APPELLATE CIVIL.

Before Tek Chand and Agha Haidar JJ.

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Jan. 31st

HAJI ALI MUHAMMAD AND OTHERS (PLAINTIFFS) Appellants

versus

ANJUMAN-I-ISLAMIA, LAHORE AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 941 of 1925.

Muhammadan Law—Religious institution—Office of Sajjada Nashin *or* Mutwalli—*whether alienable*—Wakf—takias *and* khankahs—*meaning of* Khadim *and* Faqir—*explained.*

Held, that it is an elementary principle of the Muhammadan Law that the office of a *sajjada nashin* or a *mutwalli* of a religious endowment cannot form the subject of a transfer by sale or mortgage.

Held also, that *takias* and *khankahs*, properly so-called, are religious foundations among the Muhammadans and the property attached to them is *wakf* and therefore tied up in the ownership of God.

Sri Vidya Varuthi Thirtha Swamigal v. *Balusami Ayyar* (1), relied upon.

Muhammad Hamid v. *Mian Mahmud* (2), and *Hussain Shah* v. *Gul Muhammad* (3), referred to.

Ali Muhammad Khan v. *Ali Akbar Khan* (4), and *Mussammat Alah Jawai* v. *Muhammad Hassan* (5), distinguished.

The meaning of "*Khadim*" and "*Faqir*," explained.

First appeal from the decree of Bawa *Jhanda Singh, Subordinate Judge, 1st Class, Lahore, dated the 10th January 1925, dismissing the plaintiff's suit.*

J. G. SETHI, for Appellants.

MEHR CHAND MAHAJAN and AZIM ULLAH, for Respondents.

(1) (1921) I. L. R. 44 Mad. 831 (P.C.). (3) (1925) I. L. R. 6 Lah. 140.
(2) (1923) I. L. R. 4 Lah. 15 (P.C.). (4) (1923) I. L. R. 4 Lah. 133.
(5) 110 P. L. R. 1908.

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AGHA HAIDAR J.—This is a plaintiffs' appeal arising out of a suit instituted by them on the 27th August, 1923, against the defendants for possession of three parcels of property, namely, A, B and C. C is a shop, while A and B are described in the plaint as vacant plots of land. The plaintiffs allege that they had purchased this property on 13th March, 1907, from one Abdulla and had obtained possession thereof as owners, that defendant No. 2, Atma Ram, had taken possession of the property A in 1917, defendants Nos. 3 and 4 of the property B in the year 1922 and defendant No. 5 of the shop C about the year 1920, and that the defendants 2 to 5 on being asked to vacate the property refused to do so and stated that they had taken the same on rent from defendant No. 1 who is described in the title of the suit as the Anjuman-i-Islamia, Punjab. In paragraph 10 of the plaint the plaintiffs claim to be entitled to the possession of the property as owners and describe themselves as *mutwallis* of the *Mai* Lado Mosque of which more hereafter.

The written statement was filed by defendant No. 1 only who pleaded that the property in suit appertained to the mosque of *Mai* Lado and had been *wakf* from time immemorial, and therefore it could not be transferred by way of sale or mortgage, according to Muhammadan Law. They further pleaded that the plaintiffs had never been in possession of the property in suit. There was a plea of waiver also.

The following issues were framed by the trial Court :—

(1) Is the property in suit a portion of the *wakf* property known as *Mai* Lado's Masjid?

(2) If so, was Abdulla competent to alienate that property?

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(3) Did Ali Muhammad, plaintiff, waive his right, if any, in the property in favour of the defendant?

(4) What relief, if any, are the plaintiffs entitled to?

The trial Court held that the property in dispute was a portion of the *takia* attached to the mosque of *Mai* Lado and was *wakf* property and, as such, was not alienable by Abdulla or his predecessor Mehr Shah. The Court did not record any finding on issue No. 3 and dismissed the plaintiffs' suit.

The plaintiffs, as stated already, have come up in appeal to this Court, and their learned counsel raised the following points in the course of his arguments :—

(1) that the property was not *wakf*;

(2) that, even if it was *wakf*, the plaintiffs were the *mutwallis* and could obtain possession of it as such;

(3) that the plaintiffs were in possession of the property until very recently but that the defendants had forcibly taken possession thereof and, therefore, the plaintiffs were entitled to succeed on the strength of their possessory title, even if the defendants have been able to establish any title in themselves; and

(4) that the plaintiffs had been all the time in possession of the property, and that the defendant No. 1 had obtained possession merely by getting the tenants, who were occupying the property in suit under the plaintiffs, to attorn to defendant No. 1.

It would appear from a mere glance at the points noted above that some of them are mutually contradictory and go far beyond the scope of the pleadings and the lines on which the case proceeded in the trial Court, as would appear later on. Some of the points were not even arguable in view of the materials on

record and in fact were merely calculated to create confusion.

As regards the first point namely that the property was not *wakf*, it is argued that there is no proof of dedication and that in any case for years past it has lost its original character as *wakf* property, and that the plaintiffs obtained proprietary rights in it under the sale deed, dated the 13th March, 1907 (Exhibit P. 4).

There is a mosque in Lahore which is called *Mai* Lado's mosque after the name of a lady, *Mussammat* Lado. It is an old mosque and the property in suit lies close to it. The earliest authentic document, in which this property is mentioned, is Exhibit P. 20 which is an extract of the settlement record of *Pargana* Lahore of the year 1856. In the column of " proprietor " is mentioned the name of " Mehr Shah, *Khadim* of Ahmadyar Shah," and in the column of " area of land with description " we find " Takia *and* Masjid " having an area of four *kanals*, fourteen *marlas*. Underneath this entry there is a detail that the area of the *takia* is four *kanals* and that of the mosque is fourteen *marlas*. In the settlement record of 1891-92 Mehr Shah, *Khadim* of Ahmad Shah, caste *Faqir Qadri*, is entered as owner in the column of " proprietor " in respect of two *kanals* and 1 *marla* which is described as *ghair mumkin masjid*, the detail of which is :—

Agricultural (*mazrua*) ... eleven *marlas*.

Non-agricultural (*ghair mazrua*) ... 1 *kanal* and ten *marlas*.

Again in the mutation register of 1901 relating to Lahore proper, Mehr Shah figures once again as the *Khadim* of Ahmad Shah, caste *Faqir Qadri*. The word *Faqir* in these entries should not be misunderstood.

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It does not mean a beggar but a religious man who devotes his life to meditation and spiritual exercises. Nor should the word '*khadim*' be interpreted to mean a servant, since it is a mode of describing the peculiar relationship which exists between a spiritual preceptor and his disciple. Portions of the original property seem to have been encroached upon during the passage of time between the year 1856 and the present day and we are not concerned with them. There cannot, therefore, be any doubt whatsoever that the mosque and the property adjacent thereto, including the property in suit, was *wakf* property and Mehr Shah was the *mutwalli* or curator of the same.

Then we come to the sale deed, dated the 13th March, 1907 (Exhibit P. 4), executed by Abdulla in favour of the plaintiffs. This being the muniment of the plaintiffs' title, requires careful scrutiny. The deed recited that along with the property in suit there was a *hujra* with a *kothri*, a vacant site in front of the *hujra* together with rights in the well for drinking purposes and rights in the mosque and *khankah* (tomb) of *Sain* Mehr Shah and that the whole property occupied an area of one *kanal* and fifteen *marlas* out of which fourteen *marlas* were occupied by the mosque and the remaining land was occupied by the other property. It further mentioned that under a registered deed of gift the vendor had been declared the owner of the property and mutation had been ordered in his name, that he had conveyed the property for a sum of Rs. 2,000 to the vendees (the plaintiffs) who had been rendering services to the mosque known as *Mai* Lado's which lies adjacent to the property sold and that they (the vendees) have promised to render services to the mosque and the *khankah* in future. The deed goes on to say that the vendor has sold the entire rights which

he had hitherto enjoyed in the mosque and *khankah* and that such rights shall be enjoyed by the vendees who shall henceforth own and possess the property together with the rights in the *khankah* and mosque. On the basis of this sale-deed a mutation, Exhibit P. 23, was effected in favour of the plaintiffs. In the ' Proprietor's ' column of this mutation entry Abdulla is described as the ' *chela* ' (disciple) of Mehr Shah, caste *Faqir Qadri*. There is a note at the foot of this mutation entry, showing that the plot, pertaining to the mosque, is for public use. I may also mention that the relationship between Abdulla and Mehr Shah is further proved by the evidence of Fazal Din (plaintiffs' witness) who described him as the *balka* of Mehr Shah. I shall presently show that this document, standing by itself, is quite sufficient to defeat the plaintiffs' claim in view of the well-known principle that the plaintiff in a suit for possession must succeed on the strength of his own title and not on the weakness of the defendant's case. Furthermore the contents of this sale-deed itself put the plaintiffs upon inquiry as to the nature and character of the property and destroy all the equities in their favour. Abdulla (P. W. 2) in his cross-examination stated that Mehr Shah remained in possession of the property and used to realise rent from the tenants occupying the same, and that the costs of the repairs of the mosque were met from the income derived from the rents of the property. Now, this document, Exhibit P. 4, the so-called sale deed in the plaintiffs' favour, describes the property in suit along with a *hujra*, a *kothri* and a vacant site in front of the *hujra* and the rights in the mosque and the *khankah* of *Sain* Mehr Shah, deceased. It appears that, after the death of Mehr Shah, who was apparently looked upon as a holy man and saint, a *khankah* was founded

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at the place to commemorate his memory. There is a recital in this sale deed of a registered deed of gift in favour of Abdulla, the plaintiffs' vendor, under which he claims to have been made the sole owner. This document, the root of Abdulla's title, has not been produced by the plaintiffs and it is significant that, in the course of argument, their counsel referred to it *as an oral will*. And the right to render services to the mosque and the *khankah* along with the property attached thereto, with the income of which the said *khankah* and the mosque had been maintained, could not be transferred under the Muhammadan Law by Abdulla whether he is treated as a *mutwalli* or a *sajjada nashin* of the mosque and the *khankah* and the property appertaining to them. Thus the very root of the plaintiffs' title disappears and the ground is cut from under their feet, since it is an elementary principle of the Muhammadan Law that the office of a *sajjada nashin* or a *mutwalli* of a religious endowment cannot form the subject of transfer by sale or mortgage. There are numerous decisions which lay down that *takias* and *khankahs*, properly so-called, are religious foundations among the Muhammadans and the property attached to them is *wakf* and therefore tied up in the ownership of God, *vide Sri Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1), where the law relating to these religious foundations is clearly summarised by the late Right Hon'ble *Syed* Ameer Ali while sitting as a member of the Judicial Committee of the Privy Council. Reference may also be made in this connection to the opening portion of the judgment in the case reported as *Muhammad Hamid* v. *Mian Mahmud* (2), and also to *Hussain*

(1) (1921) I.L.R. 44 Mad. 831 (P.C.). (2) (1923) I.L.R. 4 Lah. 15 (P.C.).

Shah v. *Gul Muhammad* (1), which lay down that 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.

Mr. Sethi relied upon *Ali Muhammad Khan* v. *Ali Akbar Khan* (2), and *Mussammat Alah Jawai* v. *Muhammad Hassan and others* (3). In the first case a certain *Pir* had died in the year 1914 and the plaintiff who was installed as a *sajjada nashin* in his place, claimed certain lands as *wakf*, on the allegation that they had been dedicated to the saint's shrine, and that three or four times on the death anniversary of the saint, an *Urs* had been celebrated there. It was held that no implied dedication could be presumed on these facts and the *onus*, which lay upon the plaintiff to establish an express or implied dedication to public religious trust had not been discharged by him. It was further held that, in the absence of *wakf*, the plaintiff's title as a *sajjada nashin* should be treated as a mere courtesy title. The second case which was decided on its own facts is of no value as a precedent.

There may be cases in which a *takia* is merely a place where a certain class of people assemble and indulge in local gossip and enjoy smoke. Such a place would obviously be devoid of all religious character and the Muhammadan Law of *wakf* and its incidents would have no application to it. But, in order to determine the religious character of a *takia* and before applying to it the incidents of a Mussalman *wakf*, one must, in the absence of direct proof of dedication, take into consideration the early history of the institution and the existence of religious associations and a holy atmosphere about it, and, for this

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purpose, the general setting, in which the property claimed to be *wakf* is placed, is of considerable importance.

In the present case we find an entry at least three-quarters of a century old, where the *takia* is mentioned along with, and in close juxtaposition to, the mosque. We also find the name of the servitor or *mutwalli*, namely, Mehr Shah, described as the disciple of a holy man called Ahmadyar Shah who, as the later records show, belonged to the well-known *Qadri* sect of the Muhammadan religious ascetics or *darweshes*. When Mehr Shah died, sometime in 1901 or 1902, he was succeeded not by his son or any other lineal descendant as his heir but by his disciple, namely, Abdulla. Mehr Shah was buried close to the mosque and, in the land which constituted the old *takia* which he had served in his lifetime, a *khankah* or tomb was built to indicate his last resting place. Thus we find that there was an old mosque with a *takia* close by, with the hallowed atmosphere created by the Muhammadan religious devotions pervading the locality where, in course of time, a *khankah* was reared as a monument to the memory of its old superior, Mehr Shah.

Having regard to what has been stated above, there cannot be any doubt that the property in suit was a *takia* which from the evidence of Revenue records and long user, must be presumed to have been *wakf* property according to the Muhammadan notions, and, therefore, neither its land nor any office connected therewith, whether that of a *sajjada nashin* or *mutwalli*, could form the subject matter of a conveyance.

The refutation of the second point in Mr. Sethi's argument, namely that, even if the property was *wakf*,

the plaintiffs were the *mutwallis* and could obtain possession of the same as such, is supplied by the concluding portion of the discussion under the first point where I have tried to explain that the plaintiffs cannot, on the basis of the sale deed in their favour, claim to have acquired the rights of the *mutwalli*, and that they are precluded from asking the Court to put them in possession of the *wakf* property or a portion thereof in that capacity. Besides, this case was never put forward by the plaintiffs in their plaint where in paragraph 10 they clearly asserted that they were the owners of the suit property and their prayer for possession in the Court below was never founded on their alleged rights as *mutwallis*. In fact, from the proceedings in the trial Court as well as the judgment, it appears that the plaintiffs had denied the very existence of the *wakf* and had claimed the property as owners in their own right. The argument, on the face of it, is frivolous and there is, therefore, no substance whatsoever, in this plea raised by the appellants' counsel.

As to point No. (3), *i.e.* that the plaintiffs were in possession of the property until very recently, but that the defendants had forcibly taken possession thereof and, therefore, the plaintiffs were entitled to succeed on the strength of their possessory title even if the defendants had established any title in themselves. The oral evidence produced by the plaintiffs in support of their possession is very vague and meagre and no reliance can be placed upon it. They have however placed on the record a number of rent deeds in order to prove that they had been in possession of the property in suit through tenants after the date of the sale deed, Ex. P. 4, in their favour. With the exception of one rent deed, Ex. P. 17, the rest of

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these documents have not been formally proved, and therefore, this Court is precluded from looking into them. As regards the rent deed, Ex. P. 17, dated the 8th September 1908, purporting to have been executed by one Lonkra Mal, Shiv Das (P. W. 3) has proved it. But it appears that this document does not relate to any portion of the property in suit and, therefore, does not help the plaintiffs. Thus the possession of the plaintiffs after the execution of the sale deed, Ex. P. 4, in their favour has not been proved and, therefore, no question of any forcible dispossession by the defendants arises. To prove the falsity of the plaintiffs' case, it may be mentioned that in paragraph 7 of the plaint they themselves have mentioned the names of the various persons who had, during the period of six years prior to the institution of the suit, taken possession of the various portions of the property from time to time. Therefore, in the absence of any proof of the plaintiffs' possession, their claim to succeed on the strength of their possessory title is utterly baseless and the authorities cited by Mr. Sethi in support of this part of his argument have no relevancy and need not be noticed. Furthermore, from the frame of the plaint as well as from the manner in which the case was presented before the Court below, it appears that the point of the plaintiffs' succeeding on the basis of their possessory title was not put forward by the plaintiffs in the trial Court and the defendants had no opportunity to meet such a case. Therefore, even if there had been any stray materials on the record which could lend some support to the plaintiffs' case on this point, it would not be fair to give any effect to it as such a course would be clearly unjust to the defendants who had no opportunity in the Court below to meet it, on which no issue had been framed and consequently no evidence could be led.

The fourth point, *i.e.* that the plaintiffs had been all the time in possession of the plaint-property, and that the defendants had obtained possession simply by getting the tenants, who were occupying the property in suit under the plaintiffs, to attorn to defendant No. 1, is devoid of all merit and is inconsistent with the allegations contained in paragraph 7 of the plaint. Besides, there is not an iota of evidence on the record to show that there were any tenants who were let into possession of any part of the property in suit by the plaintiffs, much less that any tenants had attorned to defendant No. 1. Therefore, there is no force in this plea also, which was argued for the first time in this Court.

Defendant No. 1 professes to be a registered society. We do not know the scope of its functions nor was any document placed on the record to give the Court an indication of its status and constitution. It appears, however, that this society or some of its members or supporters have for some time past been in possession of the property in suit and are its *de facto mutwallis* or caretakers and have taken over the management thereof. I express no opinion whatsoever upon the credentials of this society in the absence of any materials on the record; but the plaintiffs' suit fails because they have not been able to prove their title on any one of the allegations on which they based their claim.

I would, therefore, affirm the decree of the Court below and dismiss the plaintiffs' appeal with costs throughout.

TEK CHAND J.—I agree in the order proposed by my learned brother. TEK CHAND J

A. N. C.

Appeal dismissed