APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Jai Lal.

1924

Dec. 16.

HUSSAIN SHAH (DEFENDANT) Appellant,

versus

GUL MUHAMMAD (PLAINTIFF) Respondent.

Civil Appeal No 1632 of 1920.

Muhammadan Law—Succession—Mughal Barlas of Mauza *Qadian, tahsil Batala, district Gurdaspur*—Riwaj-i-am, *1910—Succession to the land attached to* takia *Kamal Dinwala—Wakf*—Takia—*meaning of.*

Held, that the family of the Mughal Barlas of Qadian, tahsil Batala, concerned in this suit is governed by Muhammadan Law and not by custom.

Held also, that the *takia* Kamal Dinwala is a religious or *quasi*-religious institution and that the land in dispute is wakf property attached to the *takia.*

The literal meaning of the word " takia " is resting place. In common parlance a *takia* means the resting place of a *fakir.* The word " *fakir* " means a " holy person " who has relin quished the world and devotes his time to imparting religious instructions to his disciples and others. The *takia* is the place where he usually resides and imparts such instructions. A *takia* is itself an institution recognised by law and a grant or endowment to the same is as valid a *wakf* as to a *khankah,* a *dargah* or a mosque.

Ganpathi Iyer's Law relating to Hindu and Muhammadan Endowments, pages 415, 428, 433, referred to.

First appeal from the decree of Maulvi *Barkat Ali Khan, Subordinate Judge, 1st Class, Gurdaspur, dated the 30th March 1920, awarding plaintiff possession of the land.*

GHULAM MOHI-UD-DIN and JAGAN NATH, BHANDARI, for Appellant.

ZAFARULLAH KHAN and ABDUL RASHID, for Respondent.

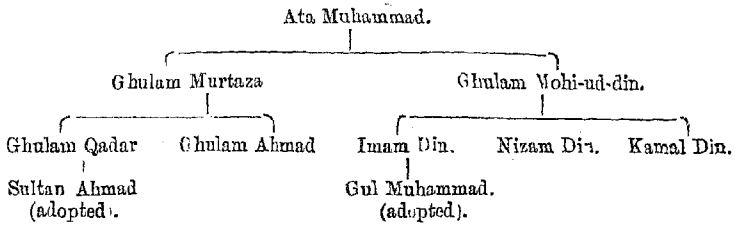
1924

HUSSAIN SHAH v. GUL MUHAMMAD.

The judgment of the Court was delivered by—

JAI LAL J.—A preliminary objection taken on behalf of the respondent that the memorandum of appeal was insufficiently stamped was disposed of by us at the commencement of the hearing. We were of opinion that the insufficiency was very small and was due to an error in calculation and therefore holding that the mistake was a *bonâ fide* one we permitted the appellant under section 149, Civil Procedure Code, to make good the difference in the Court-fees and proceeded to hear the appeal on the merits.

In order to understand the case the following pedigree will be useful :—



The plaintiff Gul Muhammad instituted this suit in the Court of the Subordinate Judge, Gurdaspur, on 5th October 1918, praying for a decree for possession of 82 *kanals* and 1 *marla* of land. The Subordinate Judge dismissed the suit in respect of 23 *kanals* and 3 *marlas* and granted a decree for possession of 58 *kanals* and 8 *marlas*.

The defendant appeals and the plaintiff has filed cross-objections in respect of the 23 *kanals* and 3 *marlas*.

The entire land in dispute was recorded in the record-of-rights prepared at the settlement of 1890-91 as owned by Imam Din, Nizam Din and Kamal Din in equal shares but under the actual cultivation of Kamal Din.

1924

HUSSAIN SHAH v. GUL MUHAMMAD.

In the record-of-rights prepared at the settlement of 1910-11 it was entered as owned by *Takia* Kamal Din under the management of Kamal Din. In the *Jamabandi* papers for 1915-16 the entry was as follows :—

"Gul Muhammad, adopted son of Imam Din and son of Nizam Din, 19 *kanals* and 19 *marlas Takia Kamal Din under the management* of Hussain Shah, disciple of Kamal Din, 62 *kanals* and 2 *marlas*."

By virtue of a mutation sanctioned on 28th August 1894 Imam Din relinquished his share in the whole land in dispute in favour of Kamal Din in exchange for other land given to him by Kamal Din. Thus Nizam Din remained the owner of a $\frac{1}{3}$rd share and Kamal Din became owner of a $\frac{2}{3}$rds share in the land in dispute.

By means of a mutation sanctioned on the 6th January 1894 Nizam Din and Kamal Din made a gift of 23 *kanals*, and 3 *marlas* out of the land in suit to *Takia* Kamal Din under the management of Kamal Din. Pir Shah, disciple of Kamal Din, is entered as cultivator of this land in the mutation entry.

By a mutation sanctioned on 15th February 1901 Nizam Din confirmed an exchange of his $\frac{1}{3}$rd share in the remaining land made by him six years before with Kamal Din. Thus Kamal Din became the sole owner of the 58 *kanals* and 8 *marlas*.

On 31st December 1907 Kamal Din transferred $\frac{2}{3}$rds of 58 *kanals*, 8 *marlas* to *Takia* known as Kamal Din Wala and on 30th January 1910 he transferred the remaining $\frac{1}{3}$rd to the same *Takia*.

Imam Din died on 3rd July 1903, Nizam Din died on 18th June 1910 and Kamal Din died in January 1912. The last named died sonless. Nizam Din

had only one son Gul Muhammad, the plaintiff, who was adopted by Imam Din.

Hussain Bakhsh or Hussain Shah, defendant, a disciple of Kamal Din, became the *Sajjada Nashin* of *Takia* Kamal Din after his death. The allegation of the plaintiff is that he is the heir to the property left by the three brothers named above, and that the land in suit did not belong to the *Takia* as there was no such *Takia* and also because the *Takia* was not a proper subject of *wakf* under the Muhammadan Law. It was further asserted that Kamal Din was not competent to make a valid gift of ancestral land as his powers of alienation were limited under the customary law. On the death of Kamal Din 19 *kanals* and 9 *marlas* of the land were entered in the name of the plaintiff but the entire area remained in the possession of the defendant.

The ancestral nature of the land is not denied before us, but it is asserted that Kamal Din was not governed by the customary law in the matter of alienation of land and it was further alleged that the *Takia* Kamal Din was a proper subject of *wakf* under the Muhammadan Law. These were the only two points that were argued before us at length by the learned counsel for the parties.

The most important question for decision undoubtedly is whether the family of Kamal Din is governed by the customary law or by the Muhammadan Law in the matter of alienation of ancestral land.

After examining the parties, the Subordinate Judge placed on the plaintiff the burden of proving that the family was governed by custom and came to the conclusion that the burden had been discharged.

1921

HUSSAIN SHAH v. GUL MUHAMMAD.

The home of the family is in Qadian in Batala Tahsil of the Gurdaspur District. It appears that at one time the head of the family exercised ruling powers and that the village was founded by the ancestors of the plaintiff, *i.e.*, the Mughal Barlas. The land in suit is situated in Qadian. None of the members of the family have been known to actually cultivate land. Imam Din was a *Risaldar* in the army and after his retirement became the *Pir* or religious head of the sweepers. Nizam Din was a Sub-Inspector of Police and retired after more than 20 years' service. Kamal Din was a *Hakim* before he became the *Pir* or head of the Naushahi Sect. *Mirza* Ghulam Ahmad was in Government service and then became the head of the well known Ahmadia Sect, and Sultan Ahmad was an Extra Assistant Commissioner in the Punjab.

Mirza Ghulam Ahmad admittedly followed the Muhammadan Law and his estate on his death in 1908 was divided among his heirs according to that law. It was sometime about 1885 that *Mirza* Ghulam Ahmad and Kamal Din both adopted 'holy orders' and ceased to have any connection with secular affairs.

Before 1885 a greater portion of land in Qadian had passed out of the family of the Mughal Barlas into the hands of the Mughal Chogattas by sale. Since 1885 a number of alienations including gifts, sales, mortgages and exchanges have taken place in the village but none are proved to have been challenged in the Courts or otherwise. Thus the village is now owned by different castes, *e.g.*, Mughal Barlas, Mughal Chogattas, Arains, Pathans, Jats, Sayyads, Biloch, Kazi, Khatris, etc., and there is no compact village community or a compact section of village community.

P. W. 3, Rafique Beg, a maternal uncle of the plaintiff and P. W. 4, Imam Din, clearly stated in cross-examination that the Mirzas had been making alienations of land and none had so far been contested.

We are of opinion that the above facts clearly establish that in the matter of alienation of land the Mirzas, *i.e.*, the descendants of Ata Muhammad follow the Muhammadan Law and not the customary law.

The learned Subordinate Judge has referred to some evidence in his judgment in support of his conclusion on this point and this evidence we now proceed to examine.

The first piece of evidence referred to by the learned Judge is the record of the questions and answers attached to the Settlement Record of 1910-11. But on reference to this document we find that it relates to the Gurdaspur Tahsil and not to the Batala Tahsil with which we are here concerned. The Qanungo on the other hand definitely states in his report that there is no entry in the *Riwaj-i-Am* prepared in 1910-11 relating to Batala Tahsil as to custom followed by the Mughal tribe in matters of alienation and succession by daughters. Reliance is then placed on three documents, Exhibits P 3, P 6 and P 8. The first two are described as relating to gifts made by some members of this family but which were declared invalid on being contested. We have examined both the documents and find that in both cases attempt was made by certain persons to get the land left by deceased members of the family mutated in their favour on the allegation that the deceased had made gifts in their favour before death, and that in both cases the heirs of the deceased proprietor had

1924

HUSSAIN SHAH v. GUL MUHAMMAD.

objected to the mutations on the ground that no gifts had been made. No question as to the validity of the gifts on the ground of incompetency of the alleged donors was raised. The revenue officials holding that there was no evidence in support of the alleged gifts declined to sanction the mutations. We fail to see how these mutations can be held to support the contention of the respondent. On the other hand we consider that they might with advantage be relied upon by the appellant to show that the right of the alleged donors to make the gifts was not questioned.

Exhibit P 8 relates to the claim made on behalf of a minor daughter, aged three years, to succeed to her father's estate. A number of owners supported her claim but the reversioners claimed that the minor was living with her maternal grandfather who it was alleged would misappropriate the property of the minor, but ultimately some land was transferred to the daughter as a result of a compromise made between the parties. This instance is quoted to show that among the Mughals daughters are excluded. We do not think that the facts stated above establish anything of the sort.

Another document is referred to by the learned Judge in his judgment, *e.g.*, a printed copy of the *Riwaj-i-Am* of 1865. No such document is on the record and none was produced before us and we are unable to express any opinion on it.

The learned counsel for the respondent relied on another circumstance which perhaps is the strongest piece of evidence in his favour. He pointed out that there were five recent instances in this family where widows, sisters and daughters had been excluded from inheritance though under the Muhammadan Law they would be entitled to succeed. He has further

shown that there have been two adoptions in the family which is an institution foreign to the Muhammadan Law but recognised by the customary law.

We have given full consideration to this argument, but do not consider that the facts relied upon can materially affect our decision in this case. In the first instance the two adoptions were evidently made with a view to keep out female heirs and therefore we are really left with the five instances of exclusion of such heirs. Then we find that in the record-of-rights prepared at the settlements of 1852 and 1865 female heirs are entered as co-sharers in the land in suit. The idea to exclude such heirs therefore appears to be of comparatively modern growth. No exclusion, after contest, of the females has been proved and it is quite possible that there were some other good reasons for their not claiming the inheritance; and lastly, the fact that in the matter of succession the parties follow custom does not necessarily show that they follow the same rule as regards alienations as well. If enquiry is instituted it will be found that in a number of families admittedly governed by the Muhammadan Law, females do not claim and do not take a share in the estate.

We hold, therefore, that there is a great preponderance of evidence in favour of the view that in this family of the Mughal Barlas right of alienation is governed by the Muhammadan Law and not by custom and in coming to this conclusion we have also been influenced by the conduct of the two brothers of Kamal Din in exchanging lands with him and in joining with him in the gifts made to the *Takia*.

A number of authorities were quoted at the Bar by the learned counsel for the parties but we do not propose to notice them in detail here as in our

1924

HUSSAIN SHAH v. GUL MUHAMMAD.

opinion the decision of each case depends upon a multitude of circumstances proved therein and the general principles which guide the Courts in deciding such matters are too well recognised to need repetition.

Keeping those principles in view we had to apply our mind to the facts and circumstances proved in this case and then to determine the issue involved. We have done so and arrived at the conclusion already indicated.

The next contention of the learned counsel for the respondent was that the *Takia Kamal Dinwala* was not an institution which could be the object of a valid *wakf* under the Muhammadan Law. He also, rather feebly, contended that the appellant was not in fact a disciple of the late Kamal Din or the *Sajjada Nashin* of the *takia*. There is ample evidence on the record to show that the appellant is a disciple of Kamal Din, and also the *Sajjada Nashin* of the *takia* in question. The main argument, however, of the learned counsel was that a *takia* was not a religious or a *quasi*-religious institution and was not recognised as such by the Muhammadan Law. The literal meaning of the word *takia* is " resting place." In common parlance a *takia* means the resting place of a *fakir*. The word ' *fakir* ' does not mean a "beggar " as is commonly understood, but it means a " holy person " who has relinquished the world and devotes his time to imparting religious instructions to his disciples and others. The *takia* is the place where he usually resides and imparts such instructions. A full description and nature of a *takia* is to be found at pages 415, 428 and 433 of Ganpathi Iyer's Law relating to Hindu and Muhammadan Endowments. It is there stated that the place of abode of a *fakir* is called a *takia* before he attains sufficient

public importance, and that when a *fakir* attains sufficient public importance and a large number of disciples begin to get round him and lodgment is provided for such disciples, then the place is called a *khankah*: and then if the *fakir* on his demise is buried in the *khankah* it becomes a *dargah;* and further that the *takia* is itself an institution recognised by law and a grant of endowment to the same will be as valid a *wakf* as to a *khankah*, a *dargah* or a mosque. We entirely agree with the opinion of the learned author. It is quite clear from the evidence on the record that Kamal Din had become a *fakir* sometime between 1885 and 1890, and that he had a number of disciples who received religious instructions from him. He was in fact the head of the Naushahi sect of the *fakirs*. On his death he was buried in the grounds attached to the *takia* and so were his two brothers Nizam Din and Imam Din. The fact that the *takia* was intended to be a religious institution, and became a religious institution, is further supported by the statements that were made by the donors of the lands to the *takia* on two occasions.

On the 5th of January 1894 Nizam Din and Kamal Din are recorded to have stated as follows :— "Land measuring 23 *kanals*, 3 *marlas*, has been attached to the *takia*. The Manager of the *takia* will enjoy the produce. He shall have no right to effect a sale or a mortgage. The Manager shall pay the Government revenue. The Managing *Gadi Nashin* of the Naushahi sect shall be the manager of the *takia*."

Then on the 30th January 1910, Kamal Din is recorded to have made the following statement :— "That the entire land might be entered in the name of the *takia* known as *Kamal Dinwala*. The gift has been made by way of *religious endowment*.

1924

HUSSAIN SHAH v. GUL MUHAMMAD.

Hence the mutation entry should be sanctioned." The words used in the vernacular are "*ghairat-i-mazhabi.*"

This leaves not the least doubt that it was the intention of Kamal Din and his brothers that the *takia* should be a religious institution and that full effect was given to this intention by the continued use of the *takia* for purposes for which it was established. We hold, therefore, that the *takia Kamal Dinwala* was a religious or *quasi*-religious institution, and as such was the object of a valid *wakf* according to Muhammadan Law, and that the land in dispute is *wakf* property attached to the *takia*, and as such does not descend to the personal heirs of Kamal Din, Nizam Din or Imam Din, but to the *Sajjada Nashin* of the *takia* who is the appellant in this case.

As a result of the above findings we accept the appeal and dismiss the plaintiff's suit with costs throughout. The cross-objections are dismissed with costs.

A. N. C.

Appeal accepted.