APPELLATE CIVIL.

Before Syed Wazir Hasan, Chief Judge and Mr. Justice B. S. Kisch.

1931
March 18.

NOOR MOHAMMAD AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* BALLABH DAS AND OTHERS (DEFENDANTS-RESPONDENTS).*

Muhammadan law—Waqf—Graveyard—User of land as graveyard, if establishes dedication—Sale of land described in public documents as graveyard, validity of—Where one part of a continuous plot is covered with graves, whether the entire plot is to be deemed a graveyard—Takia, *meaning of.*

Held, that under Muhammadan law the user of a piece of land as a graveyard will establish dedication and the land thereby becomes *waqf* property. So the only method of proving dedication in the absence of a written document is the user of the land as a cemetery.

Where a plot of land is treated by the public authorities and described in public documents as a graveyard, though it is subsequently closed as such, it is a graveyard under Muhammadan law and the sale of such land is invalid.

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.

The word *takia* connotes a graveyard in the custody of an individual *faqir*. *Court of Wards for the property of Makhdum Khan Bakhsh* v. *Ilahi Bakhsh* (1) relied on. *Sajjad Ali Khan* v. *Jagmohan Das* (2); *Abdul Ghaffar* v. *Rahmat Ali* (3) and *Chhutkao* v. *Gambhir Lal* (4), referred to.

Messrs. *Ali Zaheer, S. Muhammad Husain, Muhammad Ayub Quraishi* and *Iftikhar Husain*, for the appellants.

Messrs. *Ram Bharose Lal* and *Anant Prasad Nigam*, for the respondents.

*Second Civil Appeal No. 217 of 1930, against the decree L. S. White, District Judge of Lucknow, dated the 1st of April, 1930, upholding the decree of Babu Bhagwat Prasad, Subordinate Judge, Mohanlaganj, Lucknow, dated the 23rd of December, 1929.

(1) (1912) L.R., 40 I.A., 18.
(2) (1927) 4 O.W.N., 320.
(3) (1930) 7 O.W.N., 382.
(4) (1930) 7 O.W.N., 1159.

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HASAN, C. J. and KISCH, J. :—This is the plaintiffs' appeal from the decree of the District Judge of Lucknow, dated the 1st of April, 1930, affirming the decree of the Subordinate Judge of the same place, dated the 23rd of December, 1929.

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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 Muhammadan community from time immemorial and that therefore its alienation by Musammat Musaheb Khanam, defendant No. 4 in favour of Ballabh Das defendant No. 1 under the deed of sale, dated the 1st of February, 1928, was invalid in law.

Both the lower courts have held that the plot in suit had not been proved to be dedicated as a 'public graveyard.' There is no finding that it is not a graveyard. 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 Muhammadan 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. Exhibit 1 is the map of Mohalla Begamganj prepared at the first regular settlement of the city of Lucknow in the year 1868 and exhibit 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 pacca graves are shown and their situation on all sides of the plot No. 108

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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 a further entry "*gosha utter 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. 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 establishes that he was merely a custodian of the graveyard. In *Court of Wards for the property of Makhdum Hassan Bakhsh* v. *Ilahi Bakhsh* (1) Lord MACNAGHTEN, in delivering the judgment of their Lordships of the Judicial Committee, made the following observations:—"In the ownership column Makhdum Hassan Bakhsh . . . is entered as 'owner.' It would seem that he was properly entered as owner, being trustee of the Saint Mai Pak Daman" 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

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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 MACNAGHTEN 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 Mussulman community, and that by user, if not by dedication, the land is *waqf*. 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 the land as an open graveyard for the Muhammadan community in Multan would be frustrated." This question would apply even to the facts of this case if we substitute "original owner" in place of the word "Government" and "Begamganj" in place of the word "Multan".

For the evidence as to the user the plaintiffs also rely upon exhibit 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 column 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 columns 10 and 11 relating to the former and present "occupants or owners" respectively we find the name of Kale Khan in column No. 10 and the name of Walayeti Khanam, daughter of Kale Khan, in column No. 11, describing the latter as the occupant of the "*takia*". The word *takia* connotes a graveyard in the custody of an individual *faqir*.

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

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from the judgments of those courts what distinction in law they would make between a "public" graveyard and a "graveyard" simpliciter. The rule of Muhammadan law is absolutely clear on this point. The user of a piece of land as a graveyard will establish dedication and the land thereby becomes *waqf* 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 Muhammadan Law, volume I, 4th edition, page 406.

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 the 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 Usuf and Muhammad. (Baillie's Digest of Muhammadan Law, Chapter 8, page 620.) The text in Baillie is founded on Fatawa Alamgiri, volume II, chapter 12, and Hedaya, volume II, Kitabul Waqf.

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* (1), a passage was quoted from Mr. Ameer Ali's Book, chapter 15, page 474, as a translation of a passage from Radd-ul-Mukhtar, volume III, page 645. We think that an extract of that passage should be reproduced in this

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judgment :—"A *waqf*, says the Rudd-ul-Mukhtar, may be established without any evidence of the *waqf's* 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." We are glad to find that the opinion which we are expressing on the proposition of the Muhammadan law involved in this case is shared by other members of this Court. See for instance the cases of *Abdul Ghaffar* v. *Rahmat Ali* (1) and *Chhutkao* v. *Gambhir Lal* (2).

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We accordingly allow this appeal, set aside the decrees of the courts below and decree the plaintiffs' suit with costs in all courts.

Appeal allowed.

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Before Mr. Justice Wazir Hasan, Chief Judge and Mr. Justice B. S. Kisch.

1931
March, 30.

KUNWAR SHAMBHU NATH BAKHSH SINGH (APPELLANT) *v.* PANDIT BALMAKUND DIKSHIT (RESPONDENT).*

Civil Procedure Code (Act V of 1908), section 51 and order XL, rule 1—Money decree providing for sale of immoveable property in default—Appointment of receiver—Court's discretion—Guiding principle—Saving of ownership of judgment-debtor in village hypothecated, if sufficient ground for appointment of receiver—Rule of English law—Applicability to courts in British India.

According to the provisions of section 51 of the Code of Civil Procedure, 1908, execution of a decree may be obtained by appointment of a receiver; yet the court is clearly invested by the same provisions with a discretion and the exercise of the discretion of allowing a decree to be executed by appointing a receiver is regulated by the provisions of order XL, rule 1 of the Code. It must be shown, in a case where the relief for the appointment of a receiver is asked for at the hands of the court seized with the execution proceedings in place of the relief provided for by the decree, that

*Execution of Decree Appeal No. 80 of 1930, against the order of Babu Gopendra Bhushan Chatterji, Subordinate Judge of Rae Bareli, dated the 28th of October, 1930.

(1) (1930) 7 O.W.N., 382. (2) (1930) 7 O.W.N., 1159.