

1930.

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KING-  
EMPERORRaza and  
Srivastava,  
JJ.

learned counsel. The cases of *Gajadhar Singh v. Kishan Jiwan Lal* (1) *Jowad Husain v. Gendan Singh* (2), and *Balmakund Marwari v. Basanta Kumari Dasi* (3) were referred to in that case. It was held in that case that where an appellate court has ordered restitution under section 144 of the Code of Civil Procedure, to a person who has been dispossessed under a decree, and an appeal against that order has been dismissed by the High Court, the period of limitation under Article 181 of the Limitation Act for an application for assessment of mesne profits by way of restitution, begins to run from the date of the order of the High Court.

The result is that the appeal fails and must be dismissed. Hence we dismiss the appeal with costs.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Mr. Justice A. G. P. Pullan.*

1930.  
November,  
8.

CHHUTKAO (JUDGMENT-DECREEE-APPELLANT) v. LATA .  
GAMBHIR MAL (DECREE-HOLDER-RESPONDENT).\*

*Muhammadan law—Waqf—User—Land described as takia for many years and used as burial ground—Presumption of waqf and inalienability—Civil Procedure Code (Act V of 1908), section 47(2)—Objection to sale by judgment-debtor of land used for burial of dead, maintainability of—Court's power to treat the objection as a suit.*

It is a well understood principle of the Muhammadan law that a *waqf* may be established by the evidence of user.

Where a plot of land is described as a *takia* and has been used for many years as a place for burial by Muhammadans whether they are members of one family or not a presumption arises that there is a *waqf* by user, and as such the land is inalienable. The distinction between a private and public *waqf* has no application in the case of land used for the burial

\*Execution of Decree Appeal No. 58 of 1930, against the decree of Babu Mahabir Prasad, Subordinate Judge of Lucknow, dated the 28th of May, 1930, reversing the decree of Babu Hiran Kumar Ghoshal, Munsif, South, Lucknow, dated the 1st of February, 1930.

(1) (1917) I.L.R., 39 All., 641. (2) (1926) I.L.R., 6 Pat., 24 F.C.  
(3) (1924) I.L.R., 3 Pat., 371.

of the dead. *Sajjad Ali Khan v. Jagmohan Das* (1), and *Abdul Ghafur v. Rahmat Ali* (2), relied on. *Abdul Ghafur v. Mahant Shiam Sundar Das* (3), dissented from.

Section 47(2) of the Code of Civil Procedure enacts that the court may treat a proceeding under this section as a suit and as such a Muhammadan interested in the burial of the dead on a plot of land is at liberty to bring a suit objecting to the sale of the property even though he be the judgment-debtor standing in the position of the original mortgagor and his objection may amount to challenging his predecessor's right to mortgage the property in the first instance.

Mr. *Haider Husain*, for the appellant.

Mr. *Ali Zaheer*, for the respondent.

PULLAN, J. :—Two points arise for decision in this appeal. The first is whether a certain plot mortgaged by one Maula Shah on the 2nd of March, 1914 to one Panna Lal is or is not inalienable under the Muhammadan law and the second is whether the son of Maula Shah can come forward and object to the sale of the property in execution of a decree obtained by the mortgagee against his father.

The plot in question has been found by the learned Subordinate Judge to be one in which dead bodies have all along been buried for a very long time. He has also found that the plot is a *takia* and in the year 1875 permission was given to Maula Shah to bury dead bodies in this *takia*. The learned Subordinate Judge has considered that although the plot should be held to be the subject of a *waqf*, the *waqf* is not public but private and he takes the view that a private *waqf* is alienable. There is no evidence in this case of the dedication of this land, but if it is a *takia* there is reason for presuming a dedication. Where a plot of land is described as a *takia* and has been used for many years as a place for burial by Muhammadans whether they are members of one family or not a presumption arises that there is a *waqf* by user. It is a well understood

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(1) (1927) 4 O.W.N., 320.

(2) (1930) 7 O.W.N., 382.

(3) (1912) 16 O.C., 76.

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principle of the Muhammadan law that a *waqf* may be established by the evidence of user. This has been made clear by Mr. Ameer Ali in his book on "Muhammadan Law," volume I, page 474, 4th edition, in which he quotes both from *Radd-ul-Mukhtar* and *Fatawai-Kazi-Khan*. The opinion of the learned commentator has been accepted by a Bench of this Court in *Sajjad Ali Khan v. Jagmohan Das* (1). The burial of the dead in a plot of land for a long period of years is proof of *waqf* by user. Indeed it is one of the strongest proofs.

As Mr. Ameer Ali observes at page 406 of the same volume "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-transferable". It is only where there are one or two bodies buried but the whole plot is not considered to be *maqbara* or burial ground that the actual places where the dead are buried are considered to be consecrated and the rest of the land may be alienated. In the present case a map has been prepared by a commissioner showing that this plot is 2 bighas 11 biswas in area and that there is a little cultivation on about 10 biswas and the rest of the plot is covered with graves. These graves number more than thirty and most of them are masonry tombs. This fact taken in conjunction with the fact that the whole land is described as *takia* and was so described so far back as 1875 is in my opinion sufficient to establish the plaintiff's claim that the land is inalienable *waqf*. The distinction between a private and public *waqf* has no application in the case of land used for the burial of the dead. It is unfortunate that the learned Subordinate Judge was led astray by the head-note of a case reported in *Abdul Ghafur v. Mahant Shiam Sundar Das* (2). The head-note certainly contains a statement that evidence showing that

(1) (1927) 4 O.W.N., 320.

(2) (1912) 16 O.C., 76.

the only persons buried in the cemetery were the members of the family of the alleged founder of the *waqf*, his friends and servants and any other person for whose internment permission was given by the *mutawalli* cannot be treated as proof of the fact that the graveyard is a public *waqf*. This heading does not refer to anything contained in the printed judgment. But even if this was the expression of opinion of the court, it appears to me that it only makes an unreal distinction between a public and a private graveyard and is no authority for finding that such a graveyard is alienable. Moreover in Muhammadan law land once used as a cemetery is always regarded as a cemetery unless for any reason it turns out to be unfit for use as such. As observed by a Judge of this Court in the case of *Abdul Ghafur v. Rahmat Ali* (1) once a *waqf* is established either by evidence of dedication or by evidence of user it is an essence of the *waqf* that it should be permanent. This also was a case in which the land had been proved by user to have become *waqf* for the purpose of burying the dead. In my opinion the distinction drawn by the learned Subordinate Judge between a public and a private graveyard is an unreal distinction and the land in suit is under the Muhammadan law inalienable.

The respondent however argues that it is not open to the judgment-debtor who stands in the position of the original mortgagor to object to the sale because by so doing he is challenging his predecessor's right to mortgage the property in the first instance. There would be more in the objection were it not that section 47, clause (2) of the Code of Civil Procedure enacts that the court may treat a proceeding under this section as a suit, and it appears to me that any Muhammadan interested in the burial of the dead on this plot was at liberty to bring a suit objecting to the sale of the property. The learned Subordinate Judge has attempted to place the objector in a dilemma by saying that this is

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either a private *waqf* or a public *waqf* and if it is a private *waqf* the property is transferable and if it is a public *waqf* it belongs to the public and an objection by a third person is not maintainable under section 47 of the Code of Civil Procedure. I have already shown that this property is inalienable and whether it belongs to the public or not there is no bar to the present objector filing a suit to contest the sale even if it be held that as a party he is debarred from making an objection under section 47 of the Code of Civil Procedure which challenges the right of the mortgagor to execute the mortgage on the basis of which the decree was obtained.

The court of first instance after remand allowed the objection. In my opinion that decision was right. I allow this appeal with costs, set aside the decree of the lower court and restore the decree of the court of first instance with costs throughout.

*Appeal allowed.*

### FULL BENCH.

*Before Mr. Justice Wazir Hasan, Chief Judge,  
Mr. Justice Muhammad Raza and Mr. Justice A. G. P. Pullan.*

1930.  
November,  
11.

BINDRA (PLAINTIFF-APPELLANT) v. MATHURA AND OTHERS  
(DEFENDANTS-RESPONDENTS) \*

*Hindu law—Succession—Death of separated brother who had reunited with father—Right of separated uterine brother to succeed.*

While the general rule of succession in a reunited family is by survivorship, an exception giving the preference to uterine brothers not reunited has been engrafted to the ordinary rule. Therefore a uterine brother succeeds to the estate of his brother even though the deceased brother was separate from him at the time of his death and was reunited with the father. *Samudrala Varaha Narasimha Charlu v. Samudrala Venkata Singamma* (1), relied on. *Basanta Kumar Singh v. Jogendra Nath* (2), referred to.

\*Section 12(2) Oudh Courts Act Appeal No. 3 of 1930, against the decree of the Hon'ble Mr. Justice Bisheshwar Nath Srivastava, Judge of the Chief Court of Oudh, Lucknow, dated the 27th of March, 1930, reversing the decree of Babu Fratap Shankar, Additional Subordinate Judge of Bahraich, dated the 29th of August, 1929.

(1) (1909) I.L.R., 33 Mad., 165.

(2) (1905) I.L.R., 33 Cal., 371.