APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

1934

February, 7

BAQAR KHAN AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* BABU RAGHOINDRA PRATAP SAHI, PLAINTIFF, AND OTHERS, DEFENDANTS (RESPONDENTS)*

Muhammadan law—Waqf—*Dedication by user*—*Grove not proved to be cemetery of defendants' family*—*Presumption of dedication, whether arises from mere burial of some dead of the family.*

Under the Muhammadan law a *waqf* is created by dedication, but if a piece of land is found to have been used as a graveyard for such a long time that no direct evidence of initial dedication can be available, dedication by user can be presumed in such cases.

Where the defendants fail to prove that the grove in suit was either the cemetery of their family or had been used as a family graveyard up to the time of the mutiny when their ancestors were proprietors of the village, but, on the contrary, the possession of the plaintiff taluqdar over the grove in dispute is satisfactorily established, no presumption of *waqf* by user arises from the mere fact that the defendants buried some of the dead of their family in the grove during the last 40 years. *Chhuthao* v. *Gambhir Mal* (1), and *Noor Mohammad* v. *Ballabh Das* (2), distinguished.

Mr. *P. N. Chaudhri*, for Mr. *Haider Husain*, for the appellants.

Mr. *K. P. Misra*, for the respondents.

SRIVASTAVA, J.:—This is a defendants' appeal against the decree dated the 31st of August, 1932, of the learned Subordinate Judge of Sultanpur reversing the decree dated the 15th of February, 1932, of the learned Munsif of Musafirkhana at Sultanpur. It arises out of a suit for a declaration that the defendants had no right to bury their dead in a grove No. 1604 old/1881 new, measuring 1 bigha 9 biswas situate in village Sarauli and also praying for an injunction that the defendants

*Second Civil Appeal No. 244 of 1932, against the decree of Pandit Kishan Lal Kaul, Subordinate Judge of Sultanpur, dated the 31st of August, 1932, reversing the decree of Saiyid Abid Raza, Munsif of Musafirkhana at Sultanpur, dated the 15th of February, 1932.

(1) (1930) I.L.R., 6 Luck., 152. (2) (1931) I.L.R., 7 Luck., 198.

should be restrained from burying their dead in the said grove in future.

The suit was contested on several grounds, one of them being that the land in dispute had acquired the character of a *waqf* by user.

The learned Subordinate Judge has found that the defendants' ancestors were the proprietors of village Sarauli up to the time of the mutiny when the village was confiscated and granted to the plaintiff taluqdar. He has also found that there existed in this grove 11 *kachcha* graves of members of the family of the defendants, the oldest of these being no more than 40 years old. He has further held that the defendants have failed to prove that the grove in suit was either the cemetery of their family or had been used as a family graveyard from the time when their ancestors were proprietors of the village. On the contrary, he has held that the possession of the plaintiff over the grove in dispute has been satisfactorily established. He has been selling the produce of the fruit trees on it and permitting the *riyayas* to take the wood of the other trees standing on the plot. The learned counsel for the defendants-appellants does not deny the ownership of the plaintiff in respect of the village or even in respect of the grove in suit. He has not challenged the finding that the plaintiff has been in possession of the trees, about 30 in number, which stand in the grove. The only contention urged on their behalf is that, on the finding of the lower court of their having buried the dead members of their family in the grove in suit during the last 40 years, it should be presumed that the grove had become *wakf* property by user. In my opinion there is no room for any such presumption in the face of the findings arrived at by the lower appellate court. Under the Muhammadan law a *waqf* is created by dedication, but if a piece of land is found to have been used as a graveyard for such a long time that no direct evidence of initial dedication can be available, dedication by user can be presumed

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in such cases. It is not suggested and it is hardly possible to suppose that the Hindu taluqdar who obtained this village under a grant from the British Government would have dedicated this grove for the purpose of a graveyard, more particularly when it is agreed that there are plots of land in the village known as *bari takia* and *choti takia* which are reserved for the burial of the Muhammadan residents of the village. As stated before the earliest burial made in this plot was about 40 years ago. The defendants have examined several persons who claim to be eye-witnesses to this first burial. It is not, therefore, possible to say that no direct evidence was available as regards the circumstances existing at the time when the first burial was made in the village. These witnesses did not suggest that the burial in question was made with the permission of the taluqdar or that any dedication of the grove was made by him at that time for the purpose of a graveyard. The fact that the taluqdar has been in possession of the grove is also inconsistent with the theory of dedication. The entries in the village papers show that the plot has all along been recorded as a grove. Taking all these facts and circumstances into consideration I think the learned Subordinate Judge is right in holding that no case has been made out for presuming that the grove has become a *waqf* by user.

Reliance has been placed on behalf of the appellants on two decisions of this Court, namely *Chhutkao* v. *Gambhir Mal* (1), and *Noor Mohammad* v. *Ballabh Das* (2). In my opinion both these cases are distinguishable. In the first of these cases, the land had been described as a *takia* and evidently had been used as a place of burial by Muhammadans for a very long time. In the second case also the land had been entered in Municipal papers as *takia* and had been recorded as a *qabaristan* at the first regular settlement.

(1) (1930) I.L.R., 6 Luck., 452. (2) (1931) I.L.R., 7 Luck., 198.

It was claimed that the land had been used as a graveyard from time immemorial.

The result, therefore, is that I can see no ground for interference and dismiss the appeal with costs.

Appeal dismissed.

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Before Mr. Justice E. M. Nanavutty

HAR GOVIND PRASAD AND OTHERS (DEFENDANTS-APPELLANTS) *v.* BABU AMBIKA DUTT RAM (PLAINTIFF-RESPONDENT)*

1934

February, 8

Transfer of Property Act (IV of 1882), section 41—Essential elements of section 41, Transfer of Property Act—Prior vendee in possession—Subsequent vendee merely inspects revenue records—Inquiry not made in the village—Subsequent vendee not protected by section 41—Burden of proof under section 41 is on transferee.

Section 41 of the Transfer of Property Act makes it necessary for the transferee to prove that his transferor was the ostensible owner *with the express or implied consent of the real owner*, that the transfer was made for consideration and that the transferee took reasonable care to ascertain the right of his transferor before he entered into the transaction and that he acted in good faith when he entered into that transaction.

Where, therefore, a person purchases property which the vendor had sold to another person long before who was in possession and the new purchaser merely inspects the revenue records but does not make any inquiry in the village in which the property lies he cannot be said to have taken reasonable care to ascertain the right of the transferor and when he fails to prove that his vendor was the ostensible owner with express or implied consent of the real owner the subsequent purchaser is not protected by section 41 of the Transfer of Property Act. *Mubarak-un-nissa Bibi* v. *Mohammad Raza Khan* (1), referred to.

The burden of proof is always on the transferee to show that he acted in good faith and that his transferor was the ostensible

*Second Civil Appeal No. 41 of 1933, against the decree of Babu Mahabir Prasad, Subordinate Judge of Lucknow, dated the 19th of November, 1932, reversing the decree of Babu Gulab Chand Srimal, Munsif of Havali, Lucknow, dated the 23rd of December, 1931.

(1) (1924) I.L.R., 46 All., 377.