by adverse possession. Moreover, this plea of adverse possession is a mixed question of law and fact, and if the plaintiff wanted to base her title on it, she should have specifically advanced this plea in the first Court and an issue would have been framed and a finding given. As it is, no issue was framed by the trial Court on this plea of adverse possession, and no evidence was given as to the alleged ouster of Musammat Nasiban and Musammat Mashiran. In these circumstances the plea of adverse possession is untenable and cannot be entertained.

I come next to discuss the plea of *res judicata*. To my mind there is no force in this contention also. The parties to the present suit were not the same as those in exhibit 16 which is relied upon by the plaintiff-appellant, nor are they litigating under the same title. The plea of *res judicata* was not urged in the trial Court and no issue was framed, nor was this plea advanced by the plaintiff-appellant before the learned Subordinate Judge when he disposed of the appeals of the defendants. In my opinion there is no force in this plea of *res judicata*.

For the reasons given above these appeals fail and are dismissed, with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

HAJI AHMAD ASHRAF AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* SHAH MURTAZA ASHRAF AND OTHERS (DEFENDANTS-RESPONDENTS)*

1935 *February*, 22

Mohamedan Law—Waqf—*Gift to spiritual guide—No proof of* waqf *of property—Income used for purposes of shrine—Property, whether* waqf—"*Wala*", *meaning of—Property described as* Wala, *whether* waqf.

*First Civil Appeal No. 61 of 1932, against the decree of Babu Shiva Charan, Subordinate Judge of Fyzabad, dated the 28th of July, 1932.

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A present in the nature of a personal gift to a spiritual guide cannot be assumed to be a *waqf* and where there is nothing to prove that the property in question was ever made *waqf* or set apart in perpetuity for any pious object by anybody, evidence of the mere fact that the income of the property has long been used for purposes of the shrine is not sufficient to prove the *waqf* nature of the property. *Piran* v. *Abdool Karim* (1), *Shah Mohammad Naim Ata* v. *Mohammad Shamsh-ud-din* (2), and *Jewun Doss Sahoo* v. *Shah Kubeer-ood-Deen* (3), distinguished. *Abdul Ghafur* v. *Mahant Shiam Sundar Das* (4), *Kunwar Durga Nath Roy* v. *Ram Chander Sen* (5), and *Fakhr-ud-din Shah* v. *Kifayat-ul-Lah* (6), relied on. *Wajih-ud-din Ashraf* v. *Murtaza Ashraf* (7), and *Habib Ashraf* v. *Syed Wajih-ud-din* (8), referred to.

Word "Wala" or "Wila" is a term applied under the Mahomedan law to a particular kind of inheritance but it does not refer to *waqf*. Therefore the use of the word "wala" in a document cannot be taken as referring to a *waqf*.

Messrs. *A. M. Khwaja, Mohammad Ayub, Siraj Husain, Ajit Prasad, Faiyaz Ali* and *Ali Hasan*, for the appellants.

Messrs. *M. Wasim, Hyder Husain, P. N. Chaudhri* and *Akhtar Husain*, for the respondents.

SRIVASTAVA and ZIAUL HASAN, JJ.:—In the village of Rasulpur Dargah, Pargana Birhar, Tahsil Tanda in the Fyzabad District, there is the tomb of a Muslim saint Shah Makhdoom Syed Ashraf Jahangir, popularly known as Makhdoom Saheb, who is said to have lived for one hundred and twenty years and died in the year 1390 of the Christian era. The *urs* or death anniversary of the saint is held every year for several days in the month of Muhurram and a fair is also held annually in the month of Aghan.

The Makhdoom Saheb was originally king of Samnan in Persia. He abdicated in favour of his brother and travelled in India where he became the disciple of a spiritual leader of Bengal. He remained a celibate

(1) (1891) I.L.R., 19 Cal., 203.
(2) (1926) I.L.R., 2 Luck., 109.
(3) (1840) 2 M.I.A., 390.
(4) (1912) 16 O.C., 76.
(5) (1876) I.L.R., 2 Cal., 341.
(6) (1910) 7 A.L.J., 1095.
(7) (1929) 6 O.W.N., 891.
(8) (1933) 10 O.W.N., 214.

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throughout his life but adopted his sister's son, Shah Abdul Razzak, whom he had brought with him from Persia and Shah Abdul Razzak appears to have succeeded him not only as his disciple but also as an heir.

The suit out of which this appeal has arisen was brought by the plaintiffs as a representative suit on behalf of the Muslim public against the defendants who are all descendants of Shah Abdul Razzak for possession of certain shares in the villages of Rasulpur Dargah and Kachhaucha and for a declaration that the rest of patti Niamat Ashraf in Rasulpur Dargah and in Kachhaucha are *waqf* appertaining to the shrine of the Makhdoom Saheb and not the personal property of the defendants. It was also prayed that it be declared that the *charhawa* or offerings received at the *urs* and the *jarob kashi* charges, levied from the shopkeepers in the fair, are also *waqf* for the purposes of the *dargah* or shrine.

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Most of the defendants contested the suit and it was dismissed by the Court below, the learned Subordinate Judge of Fyzabad, who held that it was not proved that the property in dispute was *waqf* property.

The plaintiffs have filed this appeal against the judgment of the learned Subordinate Judge but before we proceed to consider the evidence adduced by them in support of their claim, it is necessary that reference be briefly made to the history of the Makhdoom Saheb and his family and of the property that was acquired by them in the district of Fyzabad.

In Mr. A. F. Millet's report on the settlement of the Fyzabad District, we find the following:

"*The Sayyids of Rasulpur*—It is popularly believed that Shah Makhdoom Sayyid Ashraf Jahangir was one of the first Musalmans who settled in these parts. He was the son of Ibrahim, king of Ispahan, Khorasan, and had the seat of his government at Samnan, Sestan, a province of Persia. On the death of his father he succeeded him on the throne at the early age of 15, and after reigning for seven years, he determined to devote the remainder

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of his days to the service of religion; and in this view he abdicated in favour of his younger brother, Muhammad Shah. He then assumed the pilgrim's garb and travelled through Hindustan. In the course of his wanderings he fell in with the renowned Shah Ala-ul-haq of Pandua, the Mahomedan capital of Bengal, at the end of the 13th and first half of the 14th century, a man of profound sanctity, whose pupil, for a period of twelve years, he then became, and from whom, as a mark of his appreciation, he received the last of his honorary titles, viz., Jahangir . . .

"Makhdum Ashraf was after a time deputed to propagate the faith of Islam in Upper India. A spot was indicated to him which he was to recognize from description, and there he was to dwell and erect his tomb . . . This he soon found in the spot where his tomb still stands, and the surrounding country he discovered to be in the possession of one Darpan Nath, a pandit of unlimited fame, who was then at the head of a gathering of five hundred jogis or pupils . . .

"The meeting of these men of opposing creed is said to have been followed by a prolonged struggle for mental superiority, the aid of witchcraft and sorcery and every other black art being freely resorted to on either side; and this great theological duel at last eventuated in the complete subversion of the idolatrous belief, and the conversion of the pandit to the faith of the Prophet. He then took the name of Kamal-ud-din, and his tomb is still pointed out near that of his vanquisher as that of 'Kamal Pandit'.

"The spot on which Makhdum Ashraf's tomb now stands he selected for his residence, giving it the name of Ruhabad. Here he ended his days in the hundred and twentieth year of his age, A. D. 1390 . . .

"Makhdum Ashraf was succeeded by his nephew already named, Haji Abdul Razaq, who changed the name of the family residence to Rasulpur and added largely to the place . . . Three generations of the Haji's

descendants continued to live in Rasulpur, and then Shah Jafar, the fourth in descent having expelled one Rakamdin, the local Rajbhar chief, from the neighbouring village of Kachhoucha, took possession of it, while his younger brother, Shah Muhammad founded the hamlet which adjoins it on the west, to which he gave the name of Ashrafpur. Thenceforth the town was known as Ashrafpur-Kachhoucha, which name it still retains.

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"At a subsequent period a member of the family, Shah Ali Makhdum, also established himself in the neighbourhood. It is said that, being thirsty he drew water from a well, and having drunk thereof, he was heard to remark '*Bas, khari,*' or in other words, 'enough, it is brackish'; and from that hour the name of the town that still exists there has been Baskhari.

"The fame of Makhdum Ashraf and of Abdul Razak and his descendants, inhabiting Kachhoucha and Baskhari, soon spread far and wide; and rent free grants were from time to time made for the support of themselves and their establishment by Jahangir, Shah Jahan and Aurangzeb, emperors of Delhi, the title deeds of which I have examined. These grants were recognized until the death of Asaf-ud-daula, but in the reign of his successor Saddat Ali, ten-sixteenths of them were resumed, and in later years the remaining aima lands of the family also disappeared under the usurpations of the chiefs of different clans that then overran the neighbourhood. We now find the descendants of Abdul Razak recorded at the revised settlement as proprietors of three villages only of Baskhari, Ashrafpur-Kachhoucha and Rasulpur, in which latter is the shrine of the great saint himself, of which more will be said when treating of fairs and shrines."

With regard to the village of Rasulpur, we have a still more definite account in the statement of proprietors or *ikrar malikan* verified in 1872 before the settlement

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Court (*vide* exhibit A3, page 119 of the paper book). Therein it is said:

"About four hundred years ago, Syed Makhdum Ashraf Jahangir who was the king of Samnan, having given up his kingdom, became an ascetic and in the course of his travels arrived at this place. He liked the climate of this place very much. Darpan Nath Jogi who was well versed in the art of magic was in possession of this land. This said magician having embraced Islam became a disciple of the said Hazrat and offered his property to his *murshid* (spiritual guide). This place was all covered up with jungle at that time. The said ancestor having cut down the jungle, populated this village and named it Rasulpur after the name of his common ancestor . . ."

We have thus a fairly authentic account of how the villages in question came into the possession of Shah Abdul Razzak and his descendants. Towards the end of the eighteenth century of the Christian era, the *sajjada nashin* of the shrine was one Shah Niamat Ashraf. He had three sons, namely, Shah Yahiya Ashraf, Shah Maksud Ashraf and Shah Zakariya Ashraf. In 1799 Shah Niamat Ashraf executed a deed (exhibit 25, page 12) by which he divided all his property among his three sons and appointed his youngest son Zakariya Ashraf as his successor to the office of *sajjada nashin*. This deed was executed on the 15th Rabi-us-sani 1214 A. H. Ten years later, however, Shah Zakariya Ashraf made over the office of *sajjada nashin* to his eldest brother. Shah Yahiya Ashraf by an agreement, dated 17th Zilhij 1224 A. H. (exhibit 7, page 19). Since then upto this day, the office of *sajjada nashin* has been held by the descendants of Yahiya Ashraf, the present *sajjada nashin* being Shah Wajihuddin Ashraf, defendant No. 34. A dispute that appears to have arisen among the descendants of Shah Niamat Ashraf about the year 1840 was settled by an award of arbitrators (exhibit 20, page 21) who held that "except the holy cloak, *sajjada nashini* and the

expenses connected with the *khankah* which is the right of the *sajjada nashin*, any extent of property which has all along been chiefly in the proprietorship of Shah Niamat Ashraf, deceased, the common ancestor, should be distributed equally in three shares among the sons and grandsons of Shah Yahia Ashraf, Maksud Ashraf and Zakariya Ashraf." In 1859 the descendants of Shah Niamat Ashraf including the then *sajjada nashin*, Shah Majiduddin Ashraf entered into an agreement by which it was provided that Shah Majiduddin Ashraf, Badruddin Ashraf and Himayat Ashraf should remain in possession of five annas four pies share of Mohal Baskhari. Shah Mahmud Ashraf, in that of five annas four pies and Abdul Karim, Abdul Rahim and Nazir Ashraf in that of the remaining five annas four pies share. It may be mentioned that while the first three named represent the branch of Shah Yahiya Ashraf, Mahmud Ashraf was the son of Niamat Ashraf's second son Maksud Ashraf and Abdul Karim, Abdul Rahim and Nazir Ashraf were the descendants of the third son Zakariya Ashraf (*vide* pedigree given at page 154 of the paper book). The agreement further provided "that the portion, according to the old practice, set apart from before and even now, for the expenses of the *urs*, the jagir of Mujawars and others, the expenses of visitors, at Kachhaucha and Dargah, shall remain in the hands of the *sajjada nashin*, which he should spend on the *urs* and the shrine and in case of misappropriation and non-appropriation to said expenditure, we, the executants and our heirs, have the power to effect a partition in proportion to shares." This agreement is dated the 30th of September, 1859, and is exhibit A1 (page 29). Three months later, that is, on the 31st of December, 1859, the *sajjada nashin* and the other executants of the previous agreement entered into a fresh agreement (exhibit A2, page 38) as it was considered that the agreement of the 30th of September, 1859, was vague in its terms. By this agreement it was provided that—

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"half the lands, cultivated and uncultivated situate at the holy shrine, inclusive of all jagir lands of the Mujawars, the mendicants and all faqirs which is maintained up to this time, and a fourth, i.e. four anna share out of sixteen anna items of offerings at the shrine and also those made by the disciples and well disposed of all kinds, both high and low, and all the *jarob kashi* items shall remain in the hands of one of the executants, Shah Majiduddin Ashraf, the *sajjada nashin* for the purposes of expenses relating to visitors and the expenditure connected with the shrine and the *urs* on condition that in case of proof of misappropriation, other executants and their heirs have the power to divide the same in proportion to ancestral shares and that the other half of the lands culturable and non-culturable, situate at the holy shrine, 'tapki', 'sair', etc., with all rights according to inheritance from ancestors among all the executants with this detail that one-third shall be taken by Majiduddin Ashraf, Badaruddin Ashraf and Himayat Ashraf, the second one-third by Shah Mahmud Ashraf and the remaining one-third by Abdul Karim, Nazir Ashraf and Abdur Rahim, more or less in proportion to their respective shares . . ."

In 1926 Shah Murtaza Ashraf, Shah Tufail Ahmad and Shah Sayeed Ahmad, defendants 1 to 3 respectively filed a suit (No. 46 of 1926) for recovery of possession of their shares of the property on the allegation that the present *sajjada nashin* was not applying the income of the reserved half of the property to the *urs* and that consequently they were entitled under the agreement of the 31st of December, 1859, to get their share of the property from him. The suit was contested by the *sajjada nashin* on the ground that the property was *waqf* and was dismissed by the trial court, the Subordinate Judge of Fyzabad. In appeal, however, the learned District Judge reversed the decree of the trial court and decreed the suit and the decree of the District Judge was

upheld by this Court. The judgment of this Court is reported in *Wajihuddin Ashraf* v. *Murtaza Ashraf* (1).

In 1929, defendants 15, 22, 25, 26, 27 and some others brought a similar suit against the *sajjada nashin* for their shares of the property and that suit was eventually decreed by this Court during the pendency of the present suit (*vide Habib Ashraf* v. *Syed Wajihuddin* (2). As defendants 1 to 3 have obtained possession of the shares decreed in their favour, the plaintiffs in the present suit pray for possession of those shares. The question for determination in this appeal is whether the property in dispute, namely, patti Niamat Ashraf of village Rasulpur Dargah and patti Niamat Ashraf of village Kachhaucha and the *charhawa* and *jarob kashi* are *waqf* or not.

The learned counsel for the plaintiffs frankly conceded at the very outset that he could not refer us to any instrument by which the property in question should have been made *waqf* by any person. He however relied on various documents and on the oral evidence of plaintiffs' witnesses in support of the plaintiffs' allegations. We have heard the arguments in this case at great length and considered every piece of evidence referred to on behalf of the appellants but are unable to hold that the alleged *waqf* has been proved. On the other hand there is ample evidence of the fact that the villages of Kachchaucha, Rasulpur and Baskhari were always treated by the descendants of Abdul Razzak as their personal property. In the partition deed of 15th Rabi-us-sani 1214 A. H. (exhibit 25) Shah Niamat Ashraf himself describes the property dealt with therein as "owned and possessed by me which are in my proprietary possession and enjoyment", and there is nothing in our judgment in this document which would show that the executant was referring to any *waqf* property. Much stress was laid on the word *'wala'* occurring in the phrase *"min haisush shira wal wala"* occurring in this document, but while *'wala'* is a term applied under the Mahomedan

(1) (1929) 6 O.W.N., 891. (2) (1933) 10 O.W.N., 214.

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law to a particular kind of inheritance, we have not been referred to any authority in support of the proposition that this word (or even '*wila*', if it be so read) refers to *waqf*

Then again the agreements of September and December, 1859, treat the property in the family as personal property and not as *waqf* property. The fact that a portion of the property and of *charhawa* and *jarob kashi* were set apart in the later agreement of December 31, 1859, for expenses of the dargah was made the basis of an argument that the executants of the agreements were thereby acknowledging a pre-existing *waqf*. We are unable to accept this argument. The provision referred to was to our mind no more than an arrangement arrived at between the descendants of Shah Niamat Ashraf for upkeep and proper management of the shrine and the fair from which they derived an income. Moreover the very fact that the terms of the 2 agreements differ shows that the executants of those agreements were not giving effect to any pre-existing *waqf* but were making arrangements that appeared to them to be suitable for carrying on the *urs* and the fair. This view is further strengthened by the provision in both these agreements about their right to partition the property set apart for the expenses of the dargah in case of any malfeasance or misfeasance on the part of the *sajjada nashin*.

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Further, from the history of how the villages of Rasulpur and Kachchaucha came into the possession of this family which we have given above, it is clear that while Rasulpur was made a present of to the Makhdoom Saheb by Darpannath, known afterwards as Kamal Shah, Kachhaucha was taken possession of by a branch of Haji Abdul Razzak's descendants after driving out the local Rajbhar chief. The present by Kamal Shah must be taken to be in the nature of a personal gift to his spiritual guide and cannot be assumed to be a *waqf*.

Reliance was placed on behalf of the plaintiffs on certain documents on the record, e.g., exhibit 1 (page 1)

exhibit 4 (page 3), exhibit 51/P. W. 1 (page 7), exhibit 52/P. W. 1 (page 6), exhibit 55/P. W. 2 (page 11) and exhibit 59/P. W. 2 (page 8) as showing that some lands were granted to the descendants of Shah Abdul Razzak by the emperors of Delhi but none of these documents relates to the villages of Rasulpur and Kachhaucha which are in question in this suit.

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It was also argued that if the *sajjada nashins* lost some of the *waqf* property, they were liable to make good the loss out of the villages in question, even if those villages be considered to be their personal property and texts were quoted from Kitab-ul-Asaf fi Ahkam-ul-Auqaf in support of this proposition, but in the first place all the documents relied on by the plaintiffs and referred to above show that the grants to different descendants of Shah Abdul Razzak were personal and not in the nature of *waqf*, and, in the second, there is absolutely no evidence to show that any property was wasted or lost through the negligence or misconduct of any of the *sajjada nashins*. The plaintiffs themselves in paragraph 3 of their plaint state that "Nawab Saadat Ali Khan during his rule confiscated a major portion out of the abovementioned grants made by way of a *waqf*. The leaders of different tribes attacked some villages and lands during the misrule of the Oudh kings and usurped them. Eventually at the time when the British rule commenced in the province of Oudh, only villages Rasulpur Dargah, Kachhaucha and Baskhari were left as muafis by way of a *waqf* appertaining to the shrine of Hazrat Makhdoom Saheb while the rest of the villages had gone out of the possession and occupation of the *sajjada nashins* of the shrine." There is not a word in the plaint to show that any of the properties was lost by the *sajjada nashin* through misconduct.

The learned counsel for the plaintiffs relied on the case of *Piran* v. *Abdool Karim* (1) which lays down that the use of the word *'waqf'* is not necessary to constitute

(1) (1891) I.L.R., 19 Cal., 203.

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a *waqf* and that so long as it appears that the intention of the donor is to set apart any specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object recognized as pious by Mahomedan law, it amounts to a valid and binding dedication. In the present case, however, we have shown that there is nothing to prove that the property in question was ever made *waqf* or set apart in perpetuity for any pious object by anybody. The case of *Shah Mohammad Naim Ata* v. *Mohammad Shamshuddin* (1) is also not in point as there is nothing in the present case to show that the property in question was given to the *sajjada nashin* of the *khankah* for the upkeep of the buildings and the school connected therewith. Nor does the case of *Jewun Doss Sahoo* v. *Shah Kubeer-ood-Deen* (2) help the plaintiffs as there is nothing in the present case to bear out the plaintiffs' allegation about the *waqf* nature of the property. On the other hand, in the case of *Abdul Ghafur* v. *Mahant Shiam Sundar Das* (3), MR. LINDSAY and MR. STUART held, following the Privy Council case of *Kunwar Durga Nath Roy* v. *Ram Chander Sen* (4) that the mere fact that the income arising out of the property in suit had been appropriated for the upkeep of a mosque was not sufficient proof that it was endowed property. Similarly, a Bench of the Allahabad High Court held in the case of *Fakhr-ud-Din Shah* v. *Kifayat-ullah* (5) that where the finding is that there was an arrangement by which the property was put under the management of the family with a view to the application of the income in the *urs* and *fatiha* ceremonies at the tomb of the original owner, an oral dedication could not be inferred and the property could not be said to be *waqf* property.

We are therefore of opinion that so far as the documentary evidence goes, it does not bear out the plaintiffs' case that the property in suit is *waqf* either by dedication

(1) (1926) I.L.R., 2 Luck., 109. (2) (1840) 2 M.I.A., 390.
(3) (1912) 16 O.C., 76. (4) (1876) I.L.R., 2 Cal., 341.
(5) (1910) 7 A.L.J., 1095.

or by user. We see no reason to come to a finding other than that at which two Benches of this Court arrived in the cases of 1926 and 1929.

As regards the oral evidence, the plaintiffs have no doubt produced a large number of witnesses some of whom include descendants of Shah Niamat Ashraf and others, officials and members of the public but oral evidence in a case of this kind is of little help. None of the witnesses can say that the property in suit was made *waqf* in his presence and the utmost that the witnesses have said is that the income of the property has long been used for purposes of the shrine but as already noted this is not sufficient to prove the *waqf* nature of the property.

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So far as *charhawa* or offerings at the shrine is concerned, we find the following on page 30 of the book Lataif-i-Ashrafi referred to by Mr. Millet in paragraph 546 of his report on the settlement of the Fyzabad district. This book is exhibit 49 in the case:

"Wa agar qabr pir bashad futuhe zar dar inja nehad badohu ba makhdum zadagan berasanad."

This clearly shows that offerings made at a tomb are intended for the descendants of the saint whose tomb it is.

For the above reasons, we are in agreement with the finding of the learned Subordinate Judge and dismiss this appeal with costs.

Appeal dismissed.