden* (6)], on the ground that "it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament": *Barrow's case*, (7). Hence, it has been ruled that a corporation is not estopped from pleading that a mortgage made by it is *ultra vires*: *Ex parte Watson* (8). See also *Fairtitle* v. *Gilbert* (9), *Blackburn* v. *Cunliffe* (10), *British M. B. Co.* v. *Charnwood, F. R. Co.* (11). But the view has been steadily maintained that trustees for a public purpose are not, by the nature of their office, protected from the operation of estoppel as against the assignees of the original parties to the deed in question: *Doe* v. *Horne* (12), *Webb* v. *Herne* (13), *Higgs* v. *Assam Tea Co.*(14). I am not prepared to accept the view indicated by Banerjee, J., in *Mallika* v. *Ratanmani* (15), which receives no support from the decision of the Judicial

(1) (1883) 74 Ala. 162.
(2) (1867) 36 Ga. 499.
(3) (1877) 58 Ga. 178.
(4) (1880) 49 Wis. 200.
(5) (1846) 10 Ala. 504, 508.
(6) (1875) 15 Kans. 249.
(7) (1880) 14 Ch. D. 432, 441.
(8) (1888) 21 Q. B. D. 301, 302.
(9) (1787) 2 T. R. 169, 171.
(10) (1885) 29 Ch. D. 902.
(11) (1887) 18 Q. B. D. 714, 719.
(12) (1842) 3 Q. B. D. 760, 766; 61 R. R. 397.
(13) (1870) 5 Q. B. D. 642.
(14) (1869) L. R. 4 Ex. 387.
(15) (1897) 1 C. W. N. 493.

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Committee in *Juggat Mohini* v. *Sokheemoney* (1), cited in support of this position; but there are cases where trustees have been allowed to impeach their own grants: *Rumonee* v. *Baluck* (2), and conflicting dicta are to be found in *Gulam Nabi* v. *Nagammal* (3), and *Gulzar* v. *Fida* (4). [See *Sidhu Sahu* v. *Gopi Charan* (5) where the earlier cases are discussed.] I am of opinion that in the case before us, the Court should not depart from the ordinary rule that the mortgagor cannot dispute the title of the mortgagee, specially in view of the express declaration of the mortgagors in the fourth paragraph of the mortgage deed that "no objection on their part or on behalf of their heirs or representatives shall be maintainable." But I do not desire to rest the decision solely on the ground of estoppel, for, as will presently be seen, there is no substance in the objection raised by the mortgagors.

As regards the *second* question, it has not been disputed on behalf of the mortgagee that in the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder: *Raja Vurmah* v. *Ravi Vurmah* (6), *Rama Varma* v. *Rama Nayar* (7), *Kannan* v. *Nila Kandan* (8), *Lakshmanaswami* v. *Rangamma* (9), *Gnanasambandha* v. *Velu Pandaram* (10), *Sarkum* v. *Rahaman* (11), *Narayana* v.

(1) (1871) 14 Moo. I. A. 289; 10 B. L. R. 19; 17 W. R. 41.
(2) (1870) 14 W. R. 101.
(3) (1896) 6 Mad. L. J. 270.
(4) (1883) I. L. R. 6 All. 24.
(5) (1912) 17 C. L. J. 233, 237.
(6) (1876) I. L. R. 1 Mad. 235; L. R. 4 I. A. 76.
(7) (1882) I. L. R. 5 Mad. 89.
(8) (1884) I. L. R. 7 Mad. 337.
(9) (1902) I. L. R. 26 Mad. 31.
(10) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69.
(11) (1896) I. L. R. 24 Calc. 83.

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Ranga (1), *Subharayudu* v. *Kotayya* (2), *Alagappa* v. *Sivaramasundara* (3), *Rajeshwar* v. *Gopeshwar* (4), *Durga* v. *Chanchal* (5), *Rup Narain* v. *Junko* (6), *Mallika* v. *Ratanmani* (7), *Rangasami* v. *Ranga* (8), *Rajaram* v. *Ganesh* (9), *Ukoor* v. *Ghunder* (10), *Juggurnath* v. *Kishen* (11), *Kali Charan* v. *Bangshi* (12), *Dubo* v. *Srinibas* (13), *Ramanathan* v. *Murugappa* (14), *Trimbak* v. *Lakshman* (15), *Kuppa* v. *Dorasami* (16). There is also authority for the proposition that alienation of a religious office may be validly made in favour of a person standing in the line of succession and not disqualified by personal unfitness, *Sitarambhat* v. *Sitaram* (17), *Mancharam* v. *Pranshankar* (18), *Annasami* v. *Ramakrishna* (19), *Nirad Mohini* v. *Shibdass* (20). But the appellant does not invite us to go even as far as this proposition. She asks us to assume that a *pala* or turn of worship is not alienable, except by custom, and contends that the custom which has been proved in this case should be recognised by the Court: *Raja Vurmah* v. *Ravi Vurmah* (21), *Gnanasamandha* v. *Velu Pandaram* (22). This raises the question, whether the custom possesses the characteristics deemed essential for the validity of a custom. These essential attributes were specified by

(1) (1891) I. L. R. 15 Mad. 183.
(2) (1892) I. L. R. 15 Mad. 389.
(3) (1894) I. L. R. 19 Mad. 211.
(4) (1907) I. L. R. 34 Calc. 828 ; I. L. R. 35 Calc. 226.
(5) (1881) I. L. R. 4 All. 81.
(6) (1878) 3 C. L. R. 112.
(7) (1897) 1 C. W. N. 493.
(8) (1892) I. L. R. 16 Mad. 146.
(9) (1898) I. L. R. 23 Bom. 131.
(10) (1865) 3 W. R. 152.
(11) (1867) 7 W. R. 266.
(12) (1871) 6 B. L. R. 727 ; 15 W. R. 339.
(13) (1870) 5 B. L. R. 617.
(14) (1903) I. L. R. 27 Mad 192.
(15) (1895) I. L. R. 20. Bom. 495.
(16) (1882) I. L. R. 6 Mad. 76.
(17) (1869) 6 Bom. H. C. R. 250.
(18) (1882) I. L. R. 6 Bom. 298.
(19) (1900) I. L. R. 24 Mad. 219.
(20) (1909) I. L. R. 36 Calc. 975.
(21) (1876) I. L. R. 1 Mad. 235 ; L. R. 4 I. A. 76.
(22) (1899) I. L. R. 23 Mad. 271 ; L. R. 27 I. A. 69.

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Tindal C. J., in *Tyson* v. *Smith* (1), in these terms; "A custom to be valid must have four essential attributes: *first*, it must be immemorial; *secondly*, it must be reasonable; *thirdly*, it must have continued without interruption since its immemorial origin; and *fourthly*, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect." See also *Hurpurshad* v. *Sheo* (2), *Raja Vurmah* v. *Ravi Vurmah* (3), *Lutchmeeput* v. *Sadaulla* (4), *Ghasiti* v. *Umrao* (5). In the case before us, the custom obviously satisfies the first, third and fourth requirements. The time when the custom originated is unknown; all that has been ascertained is that, as far as the evidence can be carried back, it has been in existence. This takes the case out of the rule formulated by Willes J., in *Mayor of London* v. *Cox* (6) that "a custom originating within time of memory, even though existing in fact, is void at law." There is no force in the contention that the proof of the existence of the custom should have been carried back by direct evidence to 1793 when the first Regulations were passed by the Indian Legislature, if not to the year 1773, when the Supreme Court was established. It is well settled, that evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption, though only a rebuttable presumption, as to the immemorial existence of the custom. As Tindal, C. J., said in *Bastard* v. *Smith* (7), you cannot reasonably expect to have it proved that the custom did in fact exist before time of legal memory; but you

(1) (1838) 9 Ad. & El. 406.
(2) (1876) L. R. 3 I. A. 259.
(3) (1876) I. L. R. 1 Mad. 235; L. R. 4 I. A. 76.
(4) (1882) I. L. R. 9 Calc. 698.
(5) (1893) I. L. R. 21 Calc. 149.
(6) (1867) L. R. 2. H. L. 239, 258.
(7) (1837) 2 Moo. & R. 129, 136.

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are to require proof, as far back as living memory goes, of a continuous, peaceable and uninterrupted use of the custom. To the same effect is the observation of Farwell, J., in *Mercer* v. *Denne* (1):—"not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right." It is interesting to note that Vijnaneswara in his Mitakshara enunciated a similar rule (Yajnavalkya, Book II, 27). On the authority of a text of Katyayana, he holds that "time within the memory of man extends as far as a hundred years", as a man has, according to Sruti, a hundred years' duration of life. (Mitakshara, trans., Gharpure, p. 50). Aparārka, in his commentary on the same text of Yajnavalkya, treats a period beyond three generations (that is one hundred and five years) as time immemorial, and, refers to an earlier text to show that a period beyond sixty years might be treated as time beyond human memory. In any event, it is well settled that if the existence of the custom has been proved for a long period, the *onus* lies on the person seeking to disprove the custom, to demonstrate its impossibility; in this case, the mortgagors have entirely failed to meet the evidence of the custom adduced by the plaintiff. There is also no room for serious controversy as regards the certainty and continuity of the custom. The only question, consequently, for consideration is, whether it is reasonable as the appellant contends or unreasonable and opposed to public policy as the respondent asserts. It is indisputable that if a custom be against reason, it has no force in law; but as explained in Co. Litt., 62*a*, the reason here referred to is not to be understood as meaning every

(1) [1904] 2 Ch. 534, 556.

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unlearned man's reason, but artificial and legal reason warranted by authority of law; or, as Blackstone puts it, (Commentaries, Vol. I, p. 77) it is sufficient if no good legal reason can be assigned against it. When, however, it is said that a custom is void, because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times, *Salisbury* v. *Gladstone* (1). It is also well settled that the period for ascertaining, whether a particular custom is reasonable or not, is the time of its possible inception; this is in accord with the observation in the *Tanistry Case* (2): "the commencement of a custom (for every custom hath a commencement, although the memory of man doth not extend to it, as the river Nile hath a spring although geographers cannot find it) ought to be upon reasonable ground and cause, for if it was unreasonable in the original, no usage or continuance can make it good: *Quod ab initio non valuit tractu temporis non convalescet.*" When tested in the light of these principles, no good ground can be assigned why the custom should be condemned as unreasonable. There is no force in the contention of the respondents that because the custom contravenes the rule that a religious office is inalienable, it must be pronounced to be against public policy; if this argument were to prevail, all customs would be unreasonable. Since customs in general involve some inconsistency with the general common law of the realm or are contrary to a particular maxim, the fact of this inconsistency is not of itself a ground for holding the custom unreasonable

(1) (1861) 9 H. L. C. 691, 700, 701. (2) (1608) Davis 29, 32.

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and bad: *Tyson* v. *Smith*(1). Thus in the *Tanistry Case* (2), it is said that "several customs which had been adjudged void in our books as being unreasonable against common right or purely against law, if their nature and quality be considered, will be found injurious to the multitude and prejudicial to the Commonwealth." To the same effect is Co. Litt. 113*a*; "*Consuetudo ex certa causa rationabili usitata privat communem legem.*" Is there then anything to show that the custom is injurious to the endowment or to the Commonwealth? One of the mortgagors has a turn of worship or *pala*; he is entitled in this character to collect the offerings made to the goddess on the day on which his turn falls; he applies a portion of the income for the worship of the goddess and appropriates the remainder for his personal use. It is not material to consider whether he should not apply the whole of the income for religious and charitable purposes; but let us assume that he and every shebait like him who has a *pala* may be compelled to do so. He transfers his turn of worship to a person who, in certain contingencies, might in his own right have been a shebait and might have held a *pala*. The transferee, as holder of the *pala*, is under precisely the same obligation to the endowment as the transferor himself. It is difficult to appreciate how a custom which recognises and validates a transfer to members of a limited circle under these cirumstances can be detrimental to the endowment or to the public. There is no question that a *pala* of the Kalighat temple is heritable, and it is immaterial whether the heir is a male or female; the custom in this respect is established beyond doubt: *Janokee* v. *Gopaul* (3). There is also no

(1) (1838) 9 A. & E. 406, 422. (2) (1608) Davis 29, 33.
(3) (1877) I. L. R. 2 Calc. 365, 372.

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question that though probably religious offices were originally indivisible, they are now deemed partible: *Trimbak* v. *Lakshman* (1), *Mitta Kunth* v. *Neeranjun* (2), *Elder Widow* v. *Younger Widow* (3), *Sethuramaswamiar* v. *Meruswamiar* (4), *Damodardas* v. *Uttamram* (5), *Nagiah* v. *Muthacharry* (6), *Limba* v. *Rama* (7), *Raman* v. *Gopal* (8), *Rajeshwar* v. *Gopeshwar* (9), *Anund* v. *Boykantnath* (10), *Ram* v. *Taruck* (11), *Debendro* v. *Odit* (12), *Eshan Chunder* v. *Monmohini* (13), *Goopee* v. *Thakoordas* (14). Indeed, the very name *pala* or turn of worship shows that the right is partible. This involves, by necessary implication, the attribute of transferability as amongst the members of the family of shebaits; partition signifies the surrender of a portion of joint right in exchange for a similar right from the co-owner. There is further no question that a *pala* has not only been deemed heritable and partible; it has also been treated as devisable, as is illustrated by the case of the sister of the first defendant, who obtained a *pala* under the testamentary devise of her father. This, again, involves the recognition of the transferable character of a *pala*; the exercise of the right to make a bequest implies an assertion of the right to make a transfer *inter vivos*. It follows, consequently, that the customary right to make a sale, mortgage, gift or lease of a *pala* in favour of persons within a limited circle is closely associated with and possibly developed out of the heritable, devisable, and partible character of a *pala*.

(1) (1895) I. L. R. 20 Bom. 495.
(2) (1874) 14 B. L. R. 166; 22 W. R. 437.
(3) (1807) 1 Mac. Sel. Rep. 180.
(4) (1909) I. L. R. 34 Mad. 470.
(5) (1892) I. L. R. 17 Bom. 271.
(6) (1900) 11 Mad. L. J. 215, 222.
(7) (1888) I. L. R. 13 Bom. 548.
(8) (1897) I. L. R. 19 All. 428.
(9) (1907) I. L. R. 34 Calc. 828.
(10) (1867) 8 W. R. 193.
(11) (1872) 19 W. R. 23.
(12) (1878) I. L. R. 3 Calc. 390.
(13) (1878) I. L. R. 4 Calc. 688.
(14) (1882) I. L. R. 8 Calc. 897.

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A custom of this description clearly cannot be characterised on any rational ground as unreasonable or opposed to public policy. It is further worthy of note that this is not a novel view of the true character of such a custom; for, as early as 8th August 1840, the validity of a conditional mortgage of a *pala* effected on the 18th February, 1835, was upheld in a contested litigation. Since every custom sanctioned by the Courts must be reasonable, it follows that every case where a custom has been upheld by the Courts is an example of a reasonable custom. When the evidence is examined from this point of view, the case for the mortgagee is materially strengthened; for, as is clear from the record, not only the existence but also the validity of the custom has been repeatedly recognised by the Courts during at least 70 years prior to the institution of this suit, while no single instance has been found where its reasonableness has been successfully assailed. The custom of transferability of a *pala* in favour of a limited circle of transferees must accordingly be held valid, and no good reason has been assigned why it should be deemed unreasonable or opposed to public policy.

As regards the *third* question, it has been argued on behalf of the mortgagors respondents that as Order 34 of the Civil Procedure Code of 1908 applies only to mortgages of immoveable property, the plaintiff is not entitled to a decree for foreclosure; and in this connection, reference has been made to *Eshan Chunder* v. *Monmohini* (1), and *Jati Kar* v. *Mukunda Deb* (2), to show that a *pala* or turn of worship is not immoveable property. There is no substance in this contention. It is well settled that foreclosure is a remedy of the mortgagee which is not confined to mortgages of land; it is equally applicable to mortgages of

(1) (1878) I. L. R. 4 Calc. 683. (2) (1911) I. L. R. 39 Calc. 227.

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chattels, as decided by the House of Lords in *Harrison* v. *Hart* (1), *Tancred* v. *Potts* (2), *Kemp* v. *Westbrook* (3). The case before us is clearly not that of a pledge of a moveable; such a pledgee, as pointed out in *Harrold* v. *Plenty* (4), is in a very different position from an ordinary mortgagee, as he has only a special property in the thing pledged and may obtain a sale but not a foreclosure. The plaintiff is a mortgagee, not of immoveable but of intangible property, and he is entitled to foreclose the mortgagor quite as much as a mortgagee of chattels. [Jones on Chattel Mortgages, 1908, sections 699 and 776.] It is worthy of note that, as early as 1181, Glanville described in detail a remedy applicable to chattel mortgages which is substantially equivalent to the modern procedure for foreclosure and order absolute on failure of the mortgagor to redeem within the period fixed by the Court [Glanville, Tr. Beames, Book X, Ch. 6-8; Ed. Beale, 1900, pages 204-210]. It may be added that if the contention of the mortgagors were to prevail, they might find themselves in a worse position than what they would occupy under a foreclosure decree; for, if the procedure for foreclosure, with its consequent opportunity to the mortgagor to redeem, is not applicable, the mortgagee may very well contend that the contract between the parties must be strictly enforced and that, as the time for repayment has passed away, the title of the mortgagee to the mortgaged property has become absolute; such a result could hardly have been contemplated by the mortgagors.

The result is that this appeal is allowed and the decree of the District Judge discharged. On account

(1) (1726) 1 Comyn. 393; 2 Eq. Cas. Abr. 6.
(2) Fonblanque on Equity, 5th Ed., 261n.
(3) (1749) 1 Ves. Sen. 278.
(4) [1901] 2 Ch. 314.

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taken of the sum due on the conditional mortgage in suit on the 16th November next, it transpires that the mortgagee will be entitled to Rs. 3,421 for principal and interest up to that date. The decree will direct that if the defendants pay this sum, together with costs of all the Courts with interest thereon (as specified in the decree of this Court) on or before the 16th November 1914, the mortgage will stand redeemed. On default, the mortgage will be foreclosed after the decree absolute has been made by the Primary Court in due course. The hearing fee in this Court is assessed at thirty gold mohurs.

BEACHCROFT J. I agree with the proposed order on the second ground discussed by my learned brother. On the question of estoppel, I prefer to reserve my opinion.

G. S. *Appeal allowed.*

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other transfer which was a void transaction and rendered his possession adverse. He was undoubtedly the mahant of the math in 1904, and, while transferring certain items of property to Karia, he kept the rest of the estate for himself. It is one of the villages retained by him that he sold in 1914, and that sale was a voidable transaction. The period of limitation for the recovery of the village did not begin to run until the death of Rajbans in 1916. The action, which was commenced in 1926, was, therefore, within the limitation prescribed by article 144.

The result is that this appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *Hy. S. L. Polak & Co.*

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Justice Sir Lal Gopal Mukerji

1934 *March*, 12

SHEO RAJ CHAMAR AND ANOTHER (PLAINTIFFS) *v.* MUDEER KHAN AND OTHERS (DEFENDANTS)*

Easement—Prescription—Customary right—Right of burial—Muhammadan family claiming a right to bury their dead in another man's land—Presumption from long user—License coupled with a grant—Graveyard—Easements Act (V of 1882), sections 4, 17, 18.

Where it was established that a certain Muhammadan family had, for more than thirty years, been using a plot of land, belonging to another person, as a graveyard by burying their dead in it, but the origin or source of this right or practice was not known, it was *held* that, apart from the question whether the right to bury dead bodies amounted to an easement or not, the long user gave rise to a presumption of a dedication as a graveyard, or of a license coupled with a grant and irrevocable, in the past on the part of the then owners of the land.

*Second Appeal No. 936 of 1930, from a decree of Muhammad Zia-ul-Hasan, Second Additional District Judge of Gorakhpur, dated the 18th of March, 1930, reversing a decree of S. Zillur Rahman, Munsif of Gorakhpur, dated the 28th of June, 1929.

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[*Per* MUKERJI, J.: A right to bury dead bodies is not a right of easement. Even if it be treated as a right of easement, it cannot be acquired by prescription, as it would tend to the total destruction of the servient heritage within the meaning of section 17 of the Easements Act, but might be acquired by grant or custom.]

[*Per* SULAIMAN, C. J.: The definition in section 4 of the Easements Act appears to be wide enough to cover a right to bury dead bodies in another man's land. The customary rights recognized by section 18 of the Act are also easements; such rights may apparently exist not only in favour of a community but also of a family or an individual. Total destruction of the servient heritage would not necessarily follow if the surface of the land were allowed to be used for purposes of cultivation.]

Mr. *Haribans Sahai,* for the appellants.

Dr. *M. Wali-ullah,* for the respondents.

MUKERJI, J.:—These two appeals, 936 and 967, arise out of the same suit brought by the appellants to obtain a declaration that certain plots of land described by their numbers in the plaint were the occupancy holdings of the plaintiffs and that the defendants had no right to bury corpses therein, and to obtain an injunction and damages. The defence was that the defendants were concerned only with one of the several plots in suit, namely with plot No. 770, and that they had been burying the dead bodies of members of their family on the plot for a very long time.

The court of first instance held that the plaintiffs had no cause of action in respect of plots other than the No 770; that the defendants buried the dead persons of their family on the land No. 770 as mere licensees of the landholder and plaintiffs, who claimed under the landholder, and that, therefore, the defendants were not entitled to bury any dead bodies in future, as the plaintiffs objected to such a conduct on the defendants' part. The court accordingly dismissed the suit with respect to the plots other than plot No. 770 and granted an injunction against the defendants against burying any

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Mukerji, J.

dead bodies in future. The rest of the claim was dismissed and the parties were directed to pay their own costs.

Both the parties appealed. The plaintiffs' appeal was dismissed, the defendants' was allowed and the suit was dismissed with costs throughout.

The learned Judge of the lower appellate court found that the defendants had been burying dead bodies in plot No. 770 for more than thirty years. The learned Judge, however, did not specify what rights under the law the defendants had acquired by burying for a long time dead bodies in plot No. 770.

The plaintiffs have filed two appeals in view of the fact that there were two appeals in the court below.

It has been contended on behalf of the plaintiffs that at the most the defendants were licensees and they were not entitled to bury dead bodies in future.

The defendants are three in number. They do not claim their right to bury dead bodies as a matter of custom enjoyed by their community at large; they confine the right claimed to themselves alone.

The land has been found to belong to the zamindar and it has been found that the plaintiffs are recorded as tenants thereof. Indeed, according to documentary evidence, they were sub-tenants for a long time and then they acquired rights as principal tenants. In the circumstances, unless the defendants can establish a right recognized by law which would enable them to continue to bury dead bodies in plot No. 770, the suit as to injunction must succeed.

At the Bar the only question argued was whether the defendants had acquired a right of easement by prescription.

There appear to be good many difficulties in the way of assertion of a claim of right of easement said to have been acquired by prescription on the part of the defendants. The defendants reside in a village called Maharkol, between which and the village Dabauli, in

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which the plot No. 770 is situated, there flows a stream of water. The defendants allege in their written statement that during the rainy season most of the lands in their village are submerged and then alone they resort to plot No. 770 in village Dabauli for the purposes of burying dead bodies.

An easement is defined under the Easements Act, 1882, as a right which the owner or occupier of a certain land possesses as such for the beneficial enjoyment of that land to do or continue to do something . . . . upon certain other land not his own. It can hardly be said that it is necessary to bury dead bodies in plaintiffs' land in order that the defendants may enjoy their residential house. The man who dies and is buried cannot be said to have possessed a right to be buried, *for the enjoyment of his house*. If it be said that the right is held by the survivors, even then it is difficult to say that the right is necessary *for the enjoyment of the residential house by those survivors.*

In this view, a right to bury a dead body is not a right of easement as contemplated by the Easements Act. This view was taken in several cases, see for example, *Gopal Krishna Sil* v. *Abdul Samad Chaudhuri* (1), which was followed in *Mangat Ram* v. *Siraj-ul-Hasan* (2) and other subsequent cases in Lahore court and in Bombay in the case of *Mohidin* v. *Shivlingappa* (3). Not a single case has been cited where a private right of easement to bury a dead body on another person's land has been recognized by a court of law. Then, even if it were conceded that the right to bury a dead body on another person's land may be treated as a right of easement, it cannot be acquired by prescription. It may be acquired by grant or custom but not by prescription. Section 17 of the Easements Act lays down that a right, which would tend to the total destruction of the subject of the right, cannot be acquired by prescription. The

(1) (1921) 66 Indian Cases, 540. (2) (1924) 78 Indian Cases, 172.
(3) (1899) I.L.R., 23 Bom., 656.

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expression "total destruction" has been interpreted judicially as meaning not the physical destruction of the servient heritage but such user of it as would make it totally unfit for the owner's use. An easement has always been described as a fractional user of property leaving the remaining user of the property with the owner. In *Lal Bahadur* v. *Rameshwar Dayal* (1) it was held that a claim to drive cattle to pasture through defendant's waste lands, not by any prescribed or definite route, but generally and promiscuously over the entire waste lands, could not be acquired by prescription. Similar cases are to be found in the books. If the defendants be permitted to bury dead bodies on the land No. 770, the portion of the land under which the dead body is actually buried would be unfit for cultivation by the plaintiffs, and in course of time the whole of the land may be covered with graves, so that it would become entirely unfit for plaintiffs' use. The right to bury a dead body carries with it a right to see that the land under which the dead body is buried is kept sacred and is not trampled upon or is otherwise subjected to an act of sacrilege. This view was accepted in the case of *Ramrao Narayan* v. *Rustum Khan* (2).

It follows, therefore, that the defendants are not entitled to continue to bury dead bodies on the plot in dispute, *by virtue of any right of easement.*

There is however another aspect of the case and it is this. Can we infer any lost grant from the fact found that the defendants have been burying the dead of their family on the land in dispute, without any let or hindrance for the last 30 years or more?

It has been held by the Privy Council that any new point of law may be taken in appeal if the same may fairly be urged on the facts admitted by the parties or found by the court. Indeed their Lordships allowed, in one case, a new point of law to be urged before them for the first time.

(1) (1920) I.L.R., 43 All., 345. (2) (1901) I.L.R., 26 Bom., 198.

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The defendants, in their written statement, did not state how they acquired the right to bury the bodies of their relatives on the land in dispute (No. 770). Probably they never knew how the right arose, if it really be old and so old that the origin of the right is lost in antiquity. The finding that they have been using the land for at least 30 years supports their contention. It is nobody's case that the practice arose out of sheer force. If indeed it did, the defendants have acquired a right by sheer adverse possession held and maintained for more than 12 years. The adverse possession to be effective need not be for the full proprietary right. If the origin was peaceful, as we must assume it was, in the present case, we may and indeed must presume either a dedication on the part of the then owners or a grant on their part the origin of which is lost in antiquity. In this view the decision of the court below is right, though the learned Judge has not given any principle of law on which it is based.

The whole trouble in this case, to my mind, has arisen from the fact that the learned counsel for the defendants in this litigation have failed to appreciate the true basis on which the defendants' right may be based. The defendants do not know the law. Having no definite knowledge as to the origin of their rights they contented themselves with a bare statement of the facts. It was for their counsel to suggest to the court the legal basis, if any, of their right. I am therefore of opinion that if the plea as to acquisition of the right on the basis of easement should fail, it is open to us to apply the true basis.

The result is that the appeals of the plaintiffs should fail and they should be dismissed with costs.

In form there are, as already stated in the beginning of this judgment, two appeals before us by the plaintiffs, because there were two appeals before the lower court. The plaintiffs' appeal there failed and the

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defendants' succeeded. I would dismiss both the appeals of the plaintiffs in this Court and with costs.

SULAIMAN, C.J.:—As the questions of law raised in this case are of some importance, I should like to add a few words.

I do not think that it is correct to say, as has been said in some Calcutta cases, that a new category of easement cannot be recognized by law. When there is no statutory definition of a term, it may be that new categories are difficult to recognize. For instance, this is so in the case of "public policy". But where a term has been defined by statute, the question is not whether a particular category has been recognized before, but whether it comes within the scope of that definition. The definition must be deemed to be exhaustive; indeed, the very object of defining a term is to admit that no exhaustive list can be laid down. The Easements Act is both a consolidating and amending Act. The definition in section 4 is perfectly wide and would cover any right to do a thing on another's land. It therefore does not follow that nothing which was not recognized to be an easement under the Common Law can be an easement under the Act. What rights can be acquired would depend upon local conditions and requirements. Things like the right to take wood for fuel purposes in Garhwal forests, to dry cowdung cakes on another's wall in these provinces, to use another's land for marriage parties or even the right of privacy of a house may possibly be acquired in India, although they may never have been heard of in England.

The right of burial as a customary right is recognized in numerous rulings: *Mohun Lall* v. *Sheik Noor Ahmud* (1), followed in *Mg. Shwe Kye* v. *Mg. Po Tha* (2). Now section 18 recognizes an easement which is established by local custom, but the right must be an easement. The mere fact that it is a customary right would not make it cease to be an easement. The right

(1) (1869) N.W.P., H.C.R., 116. (2) A.I.R., 1924 Rang., 61.

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acquired under section 18 in virtue of a local custom is still an easement. If, therefore, the right to bury the dead can be an easement, if existing in favour of a large community, so as to be the subject of a local custom, then I do not see why a similar right cannot be an easement if claimed by a family or an individual. There is no reason why the same right should be an easement when established by custom, but cannot be an easement when acquired by individuals. Such a right would vest in the survivors and would be the right of burying the dead bodies of the members of their family who die. They cannot enjoy their residential houses if the dead bodies are left there to rot. If the right of burying the dead is acquired in a limited way, for instance, the right to bury dead bodies underneath the ground, allowing the surface to be cultivated, it is difficult to say that the exercise of such right would necessarily tend to the total destruction of the property within the meaning of section 17 of the Easements Act so as to make it incapable of acquisition. The third paragraph of section 15 is very wide and applies to "any other easement".

There are no doubt cases of the Calcutta and Lahore High Courts in which it has been held that the right to bury the dead cannot be an easement; whereas it has certainly been held in Bombay that the right of burial, if not an easement, is a customary right which, being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be recognized as a valid, legal custom: *Mohidin* v. *Shivlingappa* (1). PIGGOTT, J., in *Mathura Prasad* v. *Karim Bakhsh* (2) followed this ruling and held that there being no dominant heritage such a right was not an easement, but "a customary right in the nature of an easement" and could be enforced. It may, however, be argued that if such a right is exercised by residents

(1) (1899) I.L.R., 23 Bom., 666. (2) (1915) 13 A.L.J., 1094.

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of a village, their lands may constitute a dominant heritage.

But it is not necessary for me to commit myself finally to the view that the right to bury dead bodies is an easement. If the right is not an easement, then it can be a license coupled with a grant. The right to bury the dead cannot be a mere license; for, from its very nature the permission is irrevocable. An owner of land cannot permit a corpse to be buried and then later on ask that the grave should be excavated and the corpse removed. If the permission from the very beginning is irrevocable, it cannot be a mere license. It must necessarily be a license coupled with a transfer, that is to say, a grant. If the right implies that the space should not be used by the original owner for any purposes whatsoever, then the spot must be taken to be gifted or granted or, at any rate, dedicated or consecrated for burial purposes. The ownership of the zamindar would in such a case cease *qua* that spot.

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In the same way a plot of land can be set apart as a graveyard. It is not necessary that the whole of it should be filled up by graves. Indeed, if it is to be a graveyard, spaces must be left in between for further graves to be dug. It would not be correct to say that only those parts of such a plot which are actually occupied by graves are consecrated, and the rest is private property. The mere fact that some spaces are not yet occupied by graves would not make it any the less dedicated land if the whole of it has been actually set apart as a graveyard.

Their Lordships of the Privy Council in *Court of Wards* v. *Ilahi Bakhsh* (1) have laid down that land can by user, even though not by dedication, become wakf. This case was naturally followed in *Ram Singh* v. *Ali Bakhsh* (2). See also *Ramrao Narayan* v. *Rustum Khan* (3).

(1) (1912) I.L.R., 40 Cal., 297. (2) (1926) 95 Indian Cases, 458.
(3) (1901) I.L.R., 26 Bom., 198.

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The question whether a plot of land is a graveyard or not is primarily a question of fact. In the case of a plot covered by recent graves the burden is undoubtedly on the person who alleges that it is a graveyard to establish how the grant was made. But in cases where a graveyard has existed from time immemorial or for a very long time, there can be a presumption of a lost grant. It is open to a court to infer from circumstances that a plot of land covered by graves, which has been used as a graveyard, is in fact a graveyard and had been set apart as such by the original owners and made a consecrated ground even though a registered document is not now forthcoming.

If Muslims or Christians, who bury their dead bodies in the ground, are allowed to settle in villages, there is nothing improbable in the zamindar allowing them a piece of ground for burying their dead. To Muslims and Christians a graveyard is just as much a necessity as a burning ghat would be for the Hindu community. If a place has been used as a graveyard or a burning ghat for a sufficiently long time, there should be a presumption that it is dedicated property, and the grant is irrevocable.

In the present suit the defence was that the defendants' graveyard had been existing in the plot in dispute for a very long time and that the graveyard had been established there for burying dead bodies in the rainy season when their own mahal is covered with water. The Commissioners' report indicated that at all the places, selected at random, which they got dug up, traces of graves were found in the form of bones, skulls or rotten planks and timber. The oral evidence of the defendant Munir Khan and his witnesses, Gulab Khan and Ryasat Khan, was to the effect that the plot is a *qabristan* (graveyard). The appellate court, as a Judge of facts, has remarked that "taking all the above facts into consideration I see no reason whatever why the evidence of the defendants' witnesses to the effect that

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plot No. 770 has been used as a graveyard for more than 30 years should not be believed" and has held accordingly. The period of "more than 30 years" shows that 30 years is the minimum period and not the maximum period. The mere fact that it is now ploughed over and the graves have been levelled to the ground, and that kharif crops have been grown upon it would not make it any the less a graveyard; nor do these circumstances make it impossible for the plot to be a graveyard. I would, therefore, accept the finding of the lower appellate court and dismiss the appeals.

Sulaiman, C.J.

BY THE COURT:—The appeals are dismissed with costs.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice King and Mr. Justice Bajpai

1934 *March*, 13

CHHOTEY LAL (OBJECTOR) *v.* GANPAT RAI AND ANOTHER (DECREE-HOLDERS)*

Hindu law—Sons' liability for father's debts—Unaffected by existence of members other than the father and the sons in the joint family—Civil Procedure Code, section 53—"Property in the hands of a son", meaning of—Undivided share of the son in the joint family property.

The pious obligation of a Hindu son to pay his father's debts is not affected by the fact that the joint family also comprises members other than the father and his sons; and the sons' liability based on the pious obligation does not become unenforceable against the joint family property if there happen to be coparceners other than the sons and their descendants, like uncles, cousins, etc. The liability can be enforced by attachment and sale of the sons' undivided share in the joint family property and the purchaser becomes entitled to obtain ascertainment and partition of that share.

Section 53 of the Civil Procedure Code enacts a rule of procedure only and is not intended to affect in any way the extent of a son's liability for his father's debts under the Hindu law. The expression "property in the hands of a son" in that

*First Appeal No. 498 of 1932, from a decree of Shankar Lal, Subordinate Judge of Aligarh, dated the 8th of November, 1932.

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general principles of *res judicata* should be applicable to such proceedings. It, however, appears to me that so long as the view taken in the Full Bench ruling in *Katwari* v. *Sita Ram Tiwari* (1) is not reconsidered, it is binding on us. It is under these circumstances that I have felt bound to agree with the order proposed by my learned brother.

BY THE COURT:—We remit the following issue to the lower court: Whether the property sought to be sold by the decree-holder is such property as is declared incapable of sale by section 11, Pensions Act (Act XXIII of 1871).

Findings shall be returned in three months. Ten days shall be allowed for objections. Parties shall be at liberty to produce evidence.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

MIRU AND OTHERS (DEFENDANTS) *v.* RAM GOPAL (PLAINTIFF)*

1935 *April*, 2

Easement—Customary right—Public right—Right to offer prayers in another person's land—Dedication as mosque or wakf*—Presumption from long user—Easements Act (V of 1882), sections 2, 18.*

A right to perform religious worship over the land of another may depend on a grant, or be acquired as a private easement by the owner of a dominant tenement. But in addition to such individual rights, a right of worship may also be acquired as a customary right, or may be claimed as a part of a public right, which would be a right vested in an entire community. The latter, under section 2 of the Easements Act, is excepted from the operation of that Act.

If a person holds a mere license, he is not entitled to vary the user so as to claim a higher right than what was granted; so, where there is merely a right to perform worship or offer prayers on a piece of land, he would not be entitled to put up a building on it for the purpose of performing worship or prayers therein. But where a mosque or a temple has stood on a piece of land for a long time and worship has been performed in it by the public all that time, and the terms of the

*Appeal No. 26 of 1934, under section 10 of the Letters Patent.

(1) (1921) I.L.R., 43 All., 547.

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original grant of the land are not now ascertainable, there would be a fair presumption that the site on which the mosque or temple stands is dedicated property and consecrated land and that the building does not stand there merely by the leave and license of the owner of the site. There is nothing legally objectionable in the owner of a land making a grant of the site to persons of a different community and creed and then allowing them to consecrate that site by building a place of worship on it; there can be no objection to such a building being changed from katcha to pucca later on; it is no longer a case of a mere license.

Messrs. *M. A. Aziz* and *Ishaq Ahmad,* for the appellants.

Messrs. *G. S. Pathak* and *S. K. Mukerji,* for the respondent.

BENNET, J.:—This is a Letters Patent appeal by the defendants from the judgment of a learned single Judge of this Court. The plaintiff is the sole zamindar of a certain mahal and in his plaint he sets out that Rahim Baksh formerly occupied a khasra plot No. 119 in the abadi and Rahim Baksh made a katcha platform on the said plot for offering prayers, and that this was the condition of affairs at the time of the partition in 1904, that there was no pucca or katcha mosque in the said plot, and that the defendants now desire to make a pucca mosque on the plot. The plaintiff therefore asked for an injunction against the defendants to restrain them from constructing any katcha or pucca mosque in this plot. The written statement alleged that there had always existed a katcha mosque on the plot in question, that in the last rainy season before the suit, which was brought in 1929, the mosque required repairs and the defendants demolished the mosque and dug up the foundations and desired to rebuild it with the katcha bricks but the Hindus objected to bricks being used from their tanks and accordingly the defendants brought pucca bricks from Saharanpur. It was claimed in paragraph 8 that contesting defendants have a right to build a mosque in a pucca manner, that the site of the

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mosque cannot be the property of the plaintiff or any one else, that it is wakf property and that every Muhammadan has a right to make a pucca mosque in place of a katcha mosque. The trial court framed the issue whether any katcha mosque has been in existence on plot No. 119 and it found in the negative. The lower appellate court reversed the finding on this issue and held that "in my opinion . . . the mosque existed in the year 1904". The finding was that there had been originally a raiyat Rahim Baksh in the house and he had left the house and gone to another house and that the house had been used as a place of worship by the Mussalmans of the village for more than 30 years, that Rahim Baksh had died 10 or 11 years before the suit, that various constructions had been made to adapt the house to a mosque during the time it was a katcha mosque, that is, there was a room and in front a thatched verandah and a platform with a pucca drain and *hammam* for heating water and a bath room and a lavatory and a hand tube well. The lower appellate court inspected the spot and came to a careful finding of fact on the issue before it.

Considerable argument has been made as to the correctness of that finding and the learned single Judge of this Court set the finding aside and held that the facts known would not result in the finding that there was a mosque. The learned Judge observed: "I am satisfied that the decision of the lower appellate court can not be supported." We find that the lower appellate court based its finding on not only the oral evidence produced by the parties but also certain documentary evidence. This documentary evidence consisted of three documents, firstly, there was a khasra Ex. A of the year 1311 Fasli (1903-04). This khasra states that plot No. 119 was entered as "masjid". During the partition the usual partition proceedings were drawn up under section 114 of the Land Revenue Act detailing how the partition is to be made. In this partition proceeding

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at a certain place, following what is laid down in section 121, there was a note in regard to places of worship and burial grounds. The partition proceeding entered that there was a mosque, and this entry was crossed out by a line and it was stated that on this No. 119 was a chabutra for the purpose of prayers. Considerable argument was made by learned counsel for the plaintiff in regard to this entry, but it should be noted that where the entry is made at all in this portion of the partition proceedings the entry must be one in regard to section 121 of the Land Revenue Act which deals with places of worship and burial grounds. As the number is not a burial ground it must come into the other category of a place of worship. The defendants were tenants in the village and they were not parties to the partition proceedings. On the other hand, plaintiff's predecessor was a party to the partition proceedings. All the co-sharers in the partition proceedings were Hindus. In the particular *qura* which was formed for the plaintiff, Ex. D, there is this No. 119 shown again as masjid, that is in the year 1907. The plaintiff's predecessor, therefore, consented to the entry in his *qura* of this No. 119 as masjid. If he had had an objection to that entry, he could have made an application to the court under section 111 of the Land Revenue Act. The fact that he did not make any objection to the entry shows that he acquiesced in the entry. On this evidence we consider that the lower appellate court had sufficient grounds to come to the finding of fact at which it arrived. That finding of fact is that the number in question has been used since before the partition in 1904 for the purpose of a mosque.

We now come to the legal arguments on the point. Learned counsel for the respondent argued that the Easements Act, chapter VI, should apply and that the question was merely one of license under chapter VI, and that in this case under section 60 the zamindar could revoke the license. He argued that the case did not

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come under section 60, because there was no transfer of property under sub-section (*a*) and that under sub-section (*b*) the katcha building was not a work of a permanent character. He referred to the ruling in *Basa Mal* v. *Ghayas-uddin* (1). That was a case in which a tenant had a certain shed in his yard outside his house and the tenant allowed the Muhammadans of the village to use this for purposes of prayer. The tenant himself then erected a permanent building on the site of the temporary shed, and the tenant described the permanent building as a mosque. The zamindars sued for demolition. This Court laid down that the claim of the zamindars was well founded. The case is easily distinguishable from the present case because in the present case there is a finding that the plot has long been used for a mosque and that the use has been by the Muhammadan inhabitants of the locality and not merely by a particular tenant who allowed other people to come there for the purpose of prayer. Further, in the ruling in question there was a condition in the wajibularz that a tenant should not build a new house outside the compound of his dwelling house without the zamindar's permission. The ruling laid down that a tenant might make a dwelling within his compound but that in the case of the erection of a mosque which would by dedication become vested in the religious body for whose observance it was used, the contention of the defendants was unsound. The present case also differs because in the ruling there had been no mosque until the erection was made which was the cause of the suit. In the present case the finding is that since 1904, and before it, there has been a mosque on the site. We do not think therefore that the ruling has any bearing on the present case. A reference is also made to the case of *Fuzlur Rahaman* v. *Anath Bandhu Pal* (2). That was a case for specific performance of a contract by a Hindu to dedicate certain property for the maintenance of a

(1) (1904) I.L.R., 27 All., 356. (2) (1911) 16 C.W.N., 114.

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mosque. The property was at the time in the hands of a receiver. There is always a discretion for the court to grant or withhold specific performance and the court acted apparently in the exercise of this discretion and held that it was not for a lawful purpose. Learned counsel argued at considerable length that a Hindu zamindar could not lawfully dedicate land for a mosque. We do not think that any difficulty exists of that nature in the present case. It is not stated that the zamindar dedicated the property for the mosque. It is stated that the zamindar allowed the defendants to dedicate the building as a mosque by their user of the building for the purpose of a mosque with the consent, express or implied, of the zamindar. The case is somewhat similar to that of *Sheo Raj Chamar* v. *Mudeer Khan* (1) where it was held by a Bench of which one of us was a member that in the case of a land being used as a graveyard from time immemorial, there was a presumption of the consent by the Hindu zamindars. It has also been held by their Lordships of the Privy Council in the case of the *Court of Wards* v. *Ilahi Bakhsh* (2) that a graveyard by user became wakf. We do not think that the provisions of the Easements Act or of any part of chapter VI in regard to license apply where a zamindar allows the Muhammadan population to use a building as a mosque. The provisions in chapter VI appear to us altogether inconsistent. In such a case we consider that where there is a finding that a mosque exists, this necessarily implies that there is no longer any question of easement or of license. Under the Muhammadan law the mosque is the property of God and not the property of the zamindar. Learned counsel for the plaintiff objected that there was no case of a transfer such as is necessary for transfer of property, but we consider that the consent of the zamindar to the use of a building as a mosque is sufficient. We note that it is specially provided in section 2, sub-section (*b*), of the

(1) (1934) I.L.R., 57 All., 166. (2) (1912) I.L.R., 40 Cal., 297.

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Easements Act that there is nothing in that Act which will affect any customary or other right, not being a license in or over immovable property, which the Government, the public, or any person, may possess in respect of other immovable property. That is, the Act deals with certain cases of easements which are connected with the property of the persons who enjoyed the easement and section 18 recognizes the case of easements which may be acquired by virtue of local custom, but besides those provisions of the Act there are customary and other rights in or over an immovable property which are not affected by the Act. We consider that the case of a mosque does not come under the Easements Act and that it is one of those cases which are excepted by section 2. This appears to be the correct method of dealing with the property which is used for a mosque and we do not consider that such property can be dealt with satisfactorily in any other manner. Under these circumstances we consider that the appeal should be allowed and we allow this Letters Patent appeal with costs and restore the judgment of the lower appellate court.

SULAIMAN, C.J.:—I agree and would like to add a few words only on the question of law which has been raised as to the nature of the right claimed in this case.

It is quite obvious that if a person holds a mere license, he is not entitled to vary the user so as to claim a higher right than what was granted. A right to perform any religious worship whether claimed by a Hindu, Muhammadan or Christian over the land of another may depend on grant, if so claimed by the grantee. It may also, if claimed by an individual, be acquired as a private easement, provided he is the owner of a dominant tenement. But in addition to such individual rights, a right of worship may also be acquired as a customary right which can be availed of by a large body of persons by virtue of such custom. Again, a right to perform worship may be claimed as a part of

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Sulaiman, C.J.

a public right, which, of course, would be a right vested in an entire community. Under section 2 of that Act, these last two classes of rights would be saved from the provisions of the Indian Easements Act. But where there is merely a right to perform worship, e.g. to offer prayers, such a right would not authorise the persons entitled to it to put up a building on the land in order to make it more convenient for them to perform the same worship.

But where a building has stood on a piece of land for a long time and the worship has been performed in that building, then it would be a matter of inference for the court which is the Judge of facts, as to whether the right has been exercised in that building for such a sufficiently long time as to justify the presumption that the building itself had been allowed to be consecrated for the purpose of such rights being performed. Where there is a mosque or a temple, which has been in existence for a long time and the terms of the original grant of the land cannot now be ascertained, there would be a fair presumption that the sites on which mosques or temples stand are dedicated property. There can be no legal impediment to such a dedication, as the owner of the land can make a grant of the site even to persons of a different community and creed, and allow them then to dedicate that site by building a place of worship on it. Where therefore the court finds that a mosque or a temple has stood for a long time and worship has been performed in it by the public, it is open to the court to infer that the building does not stand there merely by the leave and license of the owner of the site, but that the land itself is a dedicated property and the site is a consecrated land and is no longer the private property of the original owner. There is nothing legally objectionable in non-Muslim owners making a grant of a land to Muslims and in that way to enable them to build a mosque on such land, just as it would not be legally objectionable for Muslims to

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make grants of lands to persons belonging to other religions, which the latter may utilise for the purpose of building houses of worship. In the case of graveyards, it has been held in several cases that long user justifies the inference that the land itself is a dedicated or consecrated property, or that even if it is not dedicated, it has become wakf property. The presumption would be all the greater in the case of a building which is used as a mosque or a temple.

If the finding merely were that there is a right to perform worship on a piece of ground, there would, of course, be no right to put up a pucca building on that land for such a purpose. But if the finding is that there is already a mosque or a temple on the land, though the structure is katcha, the necessary inference would be that the site has become a consecrated and dedicated property; and then there can be no objection to the building being converted into a pucca building. It is no longer the case of a mere license which cannot be exceeded beyond the terms on which it was granted. I, therefore, concur in the order proposed by my learned brother.

REVISIONAL CRIMINAL

Before Justice Sir Charles Kendall

EMPEROR *v.* BHAGWAN DAS*

1935
April, 3

Criminal Procedure Code, sections 200, 202—Failure to examine the complainant—Police inquiry into complaint ordered by Magistrate—Dismissal of complaint on police report—Prosecution of complainant for false charge—Jurisdiction.

The wording of the proviso to sub-section (1) of section 202 of the Criminal Procedure Code makes it clear that the Magistrate has no jurisdiction to direct an investigation by the police into the truth or falsehood of a complaint until he has examined the complainant on oath under section 200. His

*Criminal Revision No. 70 of 1935, from an order of R. L. Yorke, Sessions Judge of Meerut, dated the 21st of January, 1935.

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1963 SCC OnLine MP 32 : AIR 1964 MP 227

Madhya Pradesh High Court
Indore Bench
(BEFORE H.R. KRISHNAN AND S.B. SEN, JJ.)

Mohammad Kasam Abdul Rehman and another ... Appellants;
Versus
Abdul Gafoor Ahmedji and others ... Respondents.

First Appeal No. 33 of 1959
Decided on October 9, 1963

The Judgment of the Court was delivered by

SEN, J.:— This appeal arises out of a suit brought by representatives of the Muslim Community of Ujjain under O. 1 R. 8 of the CPC, after obtaining sanction of the Advocate-General.

2. The property in suit is a defunct grave-yard (Kabarstan) in Ujjain. The defendants are sons of ane Abdulrahman. They used to live with one Karimshah Fakir who was appointed manager of the Kabarstan some time in Samvat Year 1974–1916 A.D. In 1916 a flour mill was set up by one Alimohammad who was alleged to be the purchaser from Mariambai. This Mariambai and Shahbajkhan constructed residential house on a part of the grave yard about 15 or 16 years before. Another house was also constructed by Shahbajkhan. These constructions, it is alleged were with the permission of the Muslim Community in general. Mariambai Shahbajkhan and defendants were allowed to live in that house for looking after the management and affairs of Kabarstan. About 4 years before the suit it is alleged that the defendants were neglecting the management of the grave-yard and were asserting their title as owners. On 15-7-47 Shahbajkhan obtained permission from the Municipality for construction of a house without sanction and Knowledge of the Muslims. The defendants demolished graves and let out certain pieces of land for fuel stalls. They also erected certain temporary huts and utilised the income for their own benefit. There were also transfers of certain portions of the house. The defendants who are the legal representatives of the said Shahbajkhan are in possession of the graveyard. They are using the graveyard and income therefrom for their personal benefits. The position of the defendants is that of trustees, the Kabarstan being a property for the benefit of the Muslim community as a whole.

3. The plaintiffs prayed for a declaration that the property, the graveyard is a Wakf property and the construction on that property belonged to the Muslims in general and never was nor is the personal property of the defendants. The plaintiffs also claim removal of the defendants as trustees and their ejectment from the property with a prayer for a settlement of a scheme for the protection of the wakf and for the improvement of the Muslima in general. They also claim accounts from the defendants for the income they received from the property in suit.

4. The defendants' case is that the grave-yard was never the property of the

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Muslims in general. It was the private property of the defendants and their predecessors in title. The houses in question are their personal property, and they have a right to dispose of the same. The graveyard was never used as a public graveyard and it was in possession of Mariambai in her own rights after whom the defendants came in possession of the same.

5. The Court granted a preliminary decree. The reliefs granted are a declaration that the suit land is a Wakf property and not personal property of the defendants; that the defendants are to be removed from the office of the trusteeship and they shall be removed after the passing of a final decree and appointment of the trustees. The defendants should give charge of the trust property to the new trustees. The Court has also asked for suggestion of names of leading persons of the Muslim Community to be appointed as trustees.

6. In appeal two contentions have been raised, first, that the Court has erred in coming to the conclusion that the property graveyard was a Wakf property and even assuming that the graveyard is a Wakf property, the portion on which there are buildings and constructions, cannot be held to be a Wakf property as it was never used as a graveyard, private or otherwise.

7. Though a number of issues have been framed, the main questions in dispute are two involved in the above two contentions. The Court has found that the property is a Wakf property and the Kabarstan, a public Kabarstan, therefore the defendants who are trustees and have committed several acts of misconduct have made themselves liable for removal. The Court has however taken the property as a whole and therefore has not given any decision on the second contention of the appellants.

8. As regards the first, there is ample evidence on record, no doubt oral, indicating that the suit property was being used as a Kabarstan. The property was commonly known as Chimte-ka-bada. Haji Karim P.W. 1, Kanyadali P.W. 3, Mohammad P.W. 4, Kalekhan P.W. 6, Abdul Aziz P.W. 7, Pirmohammad P.W. 9, Abdul Gafoor, P.W. 11 and Bandeali P.W. 12 have stated that some time or the other the property was being used as a Kabrasthan. Either father, grand father or some relations of these witnesses were buried in that Chimte-ka-bada.

9. Coupled with this oral evidence there is an application Ex. P/1 by Muslim community in general. The application was signed by quite a large number of villagers. In that application when the Municipal Committee wanted some ether place to be used as a Kabarsthan objection was raised and they submitted that Chime-ka-bada was being used as a Kabarstan with convenience for a number of years and that should be retained. Though the request of the Muslim Community was not heeded to, it is clear that the application shows that the property was used as a Kabrastan, as far back as 27-3-30, the date of the application.

10. Besides this a Civil Suit was filed by Ibrahim and others against Abdul Ahmad Bohra and Shahwazkhan, some time in 1918. Shahwazkhan is undoubtedly a person

from whom the defendants have derived title. This position is also not disputed. Abdul Ahmad is a son of Shah-wazkhan. The suit allegations indicated that a suit was filed against Shahwazkhan and Abdul Ahmad Bohra for removal of a flour mill that was set up in the Bada. The suit was decreed. The allegations in the plaint also indicated that the property was being used as a Kabarstan for a very long time and the restoration of a flour mill was against the interest of the Muslim community.

11. Shahwazkhan in that suit has also made a statement. This statement however

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has been challenged by the Warned counsel for the appellants as to whether he had made it and whether such a statement existed or not. The original record is missing and that has made the matter complicated. To give a definite finding it will be necessary to examine soma witnesses. As we do not think that the absence of such a statement would any way prejudice the case of the plaintiffs, we do not think it necessary to go into those details. Even if we do not take the said statement into consideration there is ample evidence to indicate that the property in suit was being used as a public Kabarstan.

12. The defence evidence in this connection is to the effect that for a number of years it has ceased to be used as a Kabarstan. D.W. 3 Kuwarji, D.W. 4 Mohammad Ulla and D.W. 5 Allabeli say that the property in suit was also used as a Kabarstan with a proviso that Shahwazkhan who was looking after the graves used to charge some remuneration and that the property being used as a Kabarstan was stopped long back more than 20 years.

13. Apart from the oral testimony of the defendants indicating that the user of the premises as a Kabarstan had stopped long back they have also attempted to show that the property was a private property by producing certain documentary evidence. The Municipal register Ex. D/6 and map Ex. D/7 are the main documents on which the defendants rely.

14. But according to us these documents are not sufficient to establish the title. They can be explained on the basis of the property being used as a Kabarstan. In Ex. D/6 the owner of the suit property was been shown as Shahwazkhan son of Karimsha Fakir. This is a tax register and the name of the person from whom the tax has to be realised has been mentioned in it. There is a Mutwalli or a Fakir of Kabarstan from whom the tax has to be realised. Therefore nothing turns on the mention of Shahwazkhan as owner. D/7 is nothing but a map which was submitted for the construction. In Ex. P/3 which is a Khasra Mariambai has been shown to be in possession of the land in question, but there has been no mention of the name as the owner.

15. On the basis of the oral evidence which has not been found to be tainted in any way, a conclusion can be reached safely that the property has been used as a Kaharstan. The documentary evidence does not disprove or prove in any way that it was not a Kabarstan. Under these circumstances there is nothing wrong in the trial Court's conclusion that the property was a graveyard.

16. The next question is whether it was a public or private graveyard. On this point suffice it to say that we are of the view that a Kabarstan cannot be a private Kabarstan unless it is used for the family members exclusively. Once the public are allowed to bury their dead it ceases to be a private property. The evidence of the defendants even disclosed that the property was being used as a Kabarstan for a pretty long time. There was no Discrimination about the user. It was being used by the predecessors of the defendants as well as by the public. This will indicate that it was not a private Kabarstan.

17. Under the Mohammadan Law if a land has been used from time immemorial for burial ground then the same may be called a Wakf although there is no express dedication. In *Jhaolal* v. *Ahmudullah*, AIR 1934 All 335, it has been held:—

> "Where a land has been used as a graveyard from the time immemorial, a dedication of the land as Wakf for this purpose is to be presumed and it is not necessary in such cases to prove dedication as Wakf."

18. No doubt in order to prove dedication by evidence of burials in a land and to justify the inference that the land is a cemetery it is necessary to prove a number of instances adequate in number and extent and in the instant case we have got a number of witnesses who testified the facts that the property was being used as a

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graveyard.

19. In *Quadir Baksh* v. *Saddullah*, AIR 1938 Oudh. 77 a Division Bench of that High Court have observed:—

> "The question whether a plot of land is a graveyard or not is primarily a question of fact. In the case of a plot covered by recent graves, the burden is undoubtedly on the person who alleges that it is a graveyard to establish how the grant was made. But in cases where the graveyard has existed from time immemorial or for a very long time, there can be a presumption of a lost grant. A considerable number of years when there is no evidence that prior to that number of years the plot of land was not used as a graveyard would be sufficient to justify a presumption of dedication or a lost grant. Where a large number of persons have been buried on a plot of land for more than 30 years and there has never been any attempt by any one to use this land for any purpose than that of a graveyard, the land can be taken as graveyard, 'even though it has not been entered as a graveyard in any of the village papers'"
>
> (underlining (here into '') is ours).

20. In the instant case there is no evidence to indicate that this land was used for any other purpose than graveyard and whenever it was being so used the Muslimr Community had taken exception, and has succeeded before the Court.

21. In *Mazira* v. *Sukhdarshan*, 1936 All LJ 651, it has been held that

> "the presumption is that the part of the site where the dead body is buried is dedicated with the consent of the owner so that the grave is a Wakf and the Muslim Community have access to It."

22. It is therefore clear that the property was used as a graveyard for a number of years. It had ceased to be so used as will be clear from the documentary evidence viz. the application and oral evidence adduced by the defendants. But that stoppage will not convert the Kabarstan which was once a Wakf property into a private property. A public graveyard continues to be so whether it is so used or not A graveyard will always vest in public and it cannot be divested by non-user. Such an idea is inherent in a Wakf. A public property can only be transferred by public and therefore in the absence of anything to show that the public in general has transferred

their right to a private individual, a fact which is not possible to establish, and has not been established in this case, the property continues to be a public Wakf.

23. A number of cases support the above proposition. In *Abdul Ghafoor* v. *Rahmatali*, AIR 1930 Oudh 245 it is held:

> "Once land has been dedicated for the purpose of a cemetery it must always be regarded as a cemetery, unless for any reason the land turns out to be unfit for use as a cemetery and consequently is incapable of alienation."

24. In *Ehsanbeg* v. *Rahmatali*, AIR 1935 Oudh 47, it has teen held:

> "It is immaterial that the cemetery has been closed for use as such by the Municipality because it is quite within the range of possibility that the cemetery may at some future time be again used for the purpose of burial."

25. In *Dost Mahomed* v. *Chainrai*, AIR 1940 Sind 43 it has been observed that

> "a private ownership of a plot is incompatible with dedication of it under a Wakf as a graveyard for Mohammadens in general."

26. The learned counsel for the appellants wanted to submit as already said that

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the property is a private Kabarstan. There cannot be any private Wakf. The Wakf Validating Act of 1913 makes only lawful a Wakf for following purposes (a) for the maintenance and support wholly or partially of his family, children etc. and (b) where a person creating a Wakf is a Hanafi Musalman also for his maintenance and support during his life time or for the payment of his debts. Therefore even Wakf Validating Act, 1913 cannot validate such a private Wakf.

27. As we have seen the evidence was led that some time or the other there was a mortgage of the property in dispute. Ex. D/12 and D/13 are the two mortgage deeds. According to these deeds it is clear what was mortgaged was the house and not the Kabarstan. These documents are relevant for the purpose of deciding the second question of the counsel. Suffice to say that the Mutwallis have no power without the permission of the Court to mortgage, sale or exchange Wakf property or a part thereof unless he is expressly empowered by the deed of Wakf to do so. The learned counsel submitted that this mortgaging would show that this was a private property and not subject to Wakf. But it will be clear by reading the mortgage deeds that these related to a certain house and not the actual Kabarstan.

28. We are therefore of the view that the portion of the land which was being used actually for Kabarstan must continue to be the Wakf property and must be dealt with accordingly, whereas the buildings and constructions have to be left out.

29. We have come to the above conclusion as we do not find any document indicating actually the area which was dedicated. When the factum of a Wakf has to be established by long user, the portion of the land which has actually been used can only be taken into consideration.

30. In *Mahomed Shah* v. *Fasiuddin Ansari*, (S) AIR 1955 SC 713 it has been observed that a stranger to the trust can encroach on the trust estate and will in course of time acquire a title by adverse possession. But a Mutawalli cannot take up such a position. If the Mutawalli chose to build on the part of the mosque in such a way as to integrate the whole into one unit then the Court is bound to regard this as an accretion to the estate of which they are trustees, and they will be estopped from adopting any other attitude because no trustees can be allowed to set up a title adverse to the trust or be allowed to make a benefit out of the trust for his own personal ends.

31. The above observations of the Supreme Court clearly contemplate that Mutwalli can also build and make his own property; but if he builds in such a way that it formed an integral part of the whole, then he cannot fie allowed to take advantage. In the instant case the built portion is quite separate and distinct appearing in the Khasaras. It will appear that a distinct piece of land has been mentioned as Kabarstan.

32. In *Azizuddin* v. *Ramzan*, AIR 1933 Nag 115 following the Privy Council case reported in Court of Wards for *The Property of Mutawalis Hassan Baksh* v. *??? Bakash*, ILR 40 Cal 297 (PC), it was held that a mere fact that the Mutawallis are entered in the settlement papers does not show that they were private owners and not Mutawalis of the trust property. That is true, but what we are concerned with is not the land with graves under it. We are speaking of a portion of land where no grave has been dug and nobody has been buried. It is that portion with which we are concerned. If long user have proved that it was a graveyard then alone it can be considered to be a Wakf property. The portion where there is a construction is distinct from the rest. Distinct marks show which piece of land is a burial ground and which is pot. Therefore the whole portion cannot be said to be a graveyard. A person in occupation of the property must be allowed to remain there unless a better claim is shown by others. Better claim has been shown in respect of portion not in actual occupation. Simply because a and is contiguous to other land, it cannot be said that both the lands are parts of a whole.

33. In *Noor Mohammad* v. *Ballabhdas*, AIR 1931 Oudh 293, a Division Bench of

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that High Court has held that even if a portion of a continuous plot of a land where the entire plot is shown in the settlement Khasra as Kabarstan is covered with graves the entire plot must be deemed to bear the same character. That is actually where lies the difference. In the instant case the entire plot has not been shown in the Khasara as Kabarstan as will appear from Ex. D/3; therefore the presumption contemplated was of no use.

34. In *Abdul Gafoor* v. *Hakimali*, AIR 1959 All 78, their Lordships have observed that when a graveyard is not a public graveyard and consists of the graves of members of the family alone, it is not to be presumed that the entire plot had been dedicated for the purpose of a graveyard.

35. It is not very clear what their Lordships mean about the private graveyard, but it is clear that it is possible to separate a portion of the land as a public graveyard and the other portion if never used as a burial ground, as a private property.

36. In *Abdul Rahim* v. *Fakir Mohammad*, AIR 1946 Nag 401, a Division Bench of the Nagpur High Court were discussing a property which was Wakf. Their Lordships have observed that the ancient history may not be available but even then the decision can be based on such evidence as can be gathered from how the public regarded the property, its environment and the conduct of the parties. In

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the instant case the evidence led speaks of turial on a particular portion.

37. In Khasra Ex. D/- 3 the portion at serial No. 954 has been clearly mentioned as Abadi and in possession of Mariambi. The rest of the property has been shown as Kabarstan. This would show a clear cut distinction showing the portion at serial No. 954 as private property and the rest as Kabarstan. When the proof of Wakf depends on user, it is that portion which has been shown to have been used exclusively for burial, can only be held to be a Wakf property. In the absence of any record or documentary evidence about the area, it will be unsafe to declare a property Wakf and deprive the person in actual possession from time immemorial through his predecessors of the property. The evidence of user can only lead to the portion actually used and not the surroundings.

38. There is no evidence that in the portion where exists certain buildings there was any time any burial. There is also no evidence that the constructions and erections were at the cost of the Muslim Community. We are therefore unable to agree with the trial Judge that the whole of the portion which has been shown in the map Ex. P/5 to be a Kabarstan.

39. We therefore hold that the suit property excluding the built area as indicated above is a Kabarstan. But this is admittedly a defunct Kabarstan and the local body has already fixed a different place for burial. Though the Kabarstan is a Wakf property it is not such as would yield any income. If at any time it can be used as Kabarstan, which of course depends on the Muslim Community 2nd the local body, there is no possibility of any income from the Bald Wakf. The defendants and their successors in interest therefore will be in a better position to look after the Kabarstan. The defendants are however prevented from making any private use of this Kabarstan. They also will not be entitled to alienate the property in a manner adverse to the interest of the Muslim Community. The result will be that the decree of the trial Court is set aside. The defendants-appellants are removed from the possession of the Kabarstan excepting the portion where there is a construction. In Ex. P/5 the portion in she South East corner where the construction of building is shown will remain in

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possession of the defendant-appellants. A decree which will be drawn will accompany a map to the scale showing actual portion where there is construction and which will remain in possession of the appellants. The rest of the portion will be treated as a Wakf and the defendants are prevented from using the ??? ground for any private purpose. So long the Kabarstan is not used as such, the appellants and their successors in interest will be allowed to continue as Mutawalli of this burial ground and they will render accounts whenever demanded by the Muslim Community. The costs ??? incurred will be borne by the parties. Counsel fee according to scale, if certified.

AH/RTG/R.G.D.

40. *Appeal partly allowed.*

———

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1931 SCC OnLine Oudh CC 125 : AIR 1931 Oudh 293 : 1931 OWN 579

Oudh Chief Court

(BEFORE WAZIR HASAN, C.J. AND KISCH, J.)

Noor Mohammad and another ... Plaintiffs Appellants;

Versus

Ballabh Das and others ... Defendants Respondents.

Second Appeal No. 217 of 1930

Decided on March 13, 1931

The Judgment of the Court was delivered by

KISCH, J.:— This is the plaintiffs' appeal from the decree of the District Judge of Lucknow dated 1st April 1980, affirming the decree of the Subordinate Judge of the same place dated 23rd December 1929. The question in controversy in this suit lies within a very narrow compass. The plaintiffs claim that the plot of land No. 108 situate in Mohalla Begamganj, in the city of Lucknow, is a graveyard used by the Mahomedan community from time immemorial and that therefore its alienation by Mt. Musaheb Khanam defendant 4 in favour of Ballabh Das defendant 1 under the deed of sale dated 1st February 1928 was invalid in law.

2. Both the lower Courts have held that the plot in suit has not been proved to be dedicated as a "public graveyard." There is no finding that it is not a graveyard.

3. The question as to whether it is so or not may be a pure question of fact or partly a question of fact and partly of law. In any event there is no dispute as to facts in so far as they are established by documentary evidence and the real question for decision in the case is as to whether on those facts it can be held that the plot in suit is a "graveyard" as the term is understood in the Mahomedan law. It is agreed that in the year 1870 under the orders of the Municipal Board of the city of Lucknow the land in suit was discontinued to be used as a graveyard. The evidence as to the user of the plot in suit as a graveyard since the year 1870 is therefore nil. Ex. 1 is the map of Mohallah Begam Ganj prepared at the first regular settlement of the city of Lucknow in the year 1868 and Ex. 3 is the khasra accompanying the map. In the khasra the entire plot No. 108 is entered as "qabrustan" (cemetery or graveyard) and in the

column of "proprietor" according to possession" the name of one Kale Khan is entered. In the map at least seven pucca graves are shown and their situation on all sides of the plot No. 108 indicates that it was a graveyard as it is described in the khasra just now mentioned. It follows that in the year 1868 plot No. 108 was treated by the public authorities and described in public documents as a graveyard and in the year 1870 it was closed as such. There is some discussion in the judgments of the Courts below on two points arising out of the entry in the khasra of 1868, to which reference may here be made. The one is that Kale Khan is entered in the column reserved for the entry of the names of proprietors and the other is that immediately below the entry of graveyard against the entire plot No. 108 there is further entry "gosha uttar qabrustan." Rendered in English it means "north corner graveyard." From these two entries the Courts below have drawn the inference that the whole of plot No. 108 is not a "public graveyard." The legal aspect of this inference was challenged before us.

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As regards the former entry two observations fall to be made. In the first place the character of ownership is explicitly described as being founded on possession alone and secondly Kale Khan is described in the column of remarks as a "faqir." This established that he was merely a custodian of the graveyard. In Court of Wards for the property of *Makhdum Hassan Baksh* v. *Ilahi Baksh*[1], Lord Macnaghten, in delivering the judgment of their Lordships of the Judicial Committee, made the following observations:

> "In the ownership column Makhudu Hassan Bakhsh ... is entered as "owner." It would seem that he was properly entered as owner, being trustee of the Saint Mai Pak Daman."

4. As to the second point, little need be said. The entire plot was shown, as we have already said, as a graveyard but for the purposes of survey it was measured as a plot consisting of several parcels and the first of such parcels was again described as qabrustan; and the description in the very nature of the thing, applies to all other parcels subsequently entered. In any case if one portion of a continuous plot of land where the entire plot is shown in the settlement khasra as qabrustan is covered with graves the entire plot must be deemed to bear the same character. It appears to us that the following observations of Lord Maonaghten in the case already referred to wholly cover the present case:

> "Their Lordships agree with the Chief Court in thinking that the land in suit forms part of a graveyard set apart for the Mussalman community, and that by user, if not by dedication, the land is wakf. The entry in the record of rights seems conclusive of the point. It is obvious that if it were held that within the area of the graveyard land unoccupied or apparently unoccupied by graves was private property and at the disposal of the recorded owner it would lead to endless disputes, and the whole purpose of the Government in setting aside the land as an open graveyard for the Mahomedan community in Multan would be frustrated,"

5. This quotation would apply even to the facts of this case if we substitute "original owner" in place of the word "Government" and "Begam Ganj" in place of the word "Multan."

6. For the evidence as to the user the plaintiffs also rely upon Ex. 2. This is an extract from the "Register of Qabrustan," thana Chauk (that is graveyards within the circle of police station of Chauk) city Lucknow, prepared in the year 1913. In Col. 9 of this extract relating to the plot in question the entry is that it had been closed since the first settlement of 1870 and in Cols. 10 and 11 relating to the former and present "occupants or owners" respectively we find the name of Kale Khan in Col. 10 and the name of Walayeti Khanam, daughter of Kale Khan in Col. 11, describing the latter as the occupant of the "takia." The word takia connotes a graveyard in the custody of an individual faqir.

7. As we have already said, both the, Courts below have insisted on proof of the graveyard in question as a "public" graveyard. We are unable to discover from the judgments of those Courts what distinction in law they would make between a "public" graveyard and a "graveyard" simpliciter. The rule of Mahomedan law is absolutely clear on this point. The user of a piece of land as a graveyard will establish dedication and the land thereby become wakf property.

> "A cemetery or graveyard is consecrated ground and cannot be sold or partitioned. Even lands which are not expressly dedicated but are covered by graves are regarded as consecrated and consequently inalienable and non heritable. *Ameer Ali's Mahomedan law*, Vol. 1, Edn. 4, p. 406."

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8. According to Abu Hanefa when a person has made his land a cemetery his ownership does not abate therein without an order of the Judge because the owner has the power of revocation but dedication becomes obligatory after his death. The only method of proving dedication in the absence of a written document is the user of the land as a cemetery. According to Abu Yusuf and Muhammad the ownership abates when people have buried in the cemetery and it is sufficient if one person do so and it is stated in the Mubsoot that "the futwa is with the two; and so it is generally agreed." This of course means that the generally accepted opinion is the opinion held by Abu Yusuf and Mahomad: Baillie's Digest of Mahomedan law, Chap. 8, para. 620. The text in Baillie is founded on *Tatawa Alamgiri* Vol. 2, Chap. 12 and Hedaya. Vol. 2, Kitabnl wakf. The case before us satisfies even the requirements of Abu Hanefa inasmuch as the death of the owner of the land whoever he was must be deemed to be an established event. In a decision to which one of us was a party *Sajjad Ali Khan* v. *Jagmohan Das*[2] as passage was quoted from Mr. Ameer Ali's book, Chap. 15, p. 474 as a translation of a passage from *Faddul Muhtar*, Vol. III, p. 645. We think that an extract of that passage should be reproduced in this judgment.

> "A wakf, says the Ruddul-Muhtar, may be established without any evidence of the wakf a declaration. This is the doctrine laid down by Abu Yusuf and the jurists of Balkh, such as Abu Jaafar and others follow the view; Khassaf also has adopted it."

9. We are glad to find that the opinion which we are expressing on the proposition of the Mahomedan law involved in this case is shared by other members of this Court: see for instance the cases of *Abdul Ghaffar* v. *Rahmat Ali*[3] and *Chhutkao* v. *Gombhir Mai*[4]. We accordingly allow this appeal, set aside the decrees of the Courts below and decree the plaintiffs' suit with costs in all Courts.

P.N./R.K.

10. *Appeal allowed.*

———

(1) [1913] 40 Cal. 297 : 40 I.A. 18 : 17 I.C. 744 (P.C.).

(2) A.I.R. 1927 Oudh 534 : 101 I.C. 563.

(3) A.I.R. 1930 Oudh 245 : 122 I.C. 326.

(4) A.I.R. 1931 Oudh 45 : 130 I.C. 117.

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warrant from the conduct of the plaintiff. I do not think that this was a case in which the plaintiff should have been compelled to treat the oath agreement as though it subsisted when he was of opinion, rightly or wrongly, that it had come to an end. In the result, therefore, I allow the appeal and remand the suit to the trial Court for disposal in the light of the observations in this judgment, after recording such evidence as the parties may adduce. Costs will abide the result.

Leave to appeal granted.

N. R. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh.]

Lord Roche, Lord Salvesen and Sir George Rankin.

16th December, 1935.

BALLABH DAS and another ... ... *Appellants,*

v.

NUR MOHAMMAD and another ... ... *Respondents.*

Civil Procedure Code (V of 1908) S. 100—Question of law—Legal effect of documents which are instruments of title or direct foundation of rights.

The legal effect of documents which are not merely "historical materials," but are instruments of title or otherwise the direct foundation of rights is a question of law and hence justifies an interference by the second appellate Court with the decision thereon by the lower appellate Court.

Mr. *P. V. Subba Row* for the Appellants.

Mr. *J. M. Parikh* for the Respondents.

JUDGMENT.

Sir George Rankin.—The suit concerns a plot of land in Mohalla Begumganj in the City of Lucknow measuring between seven and eight biswas. The purpose of the suit is to establish that this plot of land is a graveyard in the sense of the Mohamedan law, that is to say *extra commercium* and dedicated for the benefit of Mohamedans in general in such sense that private ownership therein does not exist. The suit is a representative suit, the plaintiffs having obtained an order under O. 1, R. 8 of the Civil Procedure Code. Their grievance against the first defendant, Ballabh Das, is that by a deed dated 1st February, 1928, he purported to take a transfer of this land from defendant No. 4 Musammat Musaheb Khanam, who conveyed the land to him professing to have derived title thereto from one Kale Khan. The plaintiffs' claim against defendants Nos. 2 and 3 is nowhere clearly stated but at the trial the case made against them was that they had encroached upon the land in suit by the erection of a wall and door as additions to a house which abuts upon the land. The defendants, while not denying that in 1868 and prior thereto some few persons had been buried in the land, nor that in 1870 the land was closed for the purposes of a cemetery by order of the Municipal Board, deny that the land was at any time dedicated or made *wakf* so as to cease to be the private property

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of the owner. The defendants claim that at the time of the first regular settlement in Lucknow the land belonged to and was settled with Kale Khan as the owner thereof.

The suit was tried by the learned Subordinate Judge at Lucknow who dismissed it with costs, defendants 3 and 4 not appearing. On appeal by the plaintiffs to the District Judge this decree was affirmed. On Second Appeal, the Chief Court at Lucknow set aside these decrees and decreed the plaintiffs' suit with costs in all Courts. Their Lordships, in a later passage of this judgment, will refer to the exact form of the decree made by the Chief Court and to a further order dated 15th September, 1931, discharged by an order dated 2nd November, 1931. Special leave to appeal to His Majesty in Council was obtained on the 17th March 1932 by defendants 1 and 2.

At the trial a large number of witnesses were called but in the opinion of the Subordinate Judge and of the District Judge the oral evidence was of little assistance to the plaintiffs. These Courts were unable to find that the plaintiffs had proved that upon this land *urs* had been celebrated or *fatihas* had been read. They did not consider it established that a large number of pukka graves existed on this land at any time. The oral evidence as to *kachcha* graves was also held unworthy of belief.

In this view the plaintiffs' case depended entirely upon the documentary evidence. Of the documents produced, by far the most important are the *khasra* and *noqsha* being the revenue survey and map which came into existence in 1868 at what is called the first Regular Settlement in Oudh. These are Exs. 3 and 1 and it is important that they should be read together. A number of other documents of secondary importance were produced and duly canvassed by the Trial Judge.

As it is common ground that the plot was closed as a graveyard in 1870, its recent history cannot be expected to shed much light upon the question of its dedication. It may, however, be mentioned that defendant No. 4, Musammat Musaheb Khanam, is found to be Kale Khan's grand-daughter. He died in 1880 leaving two daughters, Alla Rakkhi, who died in 1898, and Wilayati Khanam, who died in 1920. Defendant No. 4 is the daughter of the former. In 1913 Ex. 2, a municipal register of graveyards was prepared and Daroga Baqar Ali who prepared it described the plot as a takia, which means, according to the Chief Court, a graveyard in the custody of an individual fakir, and entered it both as a public graveyard and also as personal property. This self-contradictory document usefully notes in the "Remarks" column that there are some thatched houses of tenants for which one anna per month is received. Thus in the time of Wilayati the land is being used for profits. In 1919 Wilayati and the present defendant No. 4 brought a suit against one Mohan Lal who had a house on the Western edge of the plot and who had erected a second storey thereto and made certain openings on the side of facing towards the plot. They claimed an injunction to restrain these proceedings as an infringement of the right to privacy. In that suit a map (Ex. A. 26) was made by an Amin under order of the Court which shows a number of thatched huts which the Subordinate Judge puts at 20, of which 14 belonged to Kahars. There are also shown some five or six latrines. So by 1919 the plot in suit is being let out more and more to

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tenants of a poor class. This state of affairs continued till the present suit which arose out of disorders following upon the purchase by defendant No. 1 (who is a Hindu) in 1928 as already mentioned.

It is upon the correctness of the view taken by the Subordinate Judge and the District Judge of Exs. 1 and 3, that the decision of this appeal must depend. The survey *khasra* of 1868 is contained in sheets having 30 columns. The number of the plot of land in suit is 108. It is described in column 2, of which the heading is "Description of Plot", as a graveyard the word used being "*qabristan*". Columns 5, 6 and 7 are headed "Name of owner according to possession." The sub-head of 5 is "Government", the sub-head of 6 is "Nazul", which means forfeited or lapsed to Government and the sub-head of column 7 is "Others". In this column 7 in respect of this plot of land is entered the words "Kale Khan, son of Asalat Khan." None of the other columns are filled up until columns 15 to 17 which contain the measurements and the area of the plots of land. In the case of this plot there follow measurements of no less than ten portions described as "northern corner," "eastern corner" and so on, the total area being entered as 7 biswas, 11 biswansis and 7 kachwansis. Column 22 is headed "Culturable", and the whole area is entered in this column, namely 7-11-7. Moreover, the name of Kale Khan is entered in this *khasra* in respect of other plots, namely, in respect of a house a portion of No. 98, a courtyard No. 99 and a pukka house No. 100. In regard to this pukka house the name of Kale Khan, son of Asalat Khan, is not only entered in column 7, but also in column 8 of which the heading is "Name of resident or cultivator". In column 9 headed "Caste with religion" the entry in respect of this pukka house is "Fakir Sunni" and in column 10 of which the heading is "Occupation" the entry is "Service". The *khasra* makes it clear that the house being portion of No. 98 was let by Kale Khan to tenants. Now the map is accompanied by a key, or explanation, of the symbols used by the draughtsman. Painted in pink and yellow, certain rectilineal figures are described as meaning "graveyard", and on the map on these figures are scattered all over the plot in question, namely, plot 108. The number of representations is in fact seven, but as their Lordships read the map, it is incorrect to say that this is a representation that there exist seven graves. It is a representation that the whole of the plot is graveyard. Graves and trees are represented by another symbol which is repeated about a dozen times and is scattered over the whole area except perhaps the edges. The map shows the pukka house in respect of which Kale Khan's residence is entered as being plot 100. It also shows the passage way leading to plot 100 which is the only entrance to plot 108.

The view taken by the trial Judge was that this *khasra* and map showed the land in suit to be a graveyard which might well be privately owned; that it was recorded in the ownership of Kale Khan and that only one of the ten corners was covered with graves, the rest being vacant. Accordingly he held that unless by other evidence it could be shown that such a number of burials had taken place at one time or another in the land as to amount to a public user and be good proof of dedication as a public graveyard, the land must be treated as privately owned. The reference to Kale Khan as a *fakir* which is given with respect of the pukka house No. 100 he took to be a description of the class or

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community to which Kale Khan belonged. He thought that the entries taken as a whole were inconsistent with the idea that Kale Khan was a beggar or a saint. He thus negatived the suggestion that Kale Khan was shown to be a manager or *takiadar* and held the effect of the document to be that the suit land was the private property of Kale Khan. It is necessary to set out the reasoning of the learned Subordinate Judge as follows :—

The plaintiffs allege that Kale Khan's name is entered in Ex. 3 in the column of *proprietors by virtue of possession*. He was thus only a possessor and not a proprietor and his possession was that of a manager only. This construction does not seem warranted. There is a history behind this expression "proprietor by virtue of possession". In the mutiny of 1857 many people left the city of Lucknow. At the first Regular Settlement the Government found it extremely difficult to determine the title to the tenements of the persons who returned and occupied them. Seeing the previous insecurity of life and property from which the people had suffered at the hands of ruffians it was not only difficult for them to prove their title but an enquiry into title was bound to prolong the settlement operations to an inordinate length. The Government therefore ordered that persons in possession be recorded as proprietors of their tenements and the sites thereof. Kale Khan was thus recognised by the Government as the owner of the plot No. 108. If he had only been a manager he would have been entered as such or his name would have appeared in the column of tenants and the Mohammadans in general would have been recorded as owners of the plot. Lord Canning's proclamation of the 15th March, 1858. confiscated all land in Oudh and every right in the soil in the City of Lucknow was vested in the Crown. By the letter of the Financial Commissioner of Oudh dated the 7th August, 1868, lands were granted to people whom the Crown liked to grant. It was at the first Regular Settlement, therefore, that for the first time in the City of Lucknow anybody's title was created to any land. All previous rights, including those of the grandfather of Mirza Mahmud Beg, if any, had been swept away by confiscation. Kale Khan should therefore be considered to have been granted the plot by the Government at the first Regular Settlement. Kale Khan was thus a proprietor and not a manager. It is not alleged nor proved that he made a *Waqf*. When Kale Khan never divested himself of his rights, it is difficult to deprive him of the ownership of the plot in suit.

The learned District Judge took the same view. He said :—

In the former document there are a number of columns. Columns 5, 6 and 7 are included under a joint head, "*nam malik barui qabza*" and beneath this the three columns are headed "Government, Nazul and Digran." In this last column, that is column 7, is entered the name of Kale Khan with his father's name. Great stress is laid on this entry and it is argued that ownership being entered on the basis of possession alone it does not prove that Kale Khan was the full owner of the property. On the contrary it is urged that he was only a "Takiadar" or manager of the graveyard. This point has been discussed by the learned Subordinate Judge, who has given the historical reason for the entry of ownership being in this form, namely the fact that after the confiscation of Oudh it was decided at the first settlement to base title on actual possession. This explanation has not been challenged and may be accepted as correct. The entry in this "khasra" does not in my opinion do anything to prove that Kale Khan was merely a manager and not full owner of the land.

He also said :

It seems certain that at the present time there are only a very few Pacca graves and there is nothing to indicate that there were any more at the time when the land was closed as a graveyard. On the contrary it is significant that in Ex. 2 (*sic*) below the main entry of this plot 108 there are entries of a number of "Goshas" into which it was divided and only against one of these is the word "Qabaristan" shown, from which it might be concluded that it was only this portion of the land which could claim the character of a graveyard. The mere existence of a comparatively small number of graves at the time when the plot was closed to burials does not in any way prove that the land had been dedicated as a public graveyard.

Their Lordships agree with the learned Judges of the Chief Court that the learned Subordinate Judge and District Judge have misapprehended the true

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meaning and effect of the *khasra* and the map. So far as the learned District Judge is concerned it does not appear that he paid sufficient attention to the map as he does not refer to it expressly when dealing with certain vital matters. But the criticism of the Chief Court is so expressed as to allow of some misconception of its meaning, particularly when they say :—"We are unable to discover from the judgments of those Courts what distinction in law they would make between a 'public' graveyard and a 'graveyard' "*simpliciter*" and when they refer to the opinion of Abu Yusuf and Mohammad that "the ownership abates when people have buried in the cemetery and it is sufficient if one person do so."

Learned Counsel for the appellants contended that the opinion of the Chief Court was that land would become *wakf* necessarily and immediately upon the burial of a single person, an opinion which their Lordships agree would be erroneous and contrary to decided cases. It is one thing to say that as a gift may be incomplete without "delivery" so a mere oral dedication as a graveyard would not take effect until one burial had taken place. It is another thing altogether to say that one burial on a plot of land makes the land *wakf*. If a landowner were to allow one or two of his relatives to be buried in his orchard he would not necessarily be held to have dedicated the land as a cemetery. A careful reading, however, of the judgment of the Chief Court leads their Lordships to give it another and a sounder interpretation. Their criticism is that when in the document of 1868, for example, one comes across a description of certain land by the word "*qabristan*" or graveyard, this, *prima facie* at all events, means that the land is a graveyard in the sense known to the Mahomedan Law. The owner who permits one or two burials to take place in his orchard would not describe his orchard as *qabristan*. If the plaintiffs had to make out dedication entirely by direct evidence of burials being made in the ground and without any record such as the *khasra* of 1868 to help them, they would undoubtedly have to prove a number of instances adequate in character, number and extent to justify the inference that the plot of land in suit was a cemetery. The plaintiffs, however, are not in this position. The entry "*qabristan*" in the *khasra* of 1868 has to be taken together with the map which shows the whole of plot 108 to be graveyard. As regards the ten corners or *goshas* both the Subordinate Judge and the District Judge have misconstrued the *khasra*. The number of dots to represent the word "ditto" does not appear to have been sufficient to continue all down the column so as to cover the ten corners each of which is carefully measured, but it is a misconstruction of the *khasra* to hold that the first only, namely the northern corner, is represented as a graveyard and it is abundantly plain that the whole of the plot in suit was a graveyard.

Again, it is quite true that the entry of the name Kale Khan in column 7 does not by itself show that he had not a complete title to the plot. According to the headings of the *khasra*, however ancient or manifest his title, his name would have been entered in that column under the heading "Name of owner according to possession." If, however, account is taken of the fact that the particular plot No. 108 is described as a graveyard it becomes difficult indeed to suppose that the fact of possession or custodianship is not the basis of the entry. The suggestion that if Kale Khan had been only a manager he would necessarily have been entered as such or that the Mahomedans in general

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would have been recorded as owners of the plot, is at best an uncertain suggestion. It would have been a little out of place to record Kale Khan as the "resident or cultivator" of a graveyard. On the other hand if the plot was the private *ahata* or close of Kale Khan one would expect it to be treated as the house (plot No. 100) is treated and to find his name entered both in columns 7 and 8 as owner and as occupier. If the fact that the subject-matter of the entry is a graveyard is allowed to sink out of sight the entry or Kale Khan's name in column 7 is neutral. If, however, this fact be taken into account and the not insignificant circumstance be added, which can be collected from the entry against plot No. 100, that Kale Khan is classified as a *sunni fakir*, the neutrality disappears. If the house and courtyard did not abut upon and lead to the graveyard they might have some little value for the purpose of setting up Kale Khan as an owner of property: as it is they have none. The *khasra* can hardly mean that it was the intention of Government at the first Regular Settlement, to vest the ownership of such a cemetery as described in the map in a private individual, thereby destroying its character as a *qabristan* according to ordinary conception of the Mahomedan Law. It may be true as the learned Subordinate Judge has said that :—

> It is a matter of not uncommon occurrence that some Mohamadans bury their dead in their orchards or Ahatas attached to their houses and allow their neighbours or relations also to be interred there. By doing so they do not divest themselves of their ownership over their orchard of Ahata or the sites thereof.

This theory, however, does not seem to their Lordships to be adequate to explain the *khasra* and map, or the known facts. The owner in this case would need to have been both exceptionally generous in providing ground for burials, and unusually indifferent or opposed, for a Mahomedan, to the ordinary Mahomedan notion of a burial ground. Add the fact that in 1870 the ground was closed as a cemetery by order of the Municipal Board, and the orchard theory, if their Lordships may so call it, becomes still more unconvincing.

As this case came before the Chief Court on Second Appeal it is important to notice that the reasoning of the Subordinate Judge, expressly accepted by the District Judge, is such as to constitute the effect of the *khasra* a question of law. The position according to these learned Judges is that all previous titles had been swept away and that the Crown was granting lands to people at its pleasure. The Subordinate Judge says it was at the first Regular Settlement that for the first time in the City of Lucknow any body's title was created to any land. He does not suggest that the title in this case was created by another document: the *khasra* itself in his view is the instrument which confers or embodies the right. If this be so the *khasra* and the map are not merely "historical materials" in the sense in which that phrase is used in the judgment of the Board delivered by Sir Binod Mitter in *Wali Mohammad* v. *Mohammad Baksh* (1). They are within the phrase "instruments of title or otherwise the direct foundation of rights" and the learned Judges of the Chief Court were entitled and obliged to put upon them the true construction.

Learned Counsel for the appellants appeared to challenge the view taken by the Subordinate Judge and the District Judge and asked the Board to hold that the question in the present case is to be decided as a question of fact

(1) 57 I.A. 81 at 92=11 Lah. 199=31 L.W. 321 (P. C.)

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treating the *khasra* and the map as mere items of evidence. Learned Counsel, however, laid no materials before the Board upon which they would be entitled to take another view of what happened in Lucknow at the time of the first Regular Settlement in 1868. The matter being of the first importance their Lordships would be slow to express an opinion upon it save upon fuller material and in a case in which the question required to be decided. In the present case it does not require to be decided because the appellants are not in a position by attacking the view taken on this point by the Subordinate Judge and accepted by the District Judge to claim that the findings of the latter Court whether right or wrong should be restored as findings of fact. It may perhaps be said in criticism of the judgment of the learned District Judge that he has not appreciated that on the view which he has accepted of the *khasra* and map these documents are in a different category from the other items of evidence, oral or documentary. On the other hand there are no alternative findings on the one view and on the other. If the materials in the present case fell to be looked at as a mere question of evidence, their Lordships are satisfied that the true inference to be drawn from the evidence as a whole would be that the suit land is a cemetery in the ordinary Mahomedan sense and is no longer the subject of private ownership.

The learned Judges of the Chief Court having on this point reached a correct conclusion do not seem to have paid quite sufficient attention to the form of the order which they should make. Having stated in the judgment that they would "decree the plaintiffs' suit with costs in all Courts" they ultimately made a decree, dated the 13th March, 1931, whereby the plaintiffs were given possession over the plot No. 108 "and the defendants shall deliver possession of the said plot by demolishing the door and the wall from it." This form of order seems to combine the relief appropriate to an ejectment suit with two mandatory injunctions. As regards the door and wall the learned Trial Judge had framed issue No. 2—"whether the defendants 2 and 3 have encroached upon it as alleged." He had found that the only evidence of encroachment was that one witness for the plaintiff, Mashuq Ali P.W. 1, stated in examination in chief that the defendant 2's new wall and door encroached on the plot in suit but in cross-examination denied this fact. The learned Judge states: "There is no other evidence on this issue which is, therefore, answered in the negative." The learned District Judge upheld this finding saying:—

> It is not at all clear from the plaint what ground there was for suing them, but in some way it seems to have been pleaded that they made an encroachment on the plot. The learned Subordinate Judge held on evidence that there was no encroachment by them so that no relief could be given against them. In the memorandum of appeal this finding has been challenged, but nothing has been said about it in arguments, so that I need not refer to the matter any further and the case is really confined to the question whether Musammat Musaheb Khanam had any right to sell the land to Ballabh Das.

From these passages it sufficiently appears that the Chief Court were in error in making any order for the demolition of the door and the wall. The matter was drawn to their attention by a petition dated the 26th March, 1931, but instead of correcting the decree by ordering the omission of all reference to demolition of the door and the wall, the learned Judges of the Chief Court said that "in the Lower Appellate Court the matter seems to have been taken as

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falling within the general issue as to whether plot No. 108 was *wakf* property or not." This appears to their Lordships a misconception of what had happened. On the basis of this misconception the learned Judges proceeded to make an order dated 15th September, 1931 :—

> There should be an enquiry with a view to determine as to whether the door and the wall in question do not exist on plot No. 108.....If it is in the negative it would seem to follow that the decree of this Court directing the demolition and the wall should be modified.

The effect of this in their Lordships' opinion was to require the learned Subordinate Judge to hold an enquiry as to a matter which had already been decided in the suit, in fact to reopen and try for a second time a claim for a mandatory injunction in respect of the door and the wall. Their Lordships are of opinion that this cannot be justified and that the defendant concerned was rightly advised to proceed no further with his application to have the original decree of the Chief Court modified. The order of 15th September, 1931, was accordingly discharged by an order dated 2nd November, 1931. As regards the claim for a mandatory injunction the suit must fail altogether.

As regards the question of possession, their Lordships think that the decree of the Chief Court should be varied. There should now be made a declaration that the suit land is dedicated for the purposes of a graveyard according to Mahomedan Law and that the defendant No. 1 has no title thereto. But the question whether the plaintiffs should recover possession thereof in this representative suit requires fuller consideration than it has yet received at the hands of the Chief Court. It would not in their Lordships' view be right to give the land to the plaintiffs if there be no certainty that they will cause the land to be properly kept and looked after as a burial ground should be. It might possibly be thought advisable upon the whole that defendant No. 4 should be allowed to continue to look after it. These matters their Lordships will leave to be dealt with by the Chief Court and the case will go back to that Court for the purpose of making an order as to the person or persons be put in possession and the terms if any upon which possession should be given. The order for costs in three Courts in India will stand as against the first defendant only. The suit as against defendants 2 and 3 will be dismissed so for as regards the claim for demolition of the door and wall. Subject to these directions their Lordships are of opinion that this appeal should be dismissed : and that as regards the costs of this appeal the respondents should recover from the first appellant two-thirds of their costs but give credit for a sum equal to one-third of the total costs of both appellants. If the latter sum prove to be the greater then the balance is to be set off against costs ordered to be paid by the first appellant in respect of the Courts below.

Their Lordships will humbly advise His Majesty accordingly.

N. R. R. *Appeal dismissed.*

Mr. *H. Shephard* : Solicitor for the Appellant.

Messrs. *T. L. Wilson & Co.*: Solicitors for the Respondents.

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Rangnekar J.

with certain offences. In some cases you have the age of 18, in some 14, and in others 10, and so on, e.g., sections 369, 372, 373, etc. Although, therefore, one may desire to see a change effected and the age limit advanced, it is not open to one to discuss the reasons which have led the Legislature to prescribe certain limits in certain cases.

For these reasons I hold that section 361 must be read with section 363 and that the offence of kidnapping from lawful guardianship penalized by the latter section is the offence which is defined in section 361.

Per Curiam. Reference is rejected, and the accused is acquitted.

Answer accordingly : reference rejected.

Y. V. D.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

AKBARALLY ADAMJI PEERBHOY AND OTHERS *v.* MAHOMEDALLY ADAMJI PEERBHOY AND OTHERS.*

1931
June 16

Mahomedan Law—Mosque, administration of—Principles governing personal law of parties—Customs and usages may vary principles of Mahomedan Law—Proof of custom—Dedication of mosque to a community—Whether other communities excluded—Mosque, essentials of.

Questions relating to the administration of a mosque are governed by the personal law applicable to the parties concerned, viz., Sunni or Shiah law as the case may be.

As the great majority of the Musalmans in India follow the Hanafi school of Sunni law, the Courts presume that Muslims in India follow that school unless the contrary is alleged and proved. Similarly, the presumption is that if the parties are Shiahs, they are governed by the Shiah law. The great majority of Shiahs being Ithna Asharis, their exposition of the law is enforced, unless the parties show that a different rule applies to them.

Where, however, it is shown that the parties have adopted customs or usages having the force of law, such customs or usages will be given effect to, even if they are at variance with Mahomedan law. Such customs and usages must be proved by adducing evidence of a series of well-known concordant and on the whole continuous instances of the custom alleged, so that the common consent of the community is clearly demonstrated by the number of instances proved.

*O. C. J. Suit No. 1960 of 1927.

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A place may be dedicated as a mosque or masjid without there being any building; and no officer such as an Imam or Amil to lead or conduct the prayers, a Mu'azzin to call to prayers, a Khatib to pronounce the Khutba, a Khadim to sweep and keep the mosque clean, are necessary for the endowment of a mosque. The intervention of an Amil or Imam, or any leader of prayers is not necessary for prayers or devotions in a mosque.

Quære, whether under Mahomedan law a mosque cannot be so dedicated that any particular sect may prevent other Muslims from worshipping there.

Where members of the Dawoodi Bohra community were under a decree of the civil Court entitled to use a particular mosque, the Court declined to insert a clause in the scheme that the Mullaji Sahib (the religious head of the community) might exclude any member of the community from joining the congregational prayers held there, or prevent him from attending the mosque for prayers.

Adequate safeguards for the right of all members of a community to pray and offer devotions at a mosque are far more important in a scheme for its administration than a provision for the attendance of an Imam or Amil to read congregational prayers.

A SUIT for a declaration.

A mosque and three blocks of building were built opposite the Charni Road railway station in Bombay by the late Sir Adamji Peerbhoy for the benefit of the Dawoodi Bohra community. The property was managed by defendants Nos. 1 to 5, Mahomedalli and others, who were the sons of Sir Adamji Peerbhoy.

On September 22, 1927, the plaintiffs, Akbarally (a grandson of Sir Adamji Peerbhoy), and two others (members of the Dawoodi Bohra community) sued for a declaration that the aforesaid properties were subjects of trusts created for public purposes of a charitable and religious nature, that a scheme be framed for the due and proper administration of the charities, and that fit and proper persons be appointed as trustees.

The suit was heard by Madgavkar J. who, on March 12, 1929, passed the following decree :—

"There will be a declaration for the plaintiffs that the entire property is the subject of a trust for Dawoodi Borahs, namely, the mosque, block No. 1 for madressa, the lower floors of blocks Nos. 2 and 3 for travellers and pilgrims, and the upper floors for a sanitarium. Defendants Nos. 1–5 are ordered to vacate by May 31, 1929 . . . Suit referred to the Commissioner to inquire and report on a scheme in respect of the charity in suit, and to suggest names of fit and proper persons as trustees thereof . . . and that the said Commissioner be at liberty to consider the claims of any other

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members of the family of the late Sir Adamji Peerbhoy to be trustees if otherwise suitable."

Defendants Nos. 1-4 appealed.

The appeal was heard by Beaumont C. J. and Blackwell J. On August 18, 1930, their Lordships varied the decree to the following effect :—

"The decree of the lower Court is varied by omitting the words 'namely' up to 'sanitarium,' by striking out the other word 'other' and inserting the words 'including the defendants' after the word 'members' in the same line."

The Commissioner made his report and he drew up a scheme for the management of the properties dedicated to charity including the mosque.

Parties filed exceptions to the Commissioner's report and further directions were sought from the Court on that report.

M. C. Setalvad, for plaintiffs.

M. C. Chagla, for defendants Nos. 1 to 4.

TYABJI J. This suit has a long history into which I need not enter. It comes before me now for hearing on exceptions and further directions on the Commissioner's report, pursuant to a decree of the appeal Court, slightly modifying a decree passed by Mr. Justice Madgavkar. I have heard very careful and detailed arguments on the report. The points that have been taken before me can conveniently be put under three heads. They refer to three clauses in the draft scheme placed before the Commissioner by the plaintiffs.

The first arises out of clause 5 of the draft scheme which originally ran as follows :—

"5. His Holiness the Mullaji Saheb of the Dawoodi Bohra Community and his successors in office shall be the sole Amin of the Mosque and shall by virtue of his office have the sole right to manage, control and regulate the conduct of the religious services and prayers to be performed or led thereat, and to appoint an Amil and Khadim therefor, in accordance with the tenets of the Dawoodi Bohra religion free from any interference or control on the part of the Board of Trustees or any trustee of the trust property. The ground floor and upper floors

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of the mosque shall be used as mosque and the adjoining rooms shall be reserved for the residence of the Amil and Khadim."

The Commissioner cut out the last portion of the clause: the portion beginning with the words "free from any interference or control" to the end of the clause.

Mr. Setalvad for the plaintiffs urged very strenuously that the clause should be restored as it stood in his clients' original draft. His main argument was based on the evidence which he contended shows that the general feeling in the community of the Dawoodi Bohras, as well as their usages and customary ways of dealing with mosques, point to some arrangement by which the religious head of their community, commonly known as the Mullaji Saheb, should have the entire management, control, and regulation of the mosque. I stopped Mr. Setalvad from reading all the affidavits to me, saying that I would assume that the evidence establishes that many persons holding positions of influence and importance under the present regime are desirous of giving to the Mullaji Saheb the utmost powers in every detail; and that they sincerely consider it want of orthodoxy on the part of those Dawoodi Bohras who question the right of the Mullaji Saheb to control as he may be inclined, all institutions that have been established for the benefit of the community.

Mr. Setalvad has pressed that this evidence necessitates a clause in the scheme that the Mullaji Sahib shall exercise sole authority over the mosque; that he may regulate as he desires the prayers, congregational or private, said at the mosque; and that he may exclude any person he may decide to exclude from it.

The true effect of this argument is that the affidavits provide me with the principles having the force of law in accordance with which I must regulate the administration of the mosque, inasmuch as they represent (it is contended) the general feeling of the community and embody, or at least reflect, the usages and customary ways of the Dawoodi

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Bohras so as to take the place of law. This was Mr. Setalvad's main contention. Ostensibly, the Court is furnished with materials for forming a correct judgment on what will subserve the interests of the community, by being informed of what the community desires. In reality, the contention touches the foundations of the principles on which a choice of law is made. I must guard myself from being supposed to imply that the choice of law is made in disregard of the desires of the community or its welfare; but there are well-established principles in accordance with which their desires and welfare are to be brought to the cognizance of and estimated by the Court by which the choice has to be made. The plaintiff's contention was pressed before me with great force and perseverance. In order to deal with it adequately and to arrive at the precise effect and weight that I must give to the affidavits, I must examine the larger question,—on what basis the Court makes a choice of law where rival legal principles are put forward by the parties as being applicable.

The Government of India Act (5 & 6 Geo. V, c. 61), section 112, enacts that in matters of dealing between party and party, where both parties are subject to the same personal law or custom having the force of law, the High Courts shall, in the exercise of their original jurisdiction, decide according to the personal law or custom.

I presume that the question I have to decide—the manner in which the mosque must be administered—falls within that expression, and that it must be considered to be a matter of "dealing" between party and party. The Oxford Dictionary does not restrict the connotation of the word "dealing" to business transactions, and includes in it "intercourse, friendly, or business communication, connection; acting towards persons generally (in some specified way); conducting oneself, behaving".

Section 112 has a long history, which is not without interest and assistance. It is based on 21 Geo. III, c. 70,

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section 17, and 37 Geo. III, c. 142, section 13, which were re-stated by Sir Courtenay Ilbert in Article 108 of his Digest of the Statute Law relating to the Government of India. That article and section 112 are almost identical in terms. Sir Courtenay writes that it was "taken from Warren Hastings's plan for the administration of justice prepared and adopted in 1772, when the Company first 'stood forth as diwan'". "It is interesting", he adds, "as a recognition of the personal law which played so important a part during the break-up of the Roman Empire, but has, in the West, been gradually superseded by territorial law" (p. 56). "The twenty-third rule specially reserved their own laws to the natives, and provided that 'Moulavies or Brahmins' should respectively attend the courts to expound the law and assist in passing the decree" (p. 278). The 23rd rule was enacted by the Bengal Government as section 27 of the Regulation of April 17, 1780—

> "that in all suits regarding inheritance, marriage, and caste, and other religious usages or institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to Gentoos, shall be invariably adhered to" (p. 278).

Religious usages and institutions are not mentioned in section 112 of the Government of India Act. Section 13 of 37 Geo. III, c. 142, which was the basis of section 112 of the Consolidating Act, is similar in respect of this omission; though it provided that the Supreme Court shall frame such rules and orders for the conduct of suits and shall frame such process as shall be most consonant to the religious manners and laws and usages and the easy attainment of the ends of justice. Bombay Regulation IV of 1827 applies to the mufassal Courts only.

I may take it, therefore, that so far as the legislative directions to the Court are concerned, I must decide the question before me in accordance with the personal law of the parties. I may perhaps seek indirect light from the injunction that "the law of the Koran with respect to Mahomedans shall be invariably adhered to"; and that

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the rules and orders shall be so framed by the Court as to be most consonant to the religions and manners and laws and usages of the parties.

When, however, the parties are at issue on the matter, how must it be determined which personal law is applicable, and what the religion and manners and usages of the parties are? Have I any choice here, or must the parties be governed by Muhammadan law?

The ultimate basis on which the law has to be determined in regard to questions governed by personal law was considered long ago by Sir Erskine Perry C. J. in *Kojahs and Memons'* case.[1] Much more recently, the Privy Council in a case involving the consideration of these principles—*Muhammad Ismail Khan* v. *Lala Sheomukh Rai*[2]—gave no reasons for arriving at a decision causing the reversal of the established practice of the Allahabad High Court. The Privy Council laid down that customs in derogation of the law of Islam ought to be allowed to be proved even in cases governed by an enactment to the imperative effect that the rule of decision shall be the Muhammadan law. The reason seems to be that in regard to such questions, there being no established Islamic religion in India, the Courts cannot determine that a particular exposition of Muhammadan law is correct to the exclusion of all others; that justice, equity and good conscience require the application of that law which the parties as a matter of fact by their customs and usages have adopted, not the law which the Courts by a consideration of the historical circumstances relating to the parties, or of their religious books, or otherwise consider to be the law that they ought to have adopted: *Kojahs and Memons'* case.[1]

The enactments that I have cited point to a similar rule being applicable in regard to questions primarily dependent upon the religion of the parties,—such as the manner in

[1] (1847) Perry's O. C. 110.

[2] (1912) 15 Bom. L. R. 76, s. c., 17 Cal. W. N. 97, P. C.

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which the administration of a mosque must be regulated. So that the actual practices customarily adopted by the community concerned will furnish the rule for decision. Mahmood J. laid down that the administration of mosques must necessarily be governed by the Muhammadan Ecclesiastical law, of which the Court must take judicial notice: *Queen-Empress* v. *Ramzan*[1] and *Ata-ullah* v. *Azim-ullah*.[2] But that was before the Privy Council decision to which I have just referred.

What the actual practices of a community are, is a question of fact. It would have to be proved afresh in every case, were it not for the Courts taking judicial notice of previous decisions. Lord Birkenhead has demurred "to the practice of finding facts upon evidence given in other cases, between other parties": *Les Affreteurs Reunis Societe Anonyme* v. *Leopold Walford (London), Limited*.[3] The principles on which judicial notice is taken of customs are however well settled (*Ex parte Powell. In re Matthews*,[4] *Lohre* v. *Aitchison*),[5] and are illustrated by *Moult* v. *Halliday*[6] and *George* v. *Davies*,[7] the relevant passages from which are set out in *Kunhambi* v. *Kalanthar*[8] (p. 1061): "When this custom is continually being put forward and proved by evidence, a time must come when a Judge may say that he no longer requires it to be proved, but that he will take judicial notice of it": (cf. Indian Evidence Act, section 114). The process is accelerated when the parties recognise the futility of questioning the existence of a custom which has already been elaborately proved,—though only once, and though as between other parties.

The existing position with reference to the parties before me in this matter is that the Courts take judicial notice of the primary fact that Mussalmans ordinarily follow what are

(1) (1885) 7 All. 461 at p. 468, F. B.
(2) (1889) 12 All. 494 at p. 505.
(3) [1919] A. C. 801 at p. 807.
(4) (1875) 1 Ch. D. 501 at p. 506.
(5) (1878) 3 Q. B. D. 558 at p. 562.
(6) [1898] 1 Q. B. 125.
(7) [1911] 2 K. B. 445.
(8) (1914) 38 Mad. 1052.

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known as rules of Muhammadan law (see, for instance, *Abdurahim Haji Ismail Mithu* v. *Halimabai*).[1] As the great majority of the Mussalmans in India follow the Hanafi school of Sunni law, the Courts presume that Muslims in India follow the Hanafi law unless the contrary is alleged and proved. Similarly, the presumption is that if the parties are Shiahs, they are governed by the Shiah law. The great majority of Shiahs, in their turn being Ithna Asharis, their exposition of the law is enforced, unless the parties show that their particular rule is different.

These are presumptions based on the numbers of the followers of each sect "on the principle of providing for the ordinary course of things:—*In ea quæ frequentius accidunt, præveniunt jura*", or "*ad ea jura adaptantur*": *Maxted* v. *Paine*.[2]

It is not easy, however, to conceive of a case so devoid of all other circumstances from which the religion of the parties can be inferred, that this presumption from numbers should effectually come into operation.

The presumptions based on the relations between the various expositions of the law are distinct from those that I have mentioned.

Each division or school of Muhammadan law, Sunni or Shiah, Hanafi or Shafei, Ithna Ashari or Ismaili, is in the view, or at least in the theory, of those who adhere to it, the only correct exposition of Islamic law. The British Courts, as I have already stated, cannot take upon themselves to pronounce upon the correctness of any one of them to the exclusion of any other. The only function of these Courts is to determine which interpretation has been actually adopted and followed by the particular parties, and enforce that interpretation on principles of justice, equity and good conscience. This is in conformity with what I stated earlier, having then approached the question from another avenue,

[1] (1915) L. R. 43 I. A. 35. [2] (1871) L. R. 6 Ex. 132 at p. 172.

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and seen it from a wider aspect. The customarily adopted rule is enforced even if the parties have proceeded beyond interpretation of the texts: even if they have put the texts aside and adopted by custom a rule antagonistic to Muhammadan law: or being recent converts, have never permitted the new religion to displace pre-existing customs.

In enforcing, however, the various interpretations of the texts—I am not referring now to customs—the Courts have found that in spite of variations they all have common features. Moreover, the Hanafi school of law has been most often before the Courts. It has been more fully expounded than any other. It was the law enforced under the Emperor Alamgir. It is, therefore, justifiably inferred that the Hanafi law is the general law, and presumed that any other particular school is in agreement with that general law unless the contrary is proved. This has been silently accepted by the text writers in British India.

Following the same line of reasoning, the cleavage between the Sunnis and Shiahs is no doubt greatest. Hence all the Shiah schools in India are deemed to lean towards the Ithna Ashari exposition of the law rather than the Hanafi law. If I may so put it, the Ithna Ashari is deemed to be the general Shiah law on grounds similar to those with reference to Hanafi law. But as already pointed out the Ithna Ashari law itself has many features in common with the Hanafi law.

Thus it happens that when Muslim parties of the Sunni sect, no matter what their school of law, are before the Court, the Hanafi law is drawn upon unless a contrary rule is shown to prevail amongst them. A contrary rule may be shown by decisions or text books, or evidence of custom. Similarly, the Ithna Ashari law is applied to Shiah parties. And, except in regard to the law of inheritance, on which subject the Shiah and Sunni expositions proceed on principles radically at variance, the Hanafi law is the last resource

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for all classes of Muslims. Where there is no conflict of principles, the converse process may equally be followed. On a point on which the Sunni and Shiah law are shown to be in general agreement, if there is some Shiah authority available but no Sunni authority, it is in consonance with principle that the Shiah authority should be taken into consideration, though the particular parties may be Sunnis. This has been done by the highest tribunal.

It is, therefore, clear that the method in which this mosque must be administered has to be determined in accordance with the personal law of the particular parties before me. I will first speak apart from the effect to be given to the evidence adduced before me. Putting that evidence aside for the present, I shall presume, on the principles I have just stated, that that personal law is the Shiah law: that it is similar to the Shiah Ithna Ashari law unless the contrary is proved: that the Shiah Ithna Ashari law is similar to the Hanafi law unless the contrary is proved. This is significant, since with reference to the law relating to masjids there is a greater degree of uniformity amongst the various schools than in regard to many other branches. The reason perhaps is this. In speaking on such matters I must to a great extent rely on conjectures and general tendencies. With this caution I may venture on putting forward some tentative views. The difference between the various rival expositions of the law of Islam seems, in part at least, attributable to the fact that the law was originally promulgated (or at least interpreted, by the exigencies of human institutions) as an amendment of the laws, customs and institutions existing at the time in Arabia,—prevailing amongst the dominant Arabian tribes at the time of the Prophet. The new principles enunciated in the Quran and the Sunna (tradition) of the Prophet would naturally take different forms if they were superimposed on dissimilar existing institutions. In regard to the law relating to masjids, however, there seem to have been no such

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pre-existing institutions or customs ready for being adopted with slight modifications into the new religion. The new principles seem to have stood by themselves, and were given effect to as such. Thus one great source of divergence is absent.

For the reasons that I have just stated, and by the process of the inferences and presumptions that I have explained, it comes about that though every community has its own customs and usages to govern its actions, yet in regard to the administration of a mosque, the law enforced in British India relating to all Muslims is very nearly uniform. This uniformity can be infringed by evidence as to varying customs and usages.

Is there any evidence before me to rebut the presumptions and inferences I have derived? Though there is a great mass of affidavits, the vague and general statements on which Mr. Setalvad relies cannot effect such a rebuttal. Nor can I overlook that as regards the strict law of Islam, every school, every sect of Islam, has its texts giving authoritative expositions. None such have been produced. It would naturally be expected that such texts would be produced to show the original law by which this particular community was governed; and then there might be evidence of customs varying the effect of those texts. In order that the texts may be overridden by proof of customs and usages, the evidence must satisfy the Court that the majority at least of the given class of persons look upon the customary rule put forward as binding. This must be established by a series of well-known concordant and on the whole continuous instances, so that the common consent of the class in question is clearly demonstrated by the number of instances proved: Thibaut System des Pandekten Rechts, Vol. I, p. 15, cited in *Kojahs and Memons'* case[1] and *Kunhambi* v. *Kalanthar*.[2]

[1] (1847) Perry O. C. 110.

[2] (1914) 38 Mad. 1052 at p. 1063.

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The evidence before me does not make any attempt at satisfying these requirements. Nor is it clear to me whether it is contended that the principles for the administration of mosques suggested in the affidavits are intended to represent the effect of the texts of authority, or whether it is the case of the plaintiffs that their customs and usages have departed from their written texts.

Accordingly, though Mr. Setalvad is entitled to claim that what must guide me is primarily the practices, the beliefs, and the desires of the parties themselves, yet I cannot accept his further argument that the material he places before me can displace or outweigh the general considerations to which I have referred.

The affidavits are many and long. They are made by persons who may be described as being amongst the leading members of the community, at least so far as possession of wealth is a criterion. They are emphatic, I may say insistent. But on the essential points they are vague; they give no particulars, no instances; no authoritative texts are cited or produced. The common consent of the community to certain courses of conduct is sought to be demonstrated not by a series of instances of past conduct, but by bare statements made for the purposes of these proceedings: *Lachman Rai* v. *Akbar Khan*,[1] *Rahimatbai* v. *Hirbai*.[2] These statements are made by persons who hold positions of importance in the community and who consequently must have a natural bias to state as they do.

I shall be on much safer ground if I take guidance for determining the actual beliefs and practices of the community from the presumptions and general principles to which I have referred than from such affidavits.

Mr. Setalvad relied on *Sevak Kirpashankar* v. *Gopalrao*.[3] He drew my attention to clause 11 of the scheme adopted by

[1] (1877) 1 All. 440. [2] (1877) 3 Bom. 34.
[3] (1912) 15 Bom. L. R. 13, P. C.

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the Privy Council in that case. That clause he contended is a precedent to be followed. It is to this effect—

"The sevaks are the hereditary Pujaries and they alone are to provide for the worship and ceremonies of the Temple . . . They are entitled and are bound to perform the customary Seva at the Temple, and to receive the Prasad of the daily offerings and other food offerings offered . . . in accordance with the existing practice."

There is, however, great difficulty in introducing a similar clause in the present scheme. I put in the forefront the distinction between the requirements of the administration of a mosque and a temple. This distinction is brought about in the main by the fundamental simplicity of the forms of devotion laid down in Islam, by the emancipation from the need for the intervention of any established or ordained clergy or priestly class, and by the consequent absence of fetters on the administration of mosques. To a fuller consideration of this aspect of the matter I shall be brought by another argument addressed to me.

Moreover, in this case the scheme must conform to the terms of the decree of the appeal Court. There is no scope under that decree for setting up an authority independent of the trustees, as was done in the Dakore Temple case. There two sets of authorities were placed in power—the Dakore Temple Committee and the Sevaks. Again, in the Dakore Temple scheme the Sevaks were not only entitled, but were declared by the decree to be bound, to perform the customary Seva at the temple. In the present case, however, I am informed that the Mullaji Saheb is unwilling to undertake any liability upon himself. He does not wish to be appointed a trustee. He wishes me to place him in a position of authority without corresponding responsibility. Such a leonine office I have no power to create for him.

Nevertheless, in view of the evidence in this case, I suggested to the counsel that it might be provided that the Mullaji Saheb and his successors in office should have the sole right to regulate, in accordance with the tenets of the

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Dawoodi Bohra religion, the conduct of the religious services and prayers to be performed and offered at the mosque, and to appoint an Amil for officiating in the mosque. The Khadim is a menial officer, and has nothing to do with religious services or prayers: his appointment must, apart from the considerations to which I am now alluding, rest with the trustees.

My suggestion had to be dropped. The difficulty arose because the plaintiffs claimed that the authority which the Mullaji Saheb must exercise over the mosque must be plenary. In the first place it was claimed that he might regulate the congregational prayers entirely as he desired. In the second place by his authority any person or set of persons, even though they be persons who under the decree of the appeal Court have the right to the use of the mosque, may be prevented from either joining the congregational prayers as authorized and regulated by the Mullaji Saheb, or even from offering or conducting their own prayers in a form acceptable to themselves; and this notwithstanding that their prayers cause no interference with, or disturbance to, the congregational prayers held under his authority.

I put it to the plaintiffs' counsel, hypothetically, whether if on any occasion, the congregational prayers in accordance with the Mullaji Saheb's orders having already been held for one of the five prescribed prayers during the course of any day,—if thereafter half a dozen persons rightfully entered the mosque and one of them purported according to his own, it may be mistaken, notion to lead the prayers, would there be any objection to it? The learned counsel for the plaintiffs stated that this course would not be allowed.

This would mean that by means of the powers derived under a clause of the scheme (viz., that authorising the regulation of prayers), the main provision of the decree (that the mosque is for the benefit of the Dawoodi Bohras) would be violated.

It is very desirable, therefore, that a clause liable to bring about such a result should be avoided.

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I have been at pains to state that the authority sought to be exercised over the forms of devotions adopted in the mosque is sought to be imposed over Dawoodi Bohras, or to be more exact, over persons entitled under the decree of the appeal Court to enter the mosque and pray there. I do not overlook that 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 dedicated 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 Muhammadans are entitled to go and perform their devotions as of right according to their conscience: per Edge C. J. in *Ata-ullah* v. *Azim-ullah*.[1] The Privy Council in *Fazl Karim* v. *Maula Baksh*[2] have expressed no opinion upon the principle. 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. But the point does not arise in this case, since the question may be restricted to the rights of those whom the decree of the appeal Court entitles to pray in the mosque. It is not for me to consider whether every Muslim is entitled to the use of this mosque. All I have to consider is whether the rights of any Dawoodi Bohra (as laid down in the decree) would be unduly restricted, if the use of the mosque were subject to such restrictions as the plaintiffs desire.

In the course of the arguments Mr. Setalvad pressed another consideration. If the Court pronounces against the

[1] (1889) 12 All. 494, F. B., p. 501 (per Edge C. J.), pp. 504–505 (per Mahmood J.), where it is stated that a mosque cannot be appropriated exclusively to or by any particular sect or denomination of Muslims and that no portion of the community can prevent other Muslims from worshipping in it.

[2] (1891) 18 Cal. 448 at pp. 458, 459, P. C.

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inclusion of clause 5, the gentleman who has offered to maintain for the present the mosque and waqf properties, will, it seems, withdraw his offer. Mr. Chagla argued that this was disrespectful to the Court and was by way of a threat to force the Court to the decision desired by the plaintiffs. I think Mr. Setalvad was quite right in bringing this fact to my notice and was entitled to press his argument as he did. It would of course be very unfortunate, if, as a result of the trust being regulated in accordance with the law as I apprehend it to be, any religious minded persons of the community in question are deterred from supplementing the funds of the trust. But I presume that such persons would divert the stream of their charity to some other mosque, and not permit it, to be lost in the sands of resentment and discontent.

The general law of Islam in regard to devotions is so broad and liberal that the mosque in question will, even if not endowed with an Amil, be capable of furnishing for any devout Muslim (at least of the Dawoodi Bohra community) a place where he may—with or without the ministrations of an Amil or authorised leader of prayers—five times every day of his life offer prayers.

It will make the position clear, if I explain that the word "masjid" etymologically means a place where the head may be laid down in prostration (for prayer). It is not implied that the prostration may be made only in a masjid. The word does not connote any building. The books speak of an open space of building ground being consecrated as a masjid. Nor is it necessary for the purpose of consecrating a place or building as a masjid that there should be an Amil or any other religious officer appointed. It is better if there are such officers as an ordained Imam or Amil to lead the prayers, a Mu'azzin to call to prayers, a Khatib to pronounce the Khutba, a Khadim to sweep the mosque and keep it clean. Other officers or ministers may also be attached to

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a mosque. These offices or services or ministrations may be filled or rendered by a larger or smaller number of persons. But the appointment of any specific person for the performance of these or similar duties is not necessary. Nor do the obligatory prayers or other devotional acts even in the mosque demand at any time or on any occasion the lead or intervention of an Imam or Amil or other religious or priestly officer.

The authorities relating to the administration of masjids that have so far been placed before the Courts of British India do not specifically govern the Dawoodi Bohras. But the Dawoodi Bohras must, as I have already stated, show that their law differs from the general Muhammadan law if that be the fact; and as I have said, no texts have been produced, no evidence of custom or usage adduced, showing any variation. I will not refer in detail to the authorities that have so far been brought before the Courts, as there is no conflict or doubt in respect to the general law applicable to mosques. See *Fatawa Alamgiri*, Waqf. Ch. IX *init*; *Raddul-Muhtar* II, 572, cited in Amir Ali, I, 305; Baillie, I, 604, 605, 606; Hedaya, 230, 239, 240; Baillie, II, 219, 220; *Yakoob Ali* v. *Luchmun Dass*,[1] *Fazl Karim* v. *Mula Baksh*,[2] and *Kuttayan* v. *Mammanna Ravuthan*.[3]

It will be the duty of the trustees to make a respectful application to the Mullaji Saheb that he might nominate a duly authorised Amil to lead and regulate the congregational prayers. If for any reason those devout Dawoodi Bohras who attend this mosque are deprived of the opportunity of earning additional merit by joining in congregational prayers under the leadership of such an Amil, even then the mosque will not, as I have already explained, entirely fail of its primary purpose.

Adequate safeguards for the right of all members of the community to pray and offer devotions at the mosque are

[1] (1874) 6 N. W. P. 80. [2] (1891) 18 Cal. 448, P. C.
[3] (1911) 35 Mad. 681.

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far more important than a provision for the attendance of an Imam or Amil to lead congregational prayers. It is extremely important that the pristine simplicity and essential independence of forms of worship and methods of administering the affairs of a mosque should be maintained. The affidavits on which Mr. Setalvad invites me to base my decision would unsettle these fundamental principles. There is no ground for holding that the community has discarded the general Muhammadan law and adopted customs and usages demanding such a course to be followed.

Before I leave this clause, I should like to add that Mr. Setalvad during the whole of his argument desired that clause 5 should stand as originally drafted. The draft provides that the Mullaji Saheb shall be the sole Amin of the mosque. "Amin" is an Arabic word meaning in legal context a trustee. If the clause were allowed to stand in the scheme, it probably would have to be construed as meaning that the Mullaji Saheb is the sole trustee of the mosque property, and also has the right of regulating the worship and the prayers there. As I have already pointed out, this is a result that does not square with the plaintiffs' desire, and the Mullaji Saheb himself, I am told, declines to be a trustee.

For these reasons, in my opinion, clause 5 should be deleted from the scheme. A consequential amendment in clause 4 (which contains a reference to the original clause 5) is also necessary.

[His Lordship then dealt with the other clauses of the scheme which are not relevant to this report.]

Attorneys for plaintiffs Nos. 2 and 4 : Messrs. *Perreira, Amin & Fazalbhoy.*

Attorneys for defendants Nos. 1–4 : Messrs. *Chub, Gagrat & Ghasvala.*

Order accordingly.

B. K. D.

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