

Rs. 3,350. With that conclusion of the Chief Court their Lordships agree.

The result that their Lordships will humbly advise His Majesty that the appeal should be dismissed and the decree of the Chief Court be affirmed. The appellant must pay the costs of this appeal.

J. V. W.

*Appeal dismissed.*

Solicitors for the appellant : *Barrow, Rogers & Nevill.*

Solicitor for the respondents : *Edward Dalgado.*

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KIRPAL  
SINGH  
v.  
BALWANT  
SINGH.

### PRIVY COUNCIL.

#### COURT OF WARDS

v.

ILAHI BAKHSH.

P.C.\*

1912  
Oct. 31 ;  
Nov. 26.

#### [ON APPEAL FROM THE CHIEF COURT OF THE PANJAB, AT LAHORE.]

*Mahomedan law—Endowment—Creation of endowment—Wakf by dedication or user—Graveyard, land used as—Presumption of ancient origin of shrine and burial place—Panjab Land Revenue Act (XVII of 1887), s. 44—Entry of ownership in record-of-rights at settlement.*

In this case the Judicial Committee (affirming the decision of the Chief Court of the Panjab) held, on the evidence, that the land in suit (known as the Mai Pak Damau graveyard) which had been used from time immemorial by the Mahomedan community of Multan for the purpose of burying their dead, formed part of a graveyard set apart for the Mahomedan community, and that by user, if not by dedication, the land was *wakf*.

In the record-of-rights of the last settlement an area of land, which comprised the land in suit, was entered as "in the possession of Mahomedans," and was described as *kabristan* or *ghair-mumkin kabristan* (graveyard or unculturable land forming portion of a graveyard); and in the ownership column the name of the defendant (now represented by the Court of Wards) was entered as owner. Their Lordships said: "It

\* Present : LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

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would seem that he was properly entered as owner, being trustee and custodian of the shrine of the saint Mai Pak Daman, and being or claiming to be the recognised head of the Mahomedan community in Multan ;” and *held*, that, under section 44 of the Panjab Land Revenue Act (XVII of 1887), the entry not having been disproved must be presumed to be correct.

APPEAL from a judgment and decree (16th December 1907) of the Chief Court of the Panjab, which reversed a judgment and decree (15th April 1907) of the District Judge of Multan.

The defendant (the Court of Wards representing the estate of Makdum Hassan Bakhsh) was the appellant to His Majesty in Council.

The suit giving rise to this appeal was brought by the respondents, as representing the Mahomedan community of the city of Multan, for a declaration that certain land was in possession of the Mahomedan community as *wakf*, and was in fact a graveyard which had been used from time immemorial by them for the burial of their dead, and for an injunction restraining the appellant (the Court of Wards) from transferring any part of the said land.

The occasion for the suit being instituted was that in August 1905 the defendant, who claimed to be the owner of the land, gave notice by beat of drum of his intention to sell by auction portions of the area of land in dispute which were free from graves. The main contention of the plaintiffs was that the whole of the land in suit was the graveyard known as Mai Pak Daman, the origin of which was very ancient ; and that it was *wakf* and therefore inalienable. The suggested origin of it is given in a passage cited by their Lordships of the Judicial Committee in their judgment from the judgment of the Chief Court.

The main defence, so far as material to the present appeal, was that whilst the land actually covered with

graves may be inalienable, the portion of the land to be sold was not shown to belong to Mai Pak Daman, and that the defendant had a right to alienate it.

It appeared that in 1858, up to which time there was practically no restriction on burials, the Mahomedans of Multan and the neighbourhood held a public meeting to consider the question of suitable sites for burial grounds; and a resolution having been arrived at, an application to the Commissioner of the Division was drawn up and presented by the father of Makdum Hassan Bakhsh and one Haji Ghulam Mustafa Khakwani that the owners of *khan-kahs* should keep open graveyards in their own *khan-kahs*; that four old graveyards (of which Mai Pak Daman's was one) should be kept open for the whole Mahomedan community; that three new graveyards should be started; and that all other graveyards should be closed. This proposal was sanctioned. In 1867 a somewhat similar application was made to the Deputy Commissioner by the Mahomedans of Multan City that the graveyard of Pir Umar (one of the four old graveyards above mentioned) should be demarcated and protected from encroachment, and that certain other graveyards, among which was Mai Pak Daman's, should be kept open. On 22nd August 1867 there was a *robkar* of the Deputy Commissioner which recited the order of the Commissioner in 1858 sanctioning the proposals then made, and showed that all graveyards, except the seven mentioned and the *khan-kah* graveyards should be kept closed. And on 22nd September 1867, a *robkar* sent by a Revenue Officer to the Deputy Commissioner, intimated that a parwana on the subject had been issued to the Tahsildar (a copy of which was sent to the District Superintendent of Police) that if any Mahomedan buried a

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corpse outside the authorised places, it should be exhumed and re-buried in one of those places.

The District Judge found that the defendant had never treated the land in dispute as *wakf*; that within the land in suit were scattered graveyards with clear spaces between; that the defendant had sold from time to time any clear spaces for building, though the numbers they bore were in the settlement of 1880 shown as *ghair-mumkin kabristan* (unculturable land occupied by a graveyard) notably the land sold to Government for a railway station; that he had leased others "and had realised a miscellaneous income from the whole, and had asserted his rights as landlord by exacting a due of 3 pies per grave from those burying their dead with his permission"; that these transactions had not in the past been objected to by the Mahomedan community or the general public; that there had been no dedication of the whole land as *wakf*, nor any declaration that the whole was *wakf*; that so far from its being shown that the Mahomedan community was in possession, the evidence proved that the defendant was in possession, though he did not wish to interfere with actual graves; that the defendant had a right to alienate at will the clear spaces; that the plaintiffs had not shown that they were individually affected, nor that their families were affected by the proposed sale, nor that they have the right to bury their dead in the lands to be sold.

The District Judge therefore dismissed the suit. On appeal, the Chief Court (CHATTERJI AND JOHNSTONE JJ.), after stating the facts and giving the origin of the Mai Pak Daman graveyard as quoted in the judgment of their Lordships of the Judicial Committee, continued:—

"Then in 1858 this status of *wakf* was fully recognised as we have seen. No doubt user, as such, does not deprive the owner of his title, but the title remains subject to the user of the land as *wakf*.

“This disposes of the more general question ; and the next point is, what area was *wakf*? Our view is that at least all the area in suit was. The area in suit is between 50 and 60 acres in extent. At no time has the whole of it been at once covered with palpable graves : but this does not any the less make the whole a graveyard. One clan or family would bury their dead one by one in one spot, and another in another. The graves in these clusters of graves would grow in numbers as the clan increased, but continually old graves would be forgotten and would be levelled with the ground by the weather ; and if a family died out, its cluster of graves would in a few years become effaced. There would naturally be spaces clear of graves (or of known graves) between the clusters of graves of this clan and of that clan, providing room for new burials ; and hence we find the state of affairs, which is used by the defendant’s counsel as an argument in favour of his client, *viz.*, that in the area in suit are very many separate graveyards, one occupied by butchers, one by zamindars, and so forth. In reality these are not separate graveyards, but only separate clusters of graves in one big area forming a single graveyard. These clusters are not known to the Revenue authorities or to the people by distinctive names. Further, it is peculiarly necessary that the clear spaces should not be appropriated for other purposes, inasmuch as all burying of bodies outside of the seven authorised areas aforesaid has been prohibited. This was fully recognized in 1867 (*vide* the application of that year by the *raises* of Multan, mentioned above). To hold that the clear spaces are at the disposal of the defendant would amount to a closure of the graveyard as a whole, for such spaces are necessary if any more burials are to be made. Again, there is evidence that in more than one clear space on digging up the soil human bones have been found, showing that these spaces have in past centuries been used for burials. We would hold, then, that the whole area intended in 1858 to be reserved as a graveyard under the name of Mai Pak Daman is *wakf* by user, if not by dedication, and that even the clear spaces in that area are inalienable by defendant ; but Mr. Parker goes on to argue that none of the land proposed to be sold is really within that area. In the Revenue records none of the land in suit is called after Mai Pak Daman, which name does not seem to have been used at all ; but all the *khasra* numbers are described as *kabristan* or *ghair-mumkin kabristan*. In our opinion this is sufficient. In 1858 it was settled that the only *kabristans* (outside of *khankahs*) were to be the seven aforesaid. It is not pretended that the land proposed to be sold is in any *other* one of those seven, and the land in suit generally is admitted to be in the Pak Daman cemetery. The land to be sold adjoins the land admittedly in Pak Daman ; and thus the conclusion is irresistible, unless the Revenue records are incorrect, that the lands to be sold also belong to the Pak Daman lands. Mr. Parker’s

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reference to Exhibit P-13, extract from Settlement map of 1880, is useless. It is only an extract, and the mere fact that it only shows land between the two roads and excludes some of the land in suit proves nothing ; for it is not authoritatively a map showing the exact limits of Pak Daman cemetery. Indeed no map exists, so far as we know, which does show those limits as such : all we know is that the Settlement map of 1880 clearly shows that each and every *khassra* number in suit has graves in it, though of course not all over it. It may be that Exhibit P-13 was put forward by plaintiffs as showing the Pak Daman cemetery ; but it was an incomplete extract, and plaintiffs are not bound by it.

“The onus being thus on the defendant to show that, as a matter of fact, the land to be sold is not *kabristan*, I am unable to see that he has discharged that onus.

“Only two further minor arguments used by Mr. Parker need be noticed. He contends that such land has been left for extension, and only some 11 acres are to be sold. This is immaterial in our opinion. The whole is *wakf*. Again, he argues that the Makdum and his father have in the past made repeated alienations of portions of land included within Pak Daman, and, the Mahomedan community having raised no objections, plaintiffs cannot now contest the present proposed sale. Mr. Shafi has fully satisfied us that illegal acts by defendant in the past do not deprive plaintiffs in such cases of their rights : the community may from apathy or because of some countervailing advantage have acquiesced in alienations being made in and in buildings being erected upon the land of the cemetery, and yet it does not lose its right to object to further alienations. In this connection we need only refer to Ameer Ali’s Mahomedan Law, 3rd edition, p. 375 last para., and p. 381. As regards another part of this argument, *viz.*, that the alleged levy by the Makdum of 1 pice per burial as a fee shows exercise of dominion over the land, we need only remark that the evidence seems to show that *fakirs* take these fees and not the Makdum ; and if these men take the fees as *mujawars*, as Mr. Parker suggests, then the income goes to the shrine and not to the Makdum in person and therefore no inference in defendant’s favour can be drawn from the circumstance.”

In the result the decision of the District Judge was reversed, and the plaintiffs’ claims decreed in full.

On this appeal,

*De Gruyther K.C.* and *G. Considine O’Gorman*, for the appellant, contended that the land had never been treated as *wakf*. On the finding of the District Judge it appeared that the person whose estate was

represented by the Court of Wards was the owner of the land, and that was not denied; that he had treated it without any objection as his private property, and had charged a fee for burials there. The vacant spaces where there were no graves would remain the private property of the appellant and be part of his estate. The Chief Court had wrongly placed the onus on the appellant; but it being conceded that he was the owner of the land, the burden of proving a dedication of the whole of the land as *wakf* lay, it was submitted, upon the respondents, and they had failed to prove it. The appellant being in possession, the respondents were not, under section 42 of the Specific Relief Act (I of 1877), entitled to the declaration they sought, and their suit should have been dismissed.

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*Arthur Grey*, for the respondents, contended that the whole of the land in suit was shown in the Revenue records as in the possession of the Mahomedan community for use as a graveyard; and those entries raised a presumption in favour of the respondents which the appellant had not rebutted. Reference was made to the Panjab Land Revenue Act (XVII of 1887), section 44; and it was suggested that, judging from the entries in the record-of-rights, Makdum Hassan Bakhsh was the trustee and custodian of the shrine of Mai Pak Daman to which the respondents alleged the land in dispute appertained as a graveyard. There was also a presumption that land in such possession, as this was shown to be, for the specific purpose of burying the dead, had been properly dedicated as *wakf*, and was consequently inalienable. Even if no express dedication could be proved, the reservation of the ancient Mai Pak Daman in 1858, together with the entries in the Settlement record, showed that the land had become *wakf* by user. The decision of the

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Chief Court was right, and the appeal should therefore be dismissed.

*De Gruyther K. C.*, in reply, said that it had never before during the case been even hinted at that Makdum Hassan Bakhsh was a trustee, or held the land in any other capacity than as owner.

Nov. 26.

The judgment of their Lordships was delivered by LORD MACNAGHTEN. In the immediate neighbourhood of the City of Multan there is a large tract of unculturable or uncultivated land generally known as the Mai Pak Daman or the Pak Daman graveyard. From time immemorial it has been used by the Mahomedan community in Multan for the purpose of burying their dead. But there is no evidence to show when or how it was originally set apart for the purpose of a burial ground.

In the judgment of the Chief Court in this case there occurs the following passage giving, as their Lordships think, a very probable account of the origin and early history of this graveyard:—

“Bahawal Hakh, the famous saint, was born in the 12th century of the Christian era. He had a son, Sadr-ud-din, whose wife was called Mai Pak Daman. She was revered as a saint, and her body was buried in a shrine within the area in suit. No one can tell when the surrounding land was definitely set aside as *wakf*; but we can safely conjecture that in the first instance Mussalmans began to bury their dead here and there in the waste land about her tomb, because of the desire to be buried near the body of a saint. There can be no doubt that for hundreds of years the land about her tomb has been used as a burial ground, and though there is no direct proof of dedication as *wakf*, we can safely conclude that long before 1858 it had become *wakf* at least by user.”

The year 1858 referred to in the above passage is the date of a representative public meeting of Mahomedans called by the authorities for the purpose of considering the question of Mahomedan graveyards for the city. At that meeting a resolution



was passed apparently in accordance with the suggestion of the Government to the effect that owners of *khankahs* or shrines should keep open graveyards in their own *khankahs*, that four old graveyards, of which Mai Pak Daman was one, should be kept open for the whole Mahomedan community, that three new graveyards should be provided, and that all other graveyards should be closed. The predecessor in title of the person, for whom the Court of Wards is now acting, took part in giving effect to this resolution.

The resolution was sanctioned by Government, and in 1867 a *robkar* was published giving notice that if any Mahomedan buried a corpse outside the authorised places, it would be taken up and buried in one of those places.

In the record-of-rights of the last settlement an area of land which comprises the land in this suit is entered as "in the possession of the Mahomedans," and is described as *kabristan* or *ghair-mumkin kabristan*, that is "graveyard or unculturable land forming portion of a graveyard." In the ownership column Makdum Hassan Bakhsh, now represented by the Court of Wards, is entered as "owner." It would seem that he was properly entered as owner, being trustee and custodian of the shrine of the saint Mai Pak Daman, and being or claiming to be the recognised head of the Mahomedan community in Multan.

In this state of things the appellant, the Court of Wards for the property of Makdum Hassan Bakhsh, advertised for public sale a piece of ground lying within the area of the graveyard as described in the settlement papers.

Thereupon certain Mahomedan residents in Multan of different classes and various occupations combined together and brought this suit as co-plaintiffs, claiming an injunction to restrain the proposed

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sale, and also asking for a declaration that certain lands described in the settlement records as graveyard, and comprising an area considerably larger than that now in suit, was inalienable as *wakf*. It appeared in the course of the suit that on part of the land described as "graveyard" in the settlement papers there had been encroachments, that part had been acquired for public purposes, and that some lots had been, as it was alleged, sold by the Makdum for his private purposes. So, in order to avoid all questions which might be raised with regard to land which had been so dealt with, the plaint was amended, and the area for which protection was claimed was limited to a piece of ground measuring 437 kanals and 4 marlas, or something between 40 and 50 bighas.

The District Judge dismissed the suit with costs. On appeal, the Chief Court granted the relief asked for by the plaintiffs, but without costs. From this order of the Chief Court the Court of Wards has appealed to His Majesty in Council.

The only substantial ground of appeal urged before the Board was that the area known as the Pak Daman graveyard was not one continuous burial ground, but merely an area of uncultivated ground in which here and there there were to be found graves or clusters of graves, and the defence set up was that vacant ground unoccupied by graves remained the private property of Makdum Hassan Bakhsh, and that the Court of Wards was bound or entitled to deal with it for the benefit of his estate without regard to the claim advanced by or on behalf of the Mahomedan community in Multan.

The Panjab Land Revenue Act, 1887 (Act XVII of 1887), section 44, enacts that "an entry made in a record-of-rights in accordance with the law for the time being in force . . . shall be presumed to be

true until the contrary is proved or a new entry is lawfully substituted therefor."

Their Lordships agree with the Chief Court in thinking that the land in suit forms part of a graveyard set apart for the Mussalman community, and that by user, if not by dedication, the land is *wakf*. The entry in the record-of-rights seems conclusive on the point. It is obvious that if it were held that within the area of the graveyard land unoccupied or apparently unoccupied by graves was private property and at the disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government in setting aside land as an open graveyard for the Mahomedan community in Multan would be frustrated.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

J. V. W.

*Appeal dismissed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Ranken Ford, Ford & Chester.*

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