

an adjournment by taking their stand on a technical interpretation of the provisions of order XLVII, rule 1 of the Code of Civil Procedure. We have no sympathy with the appellants' contentions, which are altogether without merit. We accordingly dismiss the appeal with costs.

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NATHU SAH

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

EHSAN BEG AND ANOTHER (PLAINTIFFS-APPELLANTS) v. RAHMAT ALI AND OTHERS (DEFENDANTS-RESPONDENTS)*

1934
October, 9

Mohammedan Law—Waqf—Cypress, doctrine of—Cemetery closed for burial—Private individual constructing house on it and making waqf of it—Waqf, whether valid—Material of house, whether constitutes waqf—Person not owning property, whether can make a waqf of it—Specific Relief Act (1 of 1877), section 56—Injunction—Suit for injunction to stay proceedings in a Court not subordinate to the Court from which injunction is sought, maintainability of.

A person who is not owner of any particular property cannot make a *waqf* of it.

A person has no right whatever to build a house on a portion of a public cemetery. *Abdul Ghafoor v. Rahmat Ali (1)*, referred to.

Where a person builds a house on a portion of a public graveyard which had been closed by order of the Municipal Board and then makes a *waqf* of it and appoints *mutawallis*, the materials of the house only will constitute a *waqf* and can be made use of for the purposes of the *waqf* as the *mutawallis* think best, but the house, having been built on *waqf* property without any right or power, cannot be allowed to remain standing even as a source of income for the cemetery *waqf* as in the first place, it is quite within the range of possibility that the cemetery may at some future time be again used for purposes of burial, and in the second, a construction which is in its inception illegal cannot be allowed to remain standing in contravention of the original purposes of the *waqf*.

*Second Civil Appeal No. 249 of 1933, against the decree of Dr. Ch. Abdul Azim Siddiqi, Additional Subordinate Judge of Lucknow, dated the 31st of July, 1933, confirming the decree of Babu Gulab Chand Srimal, Munsif (South), Lucknow, dated the 31st of March, 1933.

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

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EHSAN BEG
v
RAHIMAT ALI

A suit for perpetual injunction seeking to stay proceedings in a court not subordinate to the Court from which the injunction is sought is barred by clause (b) of section 56 of the Specific Relief Act.

Mr. *Ramapat Ram*, for the appellants.

Messrs. *M. H. Kidwai* and *E. R. Kidwai*, for the respondents.

ZIAUL HASAN, J.:—This is a second appeal against a decree of the learned Additional Subordinate Judge of Lucknow, dated the 31st of July, 1933.

The suit of the plaintiffs-appellants related to a graveyard within the Municipal limits of Lucknow. It appears that the graveyard was closed by order of the Municipal Board many years ago. One Abdul Ghafoor began to build a house in a portion of the graveyard in 1929 and the present defendants-respondents brought a suit as representatives of the Muslim community for a declaration that the cemetery was public. This declaration was granted and the decree was affirmed by this Court. As by this decree the respondents could not get the house built by Abdul Ghafoor demolished, they had to bring a suit for its demolition. This suit was decreed both by the Munsif and by the Subordinate Judge in appeal. After this Abdul Ghafoor made a *wagf* of the house and appointed Ehsan Beg, plaintiff-appellant No 1 *mutwalli*. When the respondents tried to put the decree for demolition of the house into execution, the present plaintiffs-appellants who claimed to have been appointed as *mutwallis* of the cemetery by the mohalla people, brought an objection against the execution but their objection was dismissed. Thereupon they filed the suit from which this appeal has arisen for a perpetual injunction restraining the defendants-respondents from executing their decree by demolition of the house.

The suit was dismissed by the trial Court and the appeal filed by the plaintiffs was dismissed by the Subordinate Judge.

The plaintiffs have brought this second appeal. Their learned counsel has advanced various arguments

in support of the contention that the house should be allowed to stand but in my opinion none of them has any force. The cemetery in question has been held to be a public cemetery—*vide Abdul Ghafoor v. Rahmat Ali* (1) and Abdul Ghafoor had no right whatever to build a house on a portion of it. It was said that he had made the house *waqf* but I do not see how a person who is not owner of any particular property can make a *waqf* of it. The materials of the house will no doubt constitute a *waqf* and they can be made use of for the purposes of the *waqf* as the plaintiffs-appellants think best. The house, having been built on *waqf* property without any right or power on the part of Abdul Ghafoor, cannot be allowed to remain standing. It was said that the cemetery having been closed for use as such by the Municipality, the house might be allowed to stand at least as a source of income for the cemetery *waqf*; but, in the first place, it is quite within the range of possibility that the cemetery may at some future time be again used for purposes of burial, and in the second, a construction which is in its inception illegal cannot in my opinion be allowed to remain standing in contravention of the original purposes of the *waqf*. An argument similar to that made here appears to have been put forward in the previous case between the present respondents and Abdul Ghafoor (1) but the Hon'ble Judge who decided the appeal disposed of it by quoting the following passage from Baillie's Digest of Mohamedan Law:

“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.” (*Vide* page 385).

This disposes of the cypress doctrine so much stressed by the learned counsel for the appellants.

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

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There is another reason why the suit of the plaintiffs-appellants cannot succeed; it is that it is barred by clause (b) of section 56 of the Specific Relief Act as it seeks to stay proceedings in a Court not subordinate to the Court from which the injunction is sought.

The appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

1934
 November 15

ABDUL HAMID KHAN (PLAINTIFF-APPELLANT) v. PIARE MIRZA AND ANOTHER (DEFENDANTS-RESPONDENTS)*

Mohammedan Law—Inheritance—Shia Mohammedan dying leaving childless widow and no other heirs—Widow entitled not only to one-fourth share but gets remainder by the doctrine of “return”.

In the absence of all other heirs a childless Shia widow is entitled to not only a one-fourth share in the movables but gets the remainder of her husband's property also by the doctrine of “return”. *Mohammad Arshad Chowdhari v. Sajida Begum*, (1), *Khursaidi Begum v. Secretary of State for India in Council* (2), *Bafatun v. Bilati Khanum* (3), and *Collector of Masulipatam v. Cavalry Vencata Narrainpah* (4), referred to.

Messrs. *Har Dhan Chandra, Ram Nath, Ghulam Hasnain Naqvi* and *Taashuq Mirza*, for the appellant
 Mr. *Moti Lal Tilhari*, for the respondents.

NANAVUTTY and ZIAUL HASAN, JJ.:—This second appeal raises an important question of Mohammedan Law applicable to Shias. It arises out of a suit brought by the plaintiff-appellant against the respondents and one Khurshed Husain for possession of a house situate in Gannewali Gali, Mohalla Aminabad, in the city of Lucknow, and for mesne profits.

*Second Civil Appeal No. 19 of 1933, against the decree of Pandit Brij Kishan Topa, Subordinate Judge of Malihabad at Lucknow, dated the 5th of December, 1932, upholding the decree of Babu Hiran Kumar Ghoshal, Munsif South, Lucknow.

(1) (1876) I.L.R., 3 Cal., 702.

(2) (1926) I.L.R., 5 Pat., 539.

(3) (1903) I.L.R., 30 Cal., 683.

(4) (1860) 8 M.I.A., 500.