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and on no other evidence. However this may be, it is reasonable to hold that these debts have been satisfied from the usufruct enjoyed by the defendants up to the year 1926, and no case arises for granting them an equitable relief in respect of these amounts. The result is that this appeal must be allowed and the plaintiff's suit must be decreed. The mokarrari is set aside, and the plaintiff is entitled to recover possession of the property in suit with costs throughout.

AGARWALA, J.—I agree.

S. A. K.

Appeal allowed.

APPELLATE CIVIL.

Before Agarwala and Madan, JJ.

1937.

March 1, 2.
April, 2.

SHEIKH AMIRUDDIN

v.

SONELAL JHA.*

Ghairmazrua am land—landlord, whether can settle.

A landlord has no right to settle ghairmazrua am land even if the settlement does not interfere with the rights of the public.

Muhammad Waliul Haq v. *Ludpud Upadhya*(1), followed.

Ram Das Sah v. *Damodar Prasad*(2), not followed.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Madan, J.

* Appeal from Appellate Decree no. 894 of 1934, from a decision of Babu Sachindra Nath Ganguli, Subordinate Judge of Darbhanga, dated the 7th February, 1934, reversing a decision of Babu Satya Narayan Chaudhuri, Munsif of Darbhanga, dated the 6th June, 1932.

(1) (1937) I. L. R. 16 Pat. 389.

(2) (1923) 4 Pat. L. T. 223.

Khurshaid Hasnain and *Rameshwar Misra*, for the appellants.

S. M. Mullick (with him *R. Chowdhury*, *R. K. Chowdhury*, *R. N. Jha and D. L. Nandkeolyar*), for the respondents.

MADAN, J.—This is an appeal by the defendants second party. The plaintiffs brought the suit alleging that in the year 1904 they took settlement from Bibi Wahidunnissa of 1 bigha 10 kathas forming part of plot no. 166 of village Bishunpur Fazila. This plot, the total area of which is 2 bighas 17 kathas, is said to have been in exclusive possession of Wahidunnissa as seven annas co-sharer landlord of the village, and settlement with the plaintiffs is said to have been made on a rental of Rs. 6/3/-. The defendants first party are the successsors in interest of Wahidunnissa, and defendants third party are the remaining co-sharer landlords. In the cadastral survey, finally published in about the year 1900, the entire plot was recorded as gairmazrua am in possession of the Muhammadans of the locality for use as a graveyard. The plaintiffs suggested that owing to the decline in the local Muhammadan population the landlords took possession of the surplus portion of the graveyard and settled it with them. The plaintiffs also claimed to have planted trees on the land and to have surrounded it with a fence. In the year 1929 the defendants first party interfered with the plaintiffs' possession, and there was a criminal case in which the defendants first party were discharged. In their written statement in that case the defendants first party claimed that the land was in possession of the defendants second party who are Muhammadans of the village. The plaintiffs therefore sued for a declaration of their occupancy right in the land and for confirmation or recovery of possession or for such relief as they might be entitled to. The

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defendants first party denied the alleged settlement and claimed that the land was part of the graveyard. Defendants second party also claimed it as graveyard. The trial court dismissed the suit holding that the plaintiffs had not proved settlement or possession within twelve years of the suit. The Subordinate Judge on appeal decreed the suit, holding that the plaintiffs had taken settlement in the year 1904 and have remained in possession till the year 1929 when they were ousted illegally by the defendants first party.

The learned Subordinate Judge did not consider whether assuming that Wahidunnissa did purport to settle the land with the plaintiffs she had a right to do so. The land is recorded in the cadastral survey of the year 1900 as gairmazrua am in possession of the Muhammadans for use as a graveyard, and this entry has not been seriously challenged. We were referred for the plaintiffs to the decision of a single Judge in the case *Ram Das Sah* v. *Damodar Prasad*(1) where it is observed that there is nothing to prevent a landlord from settling gairmazrua am land in his zamindari so long as he does not interfere with the rights which have been acquired by the tenants. With all respect to the learned Judge who decided that case I am of opinion that the correct view of the law relating to gairmazrua am lands is that expressed by the Chief Justice and James, J. in a recently decided case of this Court *Muhammad Waliul Haq* v. *Ludpud Upadhya*(2). In that case with reference to an argument that the landlord had complete right of control over a bathing pool situated in gairmazrua am land in his zamindari, James, J. observed :—

" The entry in the record-of-rights cannot be read as warranting any presumption that the zamindar more than any other person has a right of control

(1) (1923) 4 Pat. L. T. 223.
(2) (1937) I. L. R. 16 Pat. 389.

over these Kunds. There are two forms of khatian for non-agricultural land or waste land. In one (gairmazrua malik), is entered land, waste or uncultivated or utilised for building or non-agricultural purposes, which is under the control of the zamindar. In the other (gairmazrua am or public waste), is land of that kind not under the control of the zamindar; and the only presumption in that connection which can properly be drawn from the entry in the record-of-rights is that this pool is not under the control of the zamindar."

It follows that Wahidunnissa had no right to settle the land which is the subject-matter of the present case and that the plaintiffs acquired no tenancy right by virtue of such settlement, which is repudiated by defendants first party, the successors in interest of Wahidunnissa. All that the plaintiffs have been able to establish in this suit, as against the defendants, is that they have been in actual possession of the land since the year 1904. The decree passed by the learned Subordinate Judge must therefore be modified as follows. The plaintiffs' prayer for declaration of their occupancy right under the defendants first party is refused, but it is declared that the plaintiffs are entitled to possession of the land as against the defendants first, second and third parties. The decree is only binding on the defendants second party, who are Muhammadans, in their individual capacity. The question what rights if any the plaintiffs have acquired against the local Muhammadan community with respect to their claim to use the land for the purposes of a graveyard is left for determination in a properly constituted suit.

The parties will bear their own costs throughout this present litigation.

AGARWALA, J.—I agree.

Appeal allowed in part.

J. K.