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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

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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.

[*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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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.

Mukerji, J.

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

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.

Mukerji, J.

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, 840. (2) (1924) 78 Indian Cases, 152.
(3) (1899) I.L.R., 23 Bom., 656.

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Mukerji, J.

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.

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.

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".

Sulaiman, C.J.

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.

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

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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.