APPELLATE CIVIL.

Before Shadi Lal C. J. and Gordon-Walker J.

1931

Jan. 21

MEHRAJ DIN (DEFENDANT) Appellant

versus

GHULAM MUHAMMAD AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 1231 of 1926.

Muhammadan Law—Waqf—*long user—only evidence of —Second Appeal—whether competent on finding that the property is* waqf.

Held, that it is a well-recognised principle of the Muhammadan Law that a *waqf* may be established by the evidence of user, and when a long period has elapsed since the origin of the alleged *waqf*, user can be the only available evidence to show whether the property is or is not *waqf*.

Makhdum Hassan Bakhsh v. *Ilahi Bakhsh* (1), relied upon.

Held also, that the finding of the lower Appellate Court, on an appreciation of the evidence, that the property in dispute is *waqf* is one of fact and cannot be disturbed in second appeal.

Irshad Hussain v. *Makut Manohar* (2), referred to.

Second appeal from the decree of Rai Sahib Lala *Topan Ram, Additional District Judge, Lahore, dated the 26th April 1926, varying that of Mr. E. Mukerji, Subordinate Judge, 1st Class, Lahore, dated the 23rd December 1925, and granting the plaintiffs a decree.*

BADRI DAS and MEHR CHAND, for Appellant.

MUHAMMAD HUSSAIN, for Respondents.

SHADI LAL C.J.

SHADI LAL C. J.—The learned Additional Judge has concurred with the trial Judge in holding that

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the plaintiffs have succeeded in proving that the property in dispute is *waqf* and the only question, which requires determination, is whether any ground has been established which would justify our interference in second appeal.

The property consists of a mausoleum of a saint called Pir Balkhi, who died two or three hundred years ago. There is no evidence to show how and when the alleged *waqf* was created, but it is a well-recognised principle of the Muhammadan Law that a *waqf* may be established by the evidence of user, *vide inter alia*, *Makhdum Hassan Bakhsh* v. *Ilahi Bakhsh and others* (1). When a long period has elapsed since the origin of the alleged *waqf*, user can be the only available evidence to show whether the property is or is not *waqf*.

Now, the lower appellate Court points out that Pir Balkhi was a reputed and devout saint, and that the Muhammadans of the locality, in which the mausoleum is situate, have been burning *divas* (lamps) in the niches of the mausoleum and saying their prayers and reciting *fathias*. The defendant, who claims to be the owner of the property, has wholly failed to establish his claim, and the evidence produced by the plaintiffs leaves no doubt that his father, Ghulam Muhammad, was appointed to be the caretaker of the mausoleum. Having regard to these and other circumstances, including the physical features of the building, the learned Additional Judge has declared the property to be *waqf* and this finding proceeds upon an appreciation of the evidence and does not involve any question of law. The conclusion reached by him cannot, therefore, be disturbed in

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second appeal, *vide Irshad Hussain* v. *Makut Manohar and others* (1).

The appeal is accordingly dismissed with costs.

GORDON-WALKER J.—I agree.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

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Jan. 26.

Before Shadi Lal C. J. and Gordon-Walker J.

GANPAT RAI AND OTHERS (DEFENDANTS) Appellants

versus

SAIN DAS AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 2493 of 1929.

Injunction—Party-wall—Erection on wall by one tenant-in-common—Suit by co-tenant—whether lies.

The plaintiffs and defendants were owners of two adjoining houses separated by a wall which belonged to both the parties as owners-in-common. The defendants raised the height of the wall, with a view to building a superstructure on their tenement, and did so without the permission of the plaintiffs. It was contended for the defendants, that, as they had not occupied the whole of the width of the top of the wall, but confined themselves to that moiety of it which is on the side of their own house and left the other moiety to the plaintiffs, the latter had no cause for complaint.

Held, that as the parties were "tenants-in-common," the wall could not be treated as a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners. The plaintiffs were, therefore, entitled to the use of the whole width of the top of the wall subject to a similar right of the defendants, and the construction of the new wall on half the width, amounted to an ouster, in so far as the width occupied by the defendants was concerned.

And, that the plaintiffs had been rightly granted a mandatory injunction requiring the defendants to demolish the structure raised on the joint (or "party") wall.

(1) (1927) 100 I. C. 626.