

(1927) 11 MAD CK 0057
In the Madras High Court

Mahammad Abdul Khuddus Sahib and Others	APPELLANT
Vs	
Muhammad Ashroff Sahib	RESPONDENT

Date of Decision : 13-11-1927

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : 110 Ind. Cas. 100 : (1928) 28 LW 75

Hon'ble Judges : Devadoss, J

Bench : Single Bench

Judgement

This is an application to revise the order of the Sub-Divisional Magistrate of Nidadavole passed u/s 145 of the Criminal Procedure Code. The petitioners' contention is that the land in dispute is a burial ground and that they as Muhammadans of Aurangabad are entitled to bury their dead there. The learned Magistrate has only addressed himself to the question of possession and has come to the conclusion that the respondents were in possession and directed that the possession should continue with them. In a case of this kind where Certain persons claim to have the right to bury their dead in a burial ground the Magistrate should have addressed him self to the question whether the persona claiming the right exercised that right when occasions arose. It is only in open spaces in a burial ground that new graves are made. The fact that a portion of the ground was ploughed and sown is no ground for thinking that it is not a burial ground. The petitioners obtained a declaratory decree in O.S. No. 162 of 1916 on the file of the Additional District Munsif's Court of Kovur with reference to the plot now in dispute. The decision of the District Mutisif has not been appealed against. The question is what was the portion which was declared to be the burial ground in that suit. The learned Magistrate has thought fit to place reliance upon the fact that the plot now claimed to be part of the burial ground was ploughed and sown and was also the subject of a lease. This is entirely immaterial for the present purpose. Vacant portions of a burial ground may be improperly used for raising crops; but that would not take away the right of persons entitled to bury their dead when occasion arises. Section 147 which relates to the exercise of any

right of user of any land or water covers cases of this description and the Magistrate has to see whether the right which is exercisable only on particular occasions at particular seasons was exercised during the last of such seasons or occasions. It appears there were burials in this plot in spite of objection. The question is not whether the plots in dispute were cultivated or not but whether the Muhammadans exercised their right to bury in any portion of the plot which was decreed to be a burial ground. As the learned Magistrate has not addressed himself to the real question in the case, I set aside his order and direct him to restore the petition to file and dispose of it in the light of the remarks made herein.