PRIVY COUNCIL

Bullabh Das

Vs.

Nur Mohammad

Privy Council Appeal No. 71 of 1933
(Lords Roche Salvesen and Sir George Rankin JJ.)

16.12.1935

JUDGMENT

SIR GEORGE RANKIN J.

1. This suit concerns a plot of land in Mohalla Begumganj in the City of Lucknow measuring between seven and eight biswas. The purpose of the suit is to establish that this plot of land is a graveyard in the sense of the Mahomedan law, that is to say extra commercium and dedicated for the benefit of Mahomedans in general in such sense that private ownership therein does not exist. The suit is a representative suit, the plaintiffs having obtained an order under Order 1, Rule 8, Civil Procedure Code. Their grievance against defendant 1, Ballabh Das, is that by a deed dated 1st February 1928, he purported to take a transfer of this land from defendant 4, Mt. Musaheb Khanam, who conveyed the land to him professing to have derived title thereto from one Kale Khan. The plaintiffs' claim against defendants 2 and 3 is nowhere clearly stated, but at the trial the case made against them was that they had encroached upon the land in suit by the erection of a wall and door as additions to a house which abuts upon the land. The defendants, while not denying that in 1868 and prior thereto some few persons had been buried in the land, nor that in 1870 the land was closed for the purposes of a cemetery by order of the Municipal Board, deny that the land was at any time dedicated or made wakf so as to cease to be the private property of the owner. The defendants claim that at the time of the first regular settlement in Lucknow the land belonged to and was settled with Kale Khan as the owner thereof.

2. The suit was tried by the learned Subordinate Judge at Lucknow who dismissed it with costs, defendants 3 and 4 not appearing. On appeal by the plaintiffs to the District Judge this decree was affirmed. On second appeal, the Chief Court at Lucknow set

aside these decrees and decreed the plaintiffs' suit with costs in all Courts. Their Lordships, in a later passage of this judgment, will refer to the exact form of the decree made by the Chief Court and to a further order dated 15th September 1931, discharged by an order dated 2nd November 1931. Special leave to appeal to His Majesty in Council was obtained on 17th March 1932 by defendants 1 and 2.

3. At the trial a large number of witnesses were called, but in the opinion of the Subordinate Judge and of the District Judge the oral evidence was of little assistance to the plaintiffs. These Courts were unable to find that the plaintiffs had proved that upon this lands urs had been celebrated or fatihas had been read. They did not consider it established that a large number of pukka graves existed on this land at any time. The oral evidence as to kachcha graves was also held unworthy of belief. In this view the plaintiffs' case depended entirely upon the documentary evidence. of the documents produced, by far the most important are the khasra and noqsha being the revenue survey and map which came into existence in 1868 at what is called the first Regular Settlement in Oudh. These are Exs. 3 and 1 and it is important that they should be read together. A number of other documents of secondary importance were produced and duly canvassed by the trial Judge.

4. As it is common ground that the plot was closed as a graveyard in 1870, its recent history cannot be expected to shed much light upon the question of its dedication. It may however be mentioned that defendant 4, Mt. Musaheb Khanam, is found to be Kale Khan's grand-daughter. He died in 1880 leaving two daughters, Alla Rakkhi, who died in 1898, and Wilayati Khanam, who died in 1920. Defendant 4 is the daughter of the former. In 1913, Ex. 2, a municipal register of graveyards was prepared and Daroga Baqar Ali who prepared it described the plot as a takia, which means, according to the Chief Court, a graveyard in the custody of an individual fakir and entered it both as a public graveyard and also as personal property. This self-contradictory document usefully notes in the "Remarks" column that there are some thatched houses of tenants for which one anna per month is received. Thus in the time of Wilayati the land is being used for profit. In 1919 Wilayati and the present defendant 4, brought a suit against one Mohan Lal, who had a house on the western edge of the plot and who had erected a second storey thereto and made certain openings on the side facing towards the plot. They claimed an injunction to restrain these proceedings as an infringement of the right to privacy. In that suit a map (Ex. A-26) was made by an Amin under order of the Court which shows a number of thatched huts which the Subordinate Judge puts at 20, of which 14 belonged to Kahars. There

are also shown some five or six latrines. So by 1919 the plot in suit is being let out more and more to tenants of a poor class. This state of affairs continued till the present suit which arose out of disorders following upon the purchase by defendant 1 (who is a Hindu) in 1928 as already mentioned.

5. It is upon the correctness of the view taken by the Subordinate Judge and the District Judge of Exs. 1 and 3, that the decision of this appeal must depend. The survey khasra of 1868 is contained in sheets having 30 columns. The number of the plot of land in suit is 108. It is described in column 2, of which the heading is "Description of Plot", as a graveyard the word used being "qabristan." Cols. 5, 6 and 7 are headed "Name of owner according to possession." The sub-head of 5 is "Government", the sub-head of 6 is " Nazul ", which means forfeited or lapsed to Government, and the sub-head of column 7 is "Others." In this column 7 in respect of this plot of land is entered the words "Kale Khan, son of Asalat Khan." None of the other columns are filled up until columns 15 to 17 which contain the measurements and the area of the plots of land. In the case of this plot there follow measurements of no less than ten portions described as ' northern corner," "eastern corner" and so on, the total area being entered as 7 biswas 11 biswansis and 7 kachwansis. Column 22 is headed "Culturable" and the whole area is entered in this column, namely 7. 11.7. Moreover, the name of Kale Khan is entered in this khasra in respect of other plots, namely in respect of a house, a portion of No. 98, a courtyard No. 99, and a pukka house No. 100. In regard to this pukka house the name of Kale Khan, son of Asalat Khan, is not only entered in column 7, but also in column 8 of which the heading is ?Name of resident or cultivator." In column 9 headed "Caste, with religion" the entry in respect of this pukka house is "Fakir Sunni" and in column 10, of which the heading is "Occupation," the entry is Service." The khasra makes it clear that the house being portion of No. 98 was let by Kale Khan to tenants. Now the map is accompanied by a key, or explanation, of the symbols used by the draughtsman. Painted in pink and yellow, certain rectilineal figures are described as meaning "graveyard" and on the map these figures are scattered all over the plot in question, namely plot 108. The number of representations is in fact seven, but as their Lordships read the map, it is incorrect to say that this is a representation that there exist seven graves. It is a representation that the whole of the plot is graveyard. Graves and trees are represented by another symbol which is repeated about a dozen times and is scattered over the whole area except perhaps the edges. The map shows the pukka house in respect of which Kale Khan's residence is entered as being plot 100. It also shows the passage-way leading into plot 100 which is the only entrance to plot 108.

6. The view taken by the trial Judge was that this khasra and map showed the land in suit to be a graveyard which might well be privately owned; that it was recorded in the ownership of Kale Khan and that only one of the ten corners was covered with graves, the rest being vacant. Accordingly he held that unless by other evidence it could be shown that such a number of burials had taken place at one time or another in the land as to amount to a public user and be good proof of dedication as a public graveyard, the land must be treated as privately owned. The reference to Kale Khan as a fakir which is given with respect of the pukka house No. 100 he took to be a description of the class or community to which Kale Khan belonged. He thought that the entries taken as a whole were inconsistent with the idea that Kale Khan was a beggar or a saint. He thus negatived the suggestion that Kale Khan was shown to be a manager or takiadar and held the effect of the document to be that the suit land was the private property of Kale Khan. It is necessary to set out the reasoning of the learned Subordinate Judge as follows:

> The plaintiffs allege that Kale Khan's name is entered in Ex. 3 in the column of proprietors by virtue of possession. He was thus only a possessor and not a proprietor, and his possession was that of a manager only. This construction does not seem warranted. There is a history behind this expression "proprietor by virtue of possession." In the Mutiny of 1857 many people left the City of Lucknow. At the first Regular Settlement the Government found it extremely difficult to determine the title to the tenements of the persons who returned and occupied them. Seeing the previous insecurity of life and property from which the people had suffered at the hands of ruffians, it was not only difficult for them to prove their title, but an enquiry into title was bound to prolong the settlement operations to an inordinate length. The Government therefore ordered that persons in possession be recorded as proprietors of their tenements and the sites thereof. Kale Khan was thus recognised by the Government as the owner of the plot No. 108. If he had only been a manager he would have been entered as such or his name would have appeared in the column of tenants and the Mohammadans in general would have been recorded as owners of the plot. Lord Canning's Proclamation of 15th March 1858 confiscated all land in Oudh, and every right in the soil in the City of Lucknow was vested in the Crown. By the letter of the Financial Commissioner of Oudh, dated 7th August 1868, lands were granted to people whom the Crown liked to grant. It was at the first Regular Settlement, therefore, that for the first time in the City of Lucknow anybody's title was created to any land. All previous rights, including those of

the grandfather of Mirza Mahmud Beg, if any, had been swept away by confiscation. Kale Khan should therefore be considered to have been granted the plot by the Government at the first Regular Settlement. Kale Khan was thus a proprietor and not a manager. It is not alleged nor proved that he made a wakf. When Kale Khan never divested himself of his rights, it is difficult to deprive him of the ownership of the plot in suit.

7. The learned District Judge took the same view. He said :

> In the former document there are a number of columns. Columns 5, 6 and 7 are included under a joint head, " nama malik barui qabza " and beneath this the three columns are headed " Government, Nazul and Digran." In this last column, that is column 7, is entered the name of Kale Khan with his father's name. Great stress is laid on this entry and it is argued that ownership being entered on the basis of possession alone it does not prove that Kale Khan was the full owner of the property. On the contrary it is urged that he was only a " Takiadar" or manager of the graveyard. This point has been discussed by the learned Subordinate Judge, who has given the historical reason for the entry of ownership being in this form, namely the fact that after the confiscation of Oudh it was decided at the first settlement to base title on actual possession. This explanation has not been challenged and may be accepted as correct. The entry in this " khasra " does not in my opinion do anything to prove that Kale Khan was merely a manager and not full owner of the land.

8. He also said :

> It seems certain that at the present time there are only a very few pacca graves and there is nothing to indicate that there were any more at the time when the land was closed as a graveyard. On the contrary it is significant that in Ex. 2 (sic) below the main entry of this plot 108 there are entries of a number of "goshas" into which it was divided and only against one of these is the word "qabaristan" shown, from which it might be concluded that it was only this portion of the land which could claim the character of a graveyard. The mere existence of a comparatively small number of graves at the time when the plot was closed to burials does not in any way prove that the land had been dedicated as a public graveyard.

9. Their Lordships agree with the learned Judges of the Chief Court that the learned Subordinate Judge and District Judge have misapprehended the true meaning and effect of the khasra and the map. So far as the learned District Judge is concerned it

does not appear that he paid sufficient attention to the map as he does not refer to it expressly when dealing with certain vital matters. But the criticism of the Chief Court is so expressed as to allow of some misconception of its meaning, particularly when they say :

> We are unable to discover from the judgments of those Courts what distinction in law they would make between a 'public' graveyard and a 'graveyard' simpliciter, and when they refer to the opinion of Abu Yusuf and Mohammad that the ownership abates when people have buried in the cemetery and it is sufficient if one person do so.

10. Learned counsel for the appellants contended that the opinion of the Chief Court was that land would become wakf necessarily and immediately upon the burial of a single person, an opinion which their Lordships agree would be erroneous and contrary to decided cases. It is one thing to say that as a gift may be incomplete without" delivery so a mere oral dedication as a graveyard would not take effect until one burial had taken place. It is another thing altogether to say that one burial on a plot of land makes the land wakf. If a landowner were to allow one or two of his relatives to be buried in his orchard he would not necessarily be held to have dedicated the land as a cemetery. A careful reading, however, of the judgment of the Chief Court leads their Lordships to give it another and a sounder interpretation. Their criticism is that when in the document of 1868, for example, one comes across a description of certain land by the word "qabristan" or grave-yard, this, prima facie at all events, means that the land is a grave-yard in the sense known to the Mahomedan law.

11. The owner who permits one or two burials to take place in his orchard would not describe his orchard as qabristan. If the plaintiffs had to make out dedication entirely by direct evidence of burials being made in the ground, and without any record such as the khasra of 1868, to help them, they would undoubtedly have to prove a number of instances adequate in character, number and extent to justify the inference that the plot of land in suit was a cemetery. The plaintiffs however are not in this position. The entry "qabristan" in the khasra of 1868 has to be taken together with the map which shows the whole of plot 108 to be a graveyard. As regards the ten corners or goshas both the Subordinate Judge and the District Judge have misconstrued the khasra. The number of dots to represent the word "ditto" does not appear to have been sufficient to continue all down the column so as to cover the ten corners each of which is carefully measured, but it is a misconstruction of the khasra to hold that the first only, namely the northern corner, is represented as a graveyard, and it is abundantly plain that the

whole of the plot in suit was a graveyard.

12. Again, it is quite true that the entry of the name Kale Khan in Col. 7 does not by itself show that he had not a complete title to the plot. According to the headings of the khasra, however ancient or manifest his title, his name would have been entered in that column under the heading: ?Name of owner according to possession." If however account is taken of the fact that the particular plot No. 108 is described as a graveyard it becomes difficult indeed to suppose that the fact of possession or custodianship is not the basis of the entry. The suggestion that if Kale Khan had been only a manager he would necessarily have been entered as such or that the Mahomedans in general would have been recorded as owners of the plot, is at best an uncertain suggestion. It would have been a little out of place to record Kale Khan as the "resident or cultivator" of a grave-yard. On the other hand if the plot was the private ahata or close of Kale Khan one would expect it to be treated as the house (plot No. 100) is treated and to find his name entered both in Cols. 7 and 8 as owner and as occupier. If the fact that the subject-matter of the entry is a graveyard is allowed to sink out of sight, the entry of Kale Khan's name in Col. 7 is neutral. If however this fact be taken into account and the not insignificant circumstance be added, which can be collected from the entry against plot No. 100, that Kale Khan is classified as a sunni fakir, the neutrality disappears. If the house and courtyard did not abut upon and lead to the graveyard they might have some little value for the purpose of setting up Kale Khan as an owner of property : as it is they have none. The khasra can hardly mean that it was the intention of Government at the first Regular Settlement, to vest the ownership of such a cemetery as is described in the map in a private individual, thereby destroying its character as a qabristan according to ordinary conception of the Mahomedan law. It may be true as the learned Subordinate Judge has said that:

> It is a matter of not uncommon occurrence that some Mohammadans bury their dead in their orchards or Ahatas attached to their houses and allow their neighbours or relations also to be interred there. By doing so they do not divest themselves of their ownership over their orchard or Ahata or the sites thereof.

13. This theory however does not seem to their Lordships to be adequate to explain the khasra and map, or the known facts. The owner in this case would need to have been both exceptionally generous in providing ground for burials, and unusually indifferent or opposed, for a Mohammedan, to the ordinary Mohammedan notion of a burial ground. Add the fact that in 1870 the ground was closed as a cemetery by order of the Municipal Board, and the orchard theory, if their Lordships may so call it becomes

still more unconvincing.

14. As this case came before the Chief Court on second appeal it is important to notice that the reasoning of the Subordinate Judge, expressly accepted by the District Judge, is such as to constitute the effect of the khasra a question of law. The position according to these learned Judges is that all previous titles had been swept away and that the Crown was granting lands to people at its pleasure. The Subordinate Judge says it was at the first Regular Settlement that for the first time in the City of Lucknow anybody's title was created to any land. He does not suggest that the title in this case was created by another document : the khasra itself in his view is the instrument which confers or embodies the right. If this be so the khasra and the map are not merely "historical materials" in the sense in which that phrase is used in the judgment of the Board delivered by Sir Binod Mitter in *Wali Mohammad v. Mohammad Bakhsh,* They are within the phrase " instruments of title or otherwise the direct foundation of rights" and the learned Judges of the Chief Court were entitled and obliged to put upon them the true construction.

15. Learned counsel for the appellants appeared to challenge the view taken by the Subordinate Judge and the District Judge and asked the Board to hold that the question in the present case is to be decided as a question of fact treating the khasra and the map as mere items of evidence. Learned counsel however laid no materials before the Board upon which they would be entitled to take another view of what happened in Lucknow at the time of the first Regular Settlement in 1868. The matter being of the first importance their Lordships would be slow to express an opinion upon it save upon fuller material and in a case in which the question required to be decided. In the present case it does not require to be decided because the appellants are not in a position by attacking the view taken on this point by the Subordinate Judge and accepted by the District Judge to claim that the findings of the latter Court whether right or wrong should be restored as findings of fact. It may perhpas be said in criticism of the judgment of the learned District Judge that he has not appreciated that on the view which he has accepted of the khasra and map these documents are in a different category from the other items of evidence, oral or documentary. On the other hand there are no alternative findings on the one view and on the other. If the materials in the present case fell to be looked at as a mere question of evidence, their Lordships are satisfied that the true inference to be drawn from the evidence as a whole would be that the suit land is a cemetery in the ordinary Mohammedan sense and is no longer the subject of private ownership.

16. The learned Judges of the Chief Court having on this point reached a correct conclusion do not seem to have paid quite sufficient attention to the form of the order which they should make. Having stated in the judgment that they would "decree the plaintiffs' suit with costs in all Courts" they ultimately made a decree dated the 13th March 1931, whereby the plaintiffs were given possession over the plot No. 108 and the defendants shall deliver possession of the said plot by demolishing the door and the wall from it." This form of order seems to combine the relief appropriate to an ejectment suit with two mandatory injunctions. As regards the door and wall the learned trial Judge had framed issue 2-" whether the defendants 2 and 3 have encroached upon it as alleged." He had found that the only evidence of encroachment was that one witness for the plaintiff, Mashuq Ali, P. W. 1, stated in examination-in-chief that the defendant 2's new wall and door encroached on the plot in suit but in cross-examination denied this fact. The learned Judge states : ?There is no other evidence on this issue which is, therefore, answered in the negative." The learned District Judge upheld this finding saying :

17. It is not at all clear from the plaint what ground there was for suing them, but in some way it seems to have been pleaded that they made an encroachment on the plot. The learned Subordinate Judge held on evidence that there was no encroachment by them so that no relief could be given against them. In the memorandum of appeal this finding has been challenged, but nothing has been said about it in arguments, so that I need not refer to the matter any further and the case is really confined to the question whether Mt. Musaheb Khanam had any right to sell the land to Ballabh Das. From these passages it sufficiently appears that the Chief Court were in error in making any order for the demolition of the door and the wall. The matter was drawn to their attention by a petition, dated the 26th March 1931, but instead of correcting the decree by ordering the omission of all reference to demolition of the door and the wall, the learned Judges of the Chief Court said that:

> In the lower Appellate Court the matter seems to have been taken as falling within the general issue as to whether plot No. 108 was wakf property or not.

18. This appears to their Lordships a misconception of what had happened. On the basis of this misconception the learned Judges proceeded to make an order dated 15th September 1931:

> There should be an enquiry with a view to determine as to whether the door and the wall in question do not exist on plot No. 108 .... If it is in the negative it would seem to follow that the decree of this Court directing the demolition of

the door and the wall should be modified.

19. The effect of this in their Lordships' opinion was to require the learned Subordinate Judge to hold an enquiry as to a matter which had already been decided in the suit, in fact to re-open and try for a second time a claim for a mandatory injunction in respect of the door and the wall. Their Lordships are of opinion that this cannot be justified and that the defendant concerned was rightly advised to proceed no further with his application to have the original decree of the Chief Court modified. The order of 15th September 1931, was accordingly discharged by an order dated 2nd November 1931. As regards the claim for a mandatory injunction the suit must fail altogether. As regards the question of possession, their Lordships think that the decree of the Chief Court should be varied. There should now be made a declaration that the suit land is dedicated for the purposes of a graveyard according to Mahommedan law and that the defendant 1, has no title thereto. But the question whether the plaintiffs should recover possession thereof in this representative suit requires fuller consideration than it has yet received at the hands of the Chief Court.

20. It would not in their Lordships' view be right to give the land to the plaintiffs if there be no certainty that they will cause the land to be properly kept and looked after as a burial ground should be. It might possibly be thought advisable upon the whole that defendant 4 should be allowed to continue to look after it. These matters their Lordships will leave to be dealt with by the Chief Court and the case will go back to that Court for the purpose of making an order as to the person or persons to be put in possession and the terms if any upon which possession should be given. The order for costs in the three Courts in India will stand as against defendant 1 only. The suit as against defendants 2 and 3 will be dismissed so far as regards the claim for demolition of the door and wall. Subject to these directions their Lordships are of opinion that this appeal should be dismissed; and that as regards the costs of this appeal the respondents should recover from appellant 1 two-thirds of their costs but give credit for a sum equal to one-third of the total costs of both appellants. If the latter sum prove to be the greater, then the balance is to be set-off against costs ordered to be paid by appellant 1 in respect of the Courts below.

21. Their Lordships will humbly advise His Majesty accordingly.

Order accordingly.

Cases Referred.

1930 PC 91=122 IC 316=57 IA 86=11 Lah 199 (PC).