

(1933) 11 BOM CK 0014
In the Bombay High Court

Said Maher Husein

APPELLANT

Vs

Haji Alimahomed Jalaludin

RESPONDENT

Date of Decision : 27-11-1933

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 92, 93

Citation : 152 Ind. Cas. 50

Hon'ble Judges : Broomfield, J; Baker, J

Bench : Division Bench

Judgement

Broomfield, J.—These appeals arise in a suit u/s 92, CPC relating to an institution known as the Pir Mushayak Roza at Ahmedabad. Pir Mushayak was a Muharnmadan saint who flourished in the seventeenth century. He originally belonged to Kadi but settled in Ahmedabad and died there. He was a notable religious teacher who gathered numerous disciples and wrote books which are the main foundations of the Momin sect of Muhammadans. He was buried outside the Sarangpur Gate at Ahmedabad where he had acquired some property. His tomb is an object of veneration to the devotees of the Momin faith and an uras held every year on the anniversary of his death to which pilgrims come from Bombay and various parts of Gujarat. Apparently, there are no Momins to speak of in Ahmedabad itself. Defendant No. 1 is the present head of the Momins and is a direct descendant of Pir Mushayak. He resides at Palanpur and occasionally visits Ahmedabad. The Momin community is divided into groups called after certain villages. The plaintiffs who belong to the Patanwada group are in the position of dissenters. They have challenged the orthodoxy of the present pir and oppose his claim to be regarded as a hayat or living pir. Consequently, they have suffered some kind of ex-communication, and at one time it was contended that they were disqualified from instituting this suit. That contention, however, has been given up.

2. The details of the pleadings have been given in the judgment of the lower Court. Briefly, the plaintiffs' case is that several properties were dedicated to Pir

Mushayak which he in turn dedicated to God ; that five survey numbers specified in the plaint have been dedicated to the pir or to the dargah and are wakf; that defendant No. 1 has claimed these properties as his own and has granted a permanent lease of one of them to defendant No. 2 and has thereby been guilty of a breach of trust which makes it necessary that he should be removed from management; and that a scheme should be framed for administration of the trust properties. The reliefs prayed for in the plaint are a declaration that the Roza of Pir Mushayak is a public charitable religious trust, that the properties described in the plaint belong to the said trust, the removal of defendant No. 1 from his office as Pir Jada or manager, the cancellation of the permanent lease granted by defendant No. 1 in respect of one of the properties, and the drawing up of a scheme for the administration of the trust properties. The gist of the written statement, apart from certain technical defences, is that the suit properties are not the subject of any public, charitable or religious trust, but the private property of the pirs and now of defendant No. 1. And, in the alternative, without prejudice to that contention, that there has been no breach of trust, and there is no necessity for the removal of defendant, nor for any scheme.

3. The trial Court has found in favour of the plaintiffs that the suit properties are subject to a trust created for public purposes of a religious nature, and that the defendant has been guilty of a breach of trust inasmuch as he has asserted a private title to the properties and granted a, permanent lease of one of them. It has found in favour of the defendant that there is no necessity to remove him from management or to frame a scheme. Accordingly it has been declared that the foundation, situated in Survey No. 136 consisting of the Roza of Pir Mushayak and the adjoining mosque together with other buildings is the subject of a trust created for public purposes of a charitable and religious nature, viz., for use as a mosque and a shrine by the Momin community. It has also been declared that Survey Nos. 137 and 138 and Survey No. 105, plot No. 1, are properties attached to and belonging to the trust. It has been declared also that the right of management of the said trust and properties is solely vested in defendant No. 1 and his successors in the office of the religious headship of the Momin community, but is to be subject to certain directions contained in the judgment. Appeal No. 216 is by defendant No. 1. Appeal No. 217 is by the plaintiffs. The only point seriously argued in the latter appeal is that a scheme ought to have been framed. Certain points of law were discussed at the end of Mr. Thakor's argument for defendant No, 1 in the main appeal. They are really preliminary points and may be dealt with first. In November 1922, the Collector, acting on the report of the Prant Officer, declined to grant a certificate, u/s 93, Civil Procedure Code, for the filing of a suit. On January 10, 1923, after fuller consideration, he sanctioned the suit for reasons set out in his order (Ex. 51). It has been contended that he was precluded from giving sanction by reason of his previous refusal. But no reason has been suggested why that should be so.

4. The law requires that the Collector should sanction the filing of the suit. He has done so. The fact that at one time he was not satisfied as to the propriety of

giving sanction is immaterial. It was quite open to him to change his mind on further consideration. Then Mr. Thakor has referred to Prem Narain v. Ram Charan 136 Ind. Cas. 461 : AIR PC 51 59 IA 121 : 53 A 990 : 9 OWN 53 : 36 CWN 25 : 35 LW 224 : 55 OLJ 54 : (1932) ALJ 182 : 62 MLJ 249 : 34 Bom. LR 494 : (1932) PC 125 : (1932) MWN 685 where the Privy Council has held that the sanction of Government u/s 92, CPC must be given specifically in the case of each particular suit and pointed out that it does not appear that this was done in this case. This point, however, was not and could not be pressed in view of Act II of 1932 which validated all pending suits. The third preliminary point and the only one seriously argued is this : it has been held by the Privy Council in Abdur Rahim v. Muhamwad Barkat Ali 108 Ind. Cas. 361 : AIR 1928 PC 16 551 A 66 : 55 C 519 : 9 PLT 65 : 1 LT 40 Cal. 19 : 27 LW 339 : 32 CWN 482 : 26 ALJ 464 : 54 MLJ 609 : 30 Bom. LR 774 that only suits claiming reliefs specified in Section 92 must be instituted in conformity with the provisions of that section and that a prayer for a declaration that the property in suit is wakf property is a prayer for a relief not covered by the section, The point arose in this way. There was a suit properly filed in the Court of the District Judge with the sanction of the Advocate General u/s 92 claiming reliefs specified in that section. Subsequently an application was made for amendment of the plaint by adding strangers to the trust as parties and a prayer for a declaration that the property was wakf, and this was done. The sanction of the Advocate-General was not obtained for the amendment, and the question arose whether it was necessary.

5. The Privy Council held that it was not, because the relief claimed by the amendment was not one of the reliefs specified in the section. It was held in connection with a question whether the compromise decree which came to be passed in the suit amounted to res judicata, that in so far as the nature of the suit was changed by the amendments, viz , by adding strangers to the trust and by prayers for relief not covered by Section 92, the suit ceased to be one of a representative character. Mr. Thakor, relying particularly on that latter finding, has argued that the District Court in a suit u/s 92 has no jurisdiction to grant any reliefs except those which are specified in the section itself, that a declaration that the suit property is wakf cannot be asked for nor granted, and that Section 92 has no operation except where the existence of a public charitable and religious institution is admitted. The proposition that Section 93 is to be confined to the case of admitted trusts was negatived in Jafar Khan v. Daudshah 9 Ind. Cas. 358 :13 Bom. LR 49 where it was pointed out that it has always been the practice to inquire into and determine the nature of the institution, if disputed in a suit u/s 92. The other view would in a great many cases necessitate two suits, one before a Subordinate Judge and one in a District Court. Mr. Thakor contends that the case of Jafar Khan v. Daudshah 9 Ind. Cas. 358 :13 Bom. LR 49 is impliedly overruled by the Privy Council. I am unable to agree with him. The question whether the Court in a suit sanctioned in its entirety by the Advocate-General or the Collector can make a declaration that the property is wakf in addition to granting the reliefs specified in the section was not before their

Lordships, As for Mr. Thakor's contention that the decree in this suit is without jurisdiction, I can find no support for it whatever in the Privy Council judgment. The only doubt--if there were any doubt at all would be as to whether a declaration that the property is wakf is binding on persons other than the parties to the suit.

6. I now come to the main issue in these appeals--the question whether the suit properties or any of them are wakf. First of all, it will be desirable to give a brief description of the suit properties. They consist of four survey numbers, viz., Nos. 136, 105, 1, 137 and 138. Survey No. 136, with which most of the evidence in the case is concerned, contains a number of buildings. In the centre is the Roza or shrine which contains the tomb of Pir Mushayak and seven other tombs of members of the defendant's family. To the south of the Roza there are buildings containing other tombs. On the west there is a mosque. The survey number also contains an old howd or water cistern. This is at present empty and has been so within the memory of all the witnesses, but presumably at one time it contained water. Water is at present provided by a well and a water pipe. In the south are a number of residential buildings occupied by the defendant and his predecessors on their visits to Ahmedabad. Along the north side there is a large covered verandah for the accommodation of persons visiting the shrine. The whole number containing these buildings is enclosed by a compound wall. Survey No. 105 is on the south of Survey No. 136. It now contains a number of chawls for mill hands which were built in 1921 by defendant No. 1 at a cost of nearly Rs. 40,000 which came from his private funds. Survey No. 137 is an ordinary field adjoining Survey No. 136 on the north. Survey No. 138 is on the east of Survey No. 137. This number was permanently leased in 1906 by defendant No. 1's father. That lease was cancelled in 1913, but the land was leased again by defendant No. 1 in 1919 and mill chawls have been erected on it. The first two numbers are shown in the Record of Rights as devastan; the other two are ordinary ryotwari lands.

7. The history of these properties, so far as it can be ascertained, is briefly this. Pir Mushayak left property of the value of about Rs. 9,000, as appears from the fact that his son Abdulla Saheb purchased his grand-mother's one-sixth share for Rs. 1,500 in 1704 (Ex. 174). Between 1704 and 1731 Abdulla Saheb purchased a number of small houses and small plots of land in the neighbourhood of Pir Mushayak's residence. Several of these sale-deeds have been produced. It is not necessary to refer to them in detail. The most important is one of the year 1707 (Ex. 180), and its importance consists in the fact that in the description of boundaries it refers to the Roza Pir Mushayak and also to a khankah, which means a kind of monastery. In the year (sic) disputes arose between Abdulla Saheb and his brother and nephew. There was litigation which was ended by a compromise, the results of which are recorded in Ex. 181. The income derived from the followers of Pir Mushayak was estimated to be Rs. 5,000 a year, and this was divided between Abdulla Saheb and his brother in the proportion of 5 to 4. As regards the other property, the arrangement was that

half the Roza on the eastern side was to belong to Abdulla Saheb and the other half on the west to his brother and nephew. The two brothers were declared to have an equal share in the mosque and other places so that each of them sitting in the Roza might perform the uras ceremony of Pir Mushayak. It has been suggested in the argument that these documents especially the partition deed indicate that the buildings and lands were private property and dealt with as such. But the partition deed does not necessarily show anything more than a division of the management, and in any case private acquisition in the first instance would not be very important for the purposes of determining the character of the properties now. All this evidence apparently relates to what is now Survey No 136 only. There is no evidence at all as to the time at which, or the manner in which, survey No. 105 was acquired. Survey Nos. 137 and 138 were acquired in quite modern times as I shall show. Between 1736 and 1857 there is an almost complete gap in our information, and the little that is known as to this period has been set out by the trial Judge in para. 22 of his judgment.

8. I must next refer to the information which is contained in the Government records. The earliest document relating to No. 136 is Ex. 40 which is a survey tippan of the year 1857. The land is described as talpad sarkari. There is a rough sketch showing two buildings containing tombs. Exhibit 55 is an extract from the kayam kharda of the year 1874-75. The land is here described as sanadi devasthan and shown as held on payment of quit-rent. Pir Mushayak is mentioned as the owner, and Ahmed Hussein alias Abdulla Saheb (i.e., defendant's father) as the vahivatdar. There is note in the remarks column that 1,000 yards of the land are occupied by a Roza. Exhibit 60 is a jamabandhi fasal patrak of the new survey in 1888-89. Here the land is again described as devasthan sanadi, owner Pir Mushayak, and vahivatdar Ahmed Hussein alias Abdulla Saheb as before. Exhibit 63 is the first extract relating to the Record of Rights, In column 4 the entry is Pir Mushayak, owner, and Abdulla Saheb vahivatdar. The same entry is repeated in column 9 and in column 10 the nature of the holding is given as inam. In column 12, which is for the name of the tenant, the entry is Ali Muhammad Vajir, mujawar, and there is a note in column 13 that he was to hold the land so long as he continued to worship the pir. This note has been misunderstood by the learned trial Judge who says, in para 23 of the judgment: "There is a remark that the inam was to continue so long as pir's worship is done." The remark has no reference to the continuance of the inam but merely recites that the tenant held the land on condition of the due performance of his duties as mujawar.

9. The next document to be referred to is Ex. 116 which is a register of transfer, Village Form No. 7. It shows. No. 136 as devasthan inam. The owner is Pir Mushayak, and the vahivatdar Pir Saiyad Maher Husein, i.e, the defendant. It is recorded that his name was entered on the death of his father in 1919. In Ex. 37, which is the latest extract from the Record of Rights No. 136 is still shown as devasthan, but in column 9 in which is to be entered the occupier of inam land the entry is : "The owner of Pir Mushayak's Roza Pir Saiyad Meher Husein". The

defendant therefore in this entry is no longer shown as vahivatdar but as owner, and there is a note in the remarks column that this change was made on his application claiming the land as his private property by reason of the fact that the Collector had refused sanction to file a suit u/s 92. Coming to Survey No. 105 the first document is Ex. 39 which describes the land as talpad pasyatu salami. The date is June 3, 1857. One Fakir Karimad is shown as the Owner. There is no evidence to show who this person was. As the learned Judge points out, he was evidently not a member of the defendant's family, being a fakir. In all probability he was a mujawar of the Roza. In the kayam kharda (Ex. 55) the land is shown as "sanadi devastan permanent." The owners are the Pirs Mushayak, Bakarsa and Kasamsa; the vahivatdars, defendant's father Abdul Hasan Ali, Utam Pragji and Kamal Karim. The fact that one of the vahivatdars is a Hindu is curious. Probably he must have been only a tenant of the land. In Ex. 00, dated 1888-89, the description is the same as before and again there is an entry of a Hindu vahivatdar along with defendant's father and another Muhammadan. In the Record of Rights (Ex. 62) we find Survey No. 105 divided into three parts. Plot No. 1 - the only one with which we are concerned in this suit--is shown as belonging to Pir Mushayak; the vahivatdar is the defendant's father. Pir Kasamsa and Pir Bakarsa are shown as the owners of the other two portions and the names of other _ vahivatdars are given. Mr. Thakor laid some stress upon the entry in column 14, "Separated Brothers." But as this entry obviously refers to the pirs who had been dead for centuries, the meaning of it is, to say the least of it, obscure. The later entries in the Record of Rights are the same as the case of No. 136.

10. The meaning of the terms used in the earlier records is thus given in Robertson's Glossary. Talpad means the Government share in certain villages as opposed to the wanto or alienated portion. Talpad pasayatu means talpad lands alienated by gift. Pasayatu means lands held for the maintenance and support of religious and charitable institutions or for the maintenance of village officers. Salami means tribute or quit-rent. As to Survey Nos. 137 and 138, we have more or less a complete history. The old number which corresponds to the present No. 137 was purchased by Jamalbhai Aliji Momin, who was the mujawar of Pir Mushayak's Roza, in 1876, for Rs. 87 - see Ex. 34. In 1887 this land stood in the name of AUauddin Fate. In the Record of Rights the number was divided into two parts: Plot No. 1 stood in the name of Allauddin Fate and Plot No. 2 in the name of Valibhai Fate and afterwards of his son Nurbhai. Survey No. 138 was purchased by the same mujawar, Jamalbhai Aliji, in 1883 for Rs. 299 (Ex. 35). This land also stood in the name of Allauddin Fate in 1887. Both these numbers were transferred to the name of defendant No. 1 as owner of the Roza of Pir Mushayak in 1919--see Ex. 37. This was done with the consent of the former holders AUauddin and Nurbhai as noted in the record. There is no very definite evidence as to who these various holders were, but in all probability they were mujawars or managers.

11. There is a good deal of oral evidence, relating mainly to uras and the use of

the mosque in Survey No. 136. Four plaintiffs have given evidence themselves and they have examined eleven witnesses. For the defence seven witnesses gave evidence in Court, and five were examined on commission. Stress Has been laid on the fact that defendant No. 1 did not go into the witness box himself, but he does not reside in Ahmedabad and has no personal knowledge of the suit properties prior to 1919 when he succeeded his father as pir. He has examined his manager (Ex. 198) and his accountant (Ex. 200), and has produced all documents in his possession. The oral evidence is very largely partisan in character. Most of the plaintiffs' witnesses are members of the dissenting faction; most of the defendant's are among his own particular adherents. There has probably been a good deal of exaggeration and perversion of facts on both sides, but the evidence certainly justifies the following conclusions:

Every year on the anniversary of Pir Mushayak's death some hundreds of devotees assemble at the Roza for the uras. [The plaintiff's witnesses say that the numbers run into thousands. But-the most reliable witness on that point is a Police Sub-Inspector (Ex. 204). As Sub-Inspector in Ahmedabad he has attended the uras every year from 1915-1926 to maintain order and keep the peace. According to him the believers (by which he means apparently Momins belonging to defendant's party) number from 200 to 1,000; those belonging to the other party number from 100 to 150.] The pilgrims are mostly Momins, but some other Muhammadans also attend. On these occasions all those attending offer prayers publicly in the mosque without let or hindrance. The defendant has entirely failed to prove that there is anything, private about the mosque. It is a building of some size capable of holding 150 to 200 people. There is no reservation of it for the defendant's family or even for the party amongst his followers who support his claims to be the hayat pir.

12. The dissenters have been admitted as of right, and though in recent years it has been necessary to have Police supervision, it has been merely for the purpose of maintaining order. The defendant's witnesses prefer to call the building an ibadatkhana or a prayer house instead of a mosque, and have made an attempt to distinguish it from a public mosque. One of the witnesses examined on commission has deposed that the difference between a mosque and an ibadatkana consists in the fact that in a mosque there must be a muezzin to call to prayer, prayers must be offered five times a day, and a moulvi or preacher must be maintained. In the cross-examination of plaintiff's witnesses it was elicited that the five calls to prayer are not observed. There is no moulvi: there is also no pulpit. These things however are not necessary to constitute a mosque, as was pointed out in *Akbarally v Mahomedally* 138 Ind. Cas. 810 : AIR 1932 Bom. 356 : 34 Bom. LR 655 : (1932) Bom. 434 Even the defence witnesses have to admit that there is no real restriction on public worship in the mosque. The same witness, to whom I have just referred, who made the distinction between a mosque and an ibadatkana, has deposed:

At the time of uras when we go there we offer prayers in the ibadatkhana. Two

hundred, four hundred or five hundred persons would attend.

13. And then in reply to a specific question. "Do all offer their prayers there?" he said, "Those who want to offer prayers may offer them there."

14. It also appears that the mosque is used for prayer by persons visiting the shrine at other times and not only on the occasion of the uras. Offerings of flowers and cocoanuts are made at the shrine. Gifts of money also appear to be made. But on this latter point the evidence is most conflicting and unreliable. The plaintiffs have made a strenuous effort, to show that until recent years, i.e, until the schism began, there used to be a galla (i.e., a money-box) in which were placed contributions for the up-keep of the institution. The money so contributed, amounted according to some of the witnesses, to several thousands of rupees a year. According to the defence witnesses, there never was any galla and the pilgrims never did more than present a small coin or two to the mujawar. One thing is clear. There certainly has been no galla there ever since the Sub-Inspector (Ex. 201) has been in attendance.

15. In view of the very unsatisfactory nature of the evidence on this point, I think it would be unsafe to hold either that any considerable amount of money has been contributed in this way or that any money that may have been contributed must necessarily have been intended for the upkeep of the institution. It must be remembered that most of the people who visit the Roza are the disciples of the pir for the time being as well as the disciples of Pir Mushayak, and therefore even in the case of offerings at the shrine there is no presumption that they would be made for the benefit of the shrine only. A rather feeble attempt was made to show that the affairs of the Roza had been managed by the jamat. though what jamat is referred to is not clear, since, admittedly, there is none at Ahmedabad. The trial Judge has disbelieved the evidence as to this--I think quite rightly. It does not appear that anything much in the way of management has ever been required. What was needed was no doubt done by the vahivatdars appointed by the pir and the mujawar. The old accounts produced by the defence contain entries of considerable sums of money remitted to Jamalbhai, the mujawar already mentioned in connection with Survey Nos. 137 and 138, for the expenses of the uras and other purposes (Exs. 206 to 212).

16. One or two minor points may be mentioned. The plaintiffs' witness (Ex. 150), who is a Bombay Victoria driver, has deposed that his grandfather was buried near the Roza. Another witness (Ex. 152) says that his sister's son was buried there. Witness (Ex. 151) who is a contractor says that he presented stones for the construction of a pavement in front of the Roza. All these statements are denied by the defendant. But, I think, they are probably true. In 1914, it appears that the Roza required certain repairs and an appeal for contributions was issued by the pir (see Ex. 54). Plaintiff No. 1 says that he subscribed Rs. 250 and witness (Ex. 155) claims to have subscribed Rs. 200. Witness (Ex. 159) says that he sold some cotton and gave the proceeds (Rs. 100 to Rs. 150) to the mujawar. The defendant says that the appeal fell upon deaf

ears and the repairs which cost over Rs. 3,000 were paid for out of his own pocket. There is little doubt that the bulk of the money came from the pir himself. But probably a certain amount was contributed by the devotees, and in any case the fact that a public appeal was issued is not without significance. These are the facts from which it has to be determined whether the suit properties are wakf. In the course of the very thorough and learned arguments in this case, we have been referred to numerous authorities as to the manner in which a wakf can be constituted under the Muhammadan Law. It is not necessary however to refer to these authorities in any detail for this reason. Although it was asserted in the plaint that the properties were dedicated to Pir Mushayak and were by him dedicated to God, there is, not unnaturally having regard to the lapse of time, no direct evidence of any dedication at all. These properties could not possibly have been dedicated to God by Pir Mushayak for, with the exception of a small part of Survey No. 136, they were all acquired after his death--some of them centuries after his death. If it is to be held that there has been any dedication at any time, it can only be by presumption from long use for public purposes, and the presumption, if it can be made at all, presupposes due compliance with the legal forms whatever they may be. I shall therefore deal very briefly with the law. The authorities cited show that there must be a declaration of dedication which should be made contemporaneously with the act of dedication: *Banubi v. Narsingrao* 31 B 250 : 9 Bom. LR 91 The wakif must divest himself of the ownership of the property: *Muhammad Yunus v. Muhammad Ishaq Khan* 62 Ind. Cas. 896 : AIR 1921 All. 103 : 43 A 487 : 19 ALJ 380 Physical delivery is not essential, but such possession as is possible must be given: AIR 1927 2 (Privy Council) . There are special rules in the case of mosques: *Wilson's Anglo-Muhammadan Law*, Section 320; *Amir Ali's Muhammadan Law*, Vol. 1, page 39; and *Tyabji's Principles of Muhammadan Law*, Section 514. When once a building has been set apart as a mosque it is enough to make it wakf if public prayers are once said there with the permission of the owner. But though a declaration of dedication and completion by some act giving practical effect to it are essential, it was not always necessary that there should be any direct evidence of these things. Dedication may be inferred from long user as wakf property: see *Court of Wards v. Ilahi Bakhsh* 17 Ind. Cas. 744 : 40 C 297 : 40 IA 18 : 1 PWR 1913 : 11 ALJ 265 : 13 MLT 318 : (1913) MWN 270 : 17 CLJ 360 27 PR 1913 : 83 PLR 1913 : 15 Bom. LR 436 : 25MLJ 61 and *Muhammad Hamid v. Mian Muhammad* 77 Ind. Cas. 1009 : AIR 1922 PC 384 : 50 IA 92 : 4 L 15 : 44 MLJ 149 : 32 MLT 52 : 27 CWN 701 : 25 Bom. LR 660 : 33 CLJ 231 : 1 PWR 1923; and other cases cited in *Tyabji's Principles*, Section 458. There can be no doubt as to this principle which is recognized in all the text books.

17. Now in the case of Survey No. 136 there is evidence of long user--user which may reasonably be presumed to date from the time the land was acquired centuries ago--for purposes recognized by Muhammadan Law as proper subjects of wakf. The tomb of a recognized saint is such an object: see *Tyabji*, s. 484. A

mosque, of course, is, and this mosque, which is referred to in the partition deed of 1736, must have been built in Pir Mushayak's time or soon after his death. In my opinion it must be presumed that the Roza and mosque have been duly dedicated and have become wakf by user, and the presumption may fairly be extended to the other buildings and the land enclosed within the compound wall which may be regarded as appurtenant to the Roza. So far as this survey number is concerned, the trial Judge is clearly right.

18. But, in the case of the other survey numbers, there is no evidence of any user from which a dedication for public or religious purposes could possibly be presumed. There is in fact practically no evidence as to the manner in which these lands have been used for the purposes for which they have been used until we come to the present century. In 1906 we find Survey No. 138 permanently leased by the defendant's father for the erection of mill chawls. The rent received is credited to the Pir Mushayak's private account. In 1921 we find the defendant erecting chawls on Survey No. 105 at his own expense--apparently as a private transaction quite independent of the Roza. (I do not think any importance can be attached to the statement of the plaintiff's witness Ex. 151 about certain tombs being removed before the chawls were built in this land. There is no corroboration of what he says on the point, and there, is no reference in any of the records to this land as kabrasthan).

19. If the lands other than Survey No. 136 are to be held to be wakf, it must be upon considerations quite different from those which apply in the case of that number. As far as I have been able to gather from the learned trial Judge's judgment, he holds that No. 105 must be taken to form part of the wakf estate because the entries in the records justify the conclusion that it must at some time or other have been the subject of a grant for the benefit of the institution. The description of the land as devasthan and the fact that it has been partially exempted from payment of assessment from before 1874 are important items of evidence. When considered in conjunction with such evidence of public user as we have in the case of No. 136, they help to build up a convincing case. But considered by themselves, they are far from being convincing. Devasthan properties are not necessarily public. There may be private as well as public wakfs and the revenue records do not always distinguish between them. There are, of course, numerous kinds of inam grants carrying total or partial remission of assessment. Moreover, the Courts have never held that entries in the old survey records kept primarily for fiscal purposes are in themselves sufficient evidence of title. The entries in the Record of Rights stand on a rather different footing, at any rate since the Land Revenue Amendment Act of 1913. But the plaintiffs can hardly rely on any presumption arising from the Record of Rights since, as those entries now stand, they purport to show that the defendant is the owner of the properties and not manager or trustee. It is also a point to be remembered in connection with this part of the evidence that defendant No. 1's father was a minor when the land was first shown as devasthan in 1874, and that he and the defendant never resided in Ahmedabad. In my opinion that is no

sufficient evidence to justify the lower Court's finding that Survey No. 105 belongs to the trust.

20. The grounds on which Survey Nos. 137 and 138 have been held to form part of the estate appear to be these. They were purchased by Jamalbhai who was mujawar of the Roza. There is nothing in the defendant's accounts to show that the purchase money came from the pir's private funds. The lands were in the occupation of persons who were probably connected with the Roza as mujawars or managers until they were transferred to the defendant's name, and they were transferred to him as owner of the Roza. Until 1907 (i.e., after the lease of Survey No. 138) there is nothing to show that the pir derived any income from them. These facts in the learned Judge's opinion justify the conclusion that they must have been purchased out of the funds of the institution for the benefit of the institution, and therefore belonged to it. But the reasoning is not very convincing when all the facts are considered. Jamalbhai was no doubt a mujawar, but he also held a power-of-attorney which constituted him the general agent of the pir (Ex. 182). The defendant's accounts show that considerable sums of money were remitted to him from time to time and, though it is impossible to trace the money with which these lands were purchased, it appears that money was sent to him for secular purposes besides what was sent for the purpose of the uras. There is nothing to show that he purchased for the pir. There is equally nothing to show that he purchased for the Roza. But the principal difficulty in the plaintiff's story is the one I have already indicated.

21. It is an admitted fact that the pir has a large private income. He receives something like Rs. 50,000 a year from various presents and taxes and also has land at Palanpur (see Exs. 129 to 200). But there is no reliable evidence to show that the Roza on the other hand had any income to speak of. The plaintiff's witnesses speak vaguely of income derived from flowers, cocoanuts, weighing of children, auction of the right to hoist a flag, and cash offerings at the shrine. It is doubtful, however, to say the least of it, whether what was received in this way was ever more than enough to defray the expenses. It is certainly not proved that there ever has been any galla fund such as that referred to in *Advocate General of Bombay v. Yusufalli* 84 Ind. Cas. 759 : AIR 1921 Bom. 338 : 24 Bom. LR 1060--the case relied on by the learned trial Judge--from which it would be possible to purchase property for the Roza. The Collector's order granting sanction to the suit (Ex. 51) mentions the fact that in the mutation proceedings in 1919 the defendant said that those lands were purchased out of the Roza funds. But the statement has not been proved. We do not know exactly what it was he said, and it is difficult to see what personal knowledge he can possibly have of transactions which took place before he was born. As for the fact that these lands appear to have been occupied at first by the mujawars, no great importance can be attached to that, since no separate account of income and expenses of the Roza has ever been kept in the pir's books. It may well be that the persons in charge as mujawars and managers were allowed to enjoy the income such as it was, and the pir sent what further amount was necessary for

expenses and maintenance. Very probably the mujawars were allowed to occupy the neighbouring lands in lieu of wages, It would not be justifiable to infer from that that these lands belonged to the Roza. For these reasons, I am unable to agree with the trial Court's view that Survey Nos. 137 and 138 any more than Survey No. 105-1 form part of the wakf estate either because they were purchased out of the trust funds or for any other reasons.

22. The result is that Appeal No. 216 succeeds so far as these three survey numbers are concerned, but fails as to Survey No. 136. All references to Survey Nos. 105-1, 137 and 138 must be deleted from the decreta order which, however, will be otherwise confirmed. As regards the cross-appeal, it might have been difficult to accept the lower Court's reasons for not framing a scheme if we had agreed with its view that all the properties in suit are wakf. But now that the wakf is confined to Survey No. 136, we see no necessity for any scheme. As regards costs in the main Appeal No. 216 each party has partly succeeded and partly failed. We consider that the proper order as to costs will be that the plaintiffs and defendant No. 1 will bear their own costs both in the suit and in the appeal. Defendant No. 2 will also pay his own costs. The trial Judge pointed out that it was unnecessary for him to employ separate Counsel as his defence was identical with that of defendant No. 1. The same applies in the appeal. Defendant No. 2 will, therefore, pay his own costs throughout. Appeal No. 217 is dismissed with costs.

Baker, J.

23. I agree and have nothing to add to the exhaustive judgment delivered by my learned brother. There is no direct evidence of dedication in this case. In fact, although the arguments have lasted several days, the evidence on the whole is of a somewhat nebulous character. But there is evidence that the mosque in survey No. 136 has been used for purposes of worship, and that an annual uras is held there which is attended by a large number of devotees, and this being so the evidence leads to the conclusion that this particular number must be regarded as wakf. But, so far as the other numbers are concerned, there is no evidence either of dedication or of their being purchased out of funds of a religious institution or indeed of any connection between them and the land on which the mosque and the Roza stand, except that they belong to the person who is the religious head of the institution. In these circumstances, I agree with the judgment which has been pronounced and the order consequent thereon.