
(2012) 01 AHC CK 0795
In the Allahabad High Court
Case No : Second Appeal No. 1335 of 1971

Shamsuddin (D) through L.Rs. and others	APPELLANT
Vs	
State of U.P. and others	RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, 106, 80
Land Acquisition Act, 1894 — Section 16
Transfer of Property Act, 1882 — Section 73
Uttar Pradesh Land Revenue Act, 1901 — Section 3(8), 32, 33, 78
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 3(14)

Citation : (2012) 6 AWC 5846

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : M.A. Qadeer, Shamim Ahmad, Bashir Ahmad and H.P. Yadav, for the Appellant; V.K. Singh (A.A.G.), Rajeev Mishra and Ram Prakash Mishra, S.C., for the Respondent

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—This second appeal filed on 26.4.1971 by Shri Shamshuddin (since deceased) and others substituted with his heirs Shamshad All and others for appellant No. 1 and other heirs of appellants, arises out of representative suit claiming rights over part of plot No. 592/2 of village Bargaon, Newada, P.O. Mariahun, district Jaunpur in respect of burial of dead bodies of the community, shown by letters A, B, C, D in the plaint sketch. The Original Suit No. 195 filed in the year 1967, giving rise to this second appeal, was decreed directing the State of U.P. and others through the Collector, Jaunpur; Gaon Sabha, Mauja Bargaon, Pargana Mariahun, district Jaunpur through its Pradhan and other private parties from interfering in plaintiffs' rights on burial of dead bodies on the disputed land. The Munsif Jaunpur in his judgment dated 30.4.1969 clarified in the operative portion of his order that the disputed land, which has been defined by letters A, B, C, D with blue colour in map (paper 46C) shall form part of the decree. The

Civil Appeal No. 109 of 1969 filed by Jalaluddin and others-private respondents against Shri Shamshuddin and others; Civil Appeal No. 118 of 1969 filed by Shamshuddin and others v. State of U.P. and others and Civil Appeal No. 122 of 1969 filed by State of U.P. v. Shamshuddin and others, were allowed. The judgment and decree of the lower court was set aside and the suit was dismissed, giving rise to this second appeal.

2. The substitution applications were filed from time to time and were allowed. Some of these were pending. The Court, realising that the suit in representative capacity can be pursued by any or some one of the plaintiffs, by the order dated 16.9.2011, referring to the detailed report submitted in respect of each of the substitution applications, dismissed substitution applications (A-11) and (R-6) and allowed the applications (R-4) and (R-6/1). The dismissal of the substitution applications (A/11) and (R/6), however, was directed not to result in abatement of the suit. The arguments were heard on 23.12.2011.

3. I have heard Shri M.A. Qadeer, senior advocate for the appellant. Shri V.K. Singh, Additional Advocate General has entered appearance on behalf of Gaon Sabha. Learned standing counsel appears for State-respondents.

4. The plaintiffs-respondent belong to Ansar (Weavers, Hajjam and Dafali sections) of community of Muslim religion, of village Barigaon and the adjoining village Newada. They claim the disputed land to be the graveyard of the said sections, including the plaintiffs, in which their dead bodies are buried from time immemorial and that they have customary rights to continue to do so. The trees have been planted by their ancestors for shade on graves, and for use of their wood for burial purposes. The fruits are appropriated by the plaintiffs. In 1961 the plaintiffs came to know that the Lekhpal has entered the land as "banjar" instead of graveyard and due to this wrong entry, the property has been included in the property register of the Gaon Sabha. The applications for correction of the records were dismissed by the Tehsildar. The revision against the order was dismissed by the Collector, giving rise to the suit.

5. The plaintiffs stated that private defendant Nos. 3 to 6 are not grove holders. They have no right in the land. They had threatened to interfere with plaintiffs and were thus impleaded. The plaintiffs had earlier filed Suit No. 463 of 1965 on the same cause of action but withdrew it due to the defects, in applying for permission before filing the suit. The present suit was filed after serving notice u/s 80, C.P.C. and Section 106, Panchayat Raj Act for declaration of right of burial and for perpetual injunction to restrain the defendant Nos. 3 to 6 from interfering such rights and the user of trees.

6. The State defended the suit on the ground that the disputed land was not graveyard. It was Bheeta (the land adjoining and surrounding a pond) with some scattered trees planted by the then Zamindar. It vested in the State since 1.7.1952, and is thereafter under the management of the Gaon Samaj, later Gaon Sabha. Even if there was any right of burial, it was extinguished by vesting

u/s 4 of the U.P. Zamindari Abolition and Land Reforms Act, 1951. The defendants 3 and 4 denied plaintiffs claim of burial and trees. They contended that the eastern half of plot No. 592/2 is grove of defendants 5 and 6 and western half is grove of defendants 3 and 4, and that they are in possession of the land and trees. They contended that some dead of the family of Shukh Raji and Sheikh Abdul Hamid have recently been buried in disputed land with their permission but that will not change the nature of their title. Lalji Sahu-defendant No. 5 claimed to be owner of 8 mangoes and 1 jamun trees of the disputed land out of which one mango tree was claimed to be their ancestral; one mango and one jamun tree was purchased from defendant No. 4 and 6 and the mango tree is planted by him. The defendant No. 6 Borai Tewari claimed five mango trees and khalian, ghureharni etc. in a portion of the disputed land. He, however, did not specify the portion as sehan and khalian.

7. The trial court after taking documentary and oral evidence recorded the findings that the previous suit was permitted to be withdrawn and thus the present suit is not barred by Order XXIII, Rule 1. C.P.C. The Amin prepared a map and report (Exts. 8 and 9), according to which there are about 75 graves scattered all over the disputed land. P.W. 1 Babu and P.W. 3 Firman, the plaintiffs deposed proving the existence of graves. P.W. 2 Vishwanath who is not interested in the result of the suit also deposed in proof of the existence of graves.

8. The trial court found that D.W. 1 Jalaluddin started by saying that there were two or three graves of Sheikh community burial with permission of his ancestors. In cross-examination he admitted that there are dead of the families of Katwaru, Ibrahim Gulam Buksh, Sakhawat Ali, Mohammad Raji who are Sheikhs and Pathan buried in the land. He admitted ten groves of these families and later also admitted that Jullahas, Hajjams and Dafali also buried their dead in this land without his permission. The defendant No. 5 Lalji admitted 25 graves but said that they are all on western portion of the land. D.W. 6 Borai Tewari denied existence of grave. He, however, admitted nine graves in the portion claimed by Hadisunisa-defendant No. 4. in his statement in previous suit.

9. The trial court found both from the report of the Amin as well as the oral evidence that a large number of graves are existing in both western and eastern portions of the land and thus there was overwhelming evidence including admission of defendants to hold that the entire disputed land is graveyard of Muslims and the plaintiffs being Muslims are entitled to bury their dead in it. The claim of exclusive right of Julahas, Hajjams and Dafalies of burial and land was not established. The trial court observed that if the land is proved to be graveyard, it vested in God Almighty, where there is no discrimination of any section and that such discrimination is also unknown to Mohammadan law which admits private or public graveyards. The private graveyard means one which is used exclusively by one family who dedicates the land for burial of the dead of their own family. Since there is no proof of dedication, it is to be inferred from existence of graves of all communities, and the land would be treated as public

graveyard. The plaintiffs are no doubt entitled to use the graveyard, as a member of Muslim community and not of any section of Muslim community.

10. On the issue of the effect of U.P. Zamindari Abolition and Land Reform Act, 1951 (in short, the Act) on the rights of the graveyard it was contended by the State relying upon Mohammad Naqi Khan and others Vs. State of UP and another, , that the graveyard was Waqf property which is not exempted from the operation of Section 4 of the Act, and thus the land of graveyard also vested in the State. The Court observed "inspite of the vesting of the land, the defendants have recognised the right of Muslim residents of the village to bury dead bodies in the plot. The plaintiffs should have, therefore, no grievance on this ground."

11. The defendants submitted that since the land vested in the State free from all encumbrances the State has a right to allow or prevent burial of dead bodies. They should not be bound by any injunction order. It cannot be disputed that customary rights are also included in the term encumbrances. The ownership of a land and its public utility are two different things and the land of public utility may vest in the State but that the public can still force the State to keep such land open for public utility. Sections 212 and 212A of the Act provide substantive law and procedure enabling the Gaon Sabha to eject persons from land of public utility where such persons may have been admitted to tenancy even before the date of vesting. Section 212A recognises the right of public to use land of public utility and enjoined upon the Gaon Samaj in whom the land ultimately vests to keep such land available for public utility.

12. The trial court accepted the argument that even after vesting of the land used as graveyard in the State and its management of the Gaon Samaj, the public can enforce their customary rights over such land of public utility. It would not be correct to deny that the utilisation of public land, even if it has vested can be left to the sweet will of the State Government or Gaon Samaj. The trial court further held that even if the land is vested in the State on 1.7.1952, the presence of graves continuously and also fresh burial will again vest the land in God Almighty. Under Muslim law the existence of grave on a parcel of land makes it sacred and it is vested in God by dedication. Even if the land notionally vested in the State and Gaon Samaj the graves continued and more burials done, the land thus again was dedicated.

13. The trial court thereafter considered the question of ownership of trees in the graveyard and found that since the land was vested in the State and was managed by the Gram Samaj trees do not belong to the plaintiffs. The judgment was rendered by Shri Narayan Das, the then Munsif, Jaunpur.

14. In separate appeals filed by the plaintiffs; State and defendants and consolidated together, the appellate court framed three points namely (1) whether the land in suit is a graveyard; (2) whether the trees standing therein belonged to the plaintiffs, and (3) what is the effect vesting of estate under the U.P. Zamindari Abolition and Land Reforms Act upon the status of the land in suit

and the trees.

15. On point No. 1 relying upon the evidence of the user of the land the appellate court found that it was not disputed that there are certain graves in the land. In order to constitute a graveyard, the mere existence of graves alone is not sufficient and there should be a waqf vesting the land as such in the Almighty for the purposes of graveyard. Such a waqf could be presumed in the case of use from times immemorial vide *Lala Jhao Lal Vs. Ahmudullah and Others*, . The position remains that there should be an user as graveyard since times immemorial. The existence of one or two graves in a large area will not be taken to mean that there has been waqf, by user. The Court Amin reported that the graves are scattered all over the area. He was examined to prove it. It was found that some portion on the northwest corner is still available, but it does not mean that the land can be taken away as a grove. The extract of the khasra of the settlement (Ext. 3) recorded land as Bheeta which goes to show that in the later part of 19th Century the land had not acquired the full character of graveyard but a lapse of nearly 80 years or more with so many graves would naturally mean that it is a graveyard. The appellate court thus confirmed the findings of the Munsif that the land in dispute is a graveyard of Muslims.

16. On point No. 2 regarding ownership of trees no case was found to be made out by the plaintiffs in the suit brought in representative capacity that they had planted the trees. Taking of wood for the purposes of burial is again a fact which demonstrated that the ownership of these trees did not vest in any individual and at best they either vested in the Almighty or in the intermediaries as scattered trees in the village. Since there was no evidence that the trees were planted by the plaintiffs or their ancestors, the appellate court agree with the findings of learned Munsif regarding the trees as well.

17. On point No. 3 regarding the effect of vesting the appellate court did not agree with the trial court and held that on the date of vesting all "estates; vested in the State u/s 6 of the Act, free from all encumbrances. In AIR 1925 523 (Lahore) , the word "encumbrances" in Section 16 of the Land Acquisition Act, 1894 was held to include even an easement of necessity coming into existence at the time of acquisition. In *Managing Committee, George High School Vs. Abdul Karim Khan and Others*, , it was held that the word "encumbrances" u/s 16 of the Land Acquisition Act would cover customary rights. Since the vesting of estate under the U.P. Zamindari Abolition and Land Reforms act is free from all encumbrances, it will include the land used customarily as graveyard.

18. The appellate court did not agree with the reasoning given by the trial court that after vesting of the waqf property of the graveyard in the State of U.P. the subsequent burial in the lands would again revive the grant. The appellate court relied upon *Mohammad Naqi Khan and others Vs. State of UP and another*, , in which it was held that the waqf property is not exempted from the operation of Section 4 of the U.P.Z.A. and L.R. Act, however, it was noticed that in the Judgment the only question before the High Court was whether the trees will

vest in the State of U.P. In *Tilakdhari Singh Vs. Durga Prasad Singh and Others*, , the question of vesting of trees outside the abadi was in issue and was not found relevant for the purpose of the decision of the case.

19. The appellate court found that the land, which is a part of plot No. 592 was recorded in the record of rights prepared u/s 33 of the Land Revenue Act. The copy of khasra of settlement was brought on record as Ext. 3. Since the property was recorded in one of the register maintained u/s 33 of the U.P. Land Revenue Act, it will be considered to be a part of the estate. Since there was no definite case of creation of waqf and that the waqf by user of the land as graveyard has been presumed, it was held that the ownership of the land is not transferred, though it may be that the Zamindar, who was the owner of the Bheeta, before the date of vesting, had no right to change the use of the land or even to graze cattle therein. The land, as it stood before the date of vesting was nothing but a part of the "estate" which vested in the State of U.P. free from all encumbrances. The encumbrance will also include a right of burial held by the inhabitant of the village before the date of vesting. Once this right has been put to an end, it will need again a good length of time to lapse in order to perfect a customary right or waqf by user. The appellate court found that such a long time has not lapsed as yet and thus the character of graveyard cannot be maintained. It also found that a right to make fresh grave in the land cannot be claimed as a matter of right by the plaintiffs or any other member of the community.

20. The appellate court further found that the trees found in existence since before the first settlement. By creation of a waqf by user the rights in these trees will not be lost nor the subsequent plantations appears to have been obstructed. The trees, therefore, cannot be said to be dedicated and vested in the Almighty. They must have been vested either in the intermediary or in certain other individuals and neither position will be happy for the plaintiffs as in the former case they shall vest in the State of U.P. and subsequently in Gram Sabha. The appeal was consequently allowed, giving rise to this second appeal.

21. Shri M.A. Qadeer, senior advocate appearing for plaintiff-appellants submits that if the land has been used from times immemorial for a religious purpose, i.e., for a mosque or a burial ground or for maintenance of a mosque, then the land is by user Waqf, even if there is no evidence of an express dedication vide Article 188 of Mohammedan Law of Mulla. The author relied upon *Mazhar Husain v. Adiya Saran*, AIR 1952 SC 259, and *Mohammad Shah Vs. Fasihuddin Ansari and Others*, . He submits that the definition of "encumbrance" as defined u/s 16 of the Land Acquisition Act will not apply. A dedication by long user as graveyard is not an encumbrance attached to the land. It changes the nature of the land, which will not be covered by its definition u/s 3(14) of U.P.Z.A. and L.R. Act. The land is defined u/s 3(14) of the Act as follows:

3(14) "Land" (except in Sections 109, 143 and 144 and Chapter VIII) means land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry framing.

Sub-clause (1) (i) of Section 6 of the Act provides:

6 (a) (i) in every estate in such area including land (cultivable or barren), grove-land, forests whether within or outside village boundaries, trees (other than trees in village abadi, holding or grove), fisheries. (***) tanks, ponds, water-channels, ferries, Pathways, abadi sites, hats, bazaars and melas (other than hats, bazars and melas held upon land to which Clauses (a) to (c) of sub-section (1) of Section 18 apply).

22. The graveyard is not mentioned in Section 6 and in view thereof the land in dispute will not come within the purview of the Act. The graveyard is not included u/s 18 of the Act as any right of the intermediary nor is included under Sections 19 and 20 of the Act, and in view thereof such land with dedication will not vest in the State. Since the trees are embedded to the earth and belongs to the owner of the land, i.e., waqf qabristan, the trees would also go alongwith the land.

23. In *Sayed Ali Jaseer and others v. Shafi and others*, 1981 All LJ 669, this Court held relying upon *Sukhdarshan Lal and Others Vs. Nazira and Others* , held that where a grave of a Mohammedan exists on a piece of land, the presumption is that, that part of the site on which the dead body is buried is dedicated with the consent of the owners of the land; it becomes sacred and ceases to be the private property of the former owners, and should be considered as wakf land in which the members of the Mohammedan community would be interested and to which they would be entitled to have access.

24. In *Ameer Ali's Mohammedan Law* (Edition 4 page 405) the author has observed:

According to Abu Yusuf, a dedication to any object of utility is effectuated by the kawl or word of the wakif, as in the case of a mosque. For example, when a person erects an aquaduct for Mussulmans, or an inn for the occupation of travellers, or a caravan serai or constitutes his land into a cemetery, the dedication becomes complete upon the declaration of the wakf, and all his right of property ceases therein, "According to Mohammed, it abates when people have used the aquaduct or have occupied the inn or caravan serai, or (have been) buried in the cemetery, and it is sufficient if one person do so. The rule is the same as to wells and cisterns, and if they are delivered to a superintendent, the dedication is valid in like manner. It is stated in the Mobsut that the fatwa is according to the Disciples by general consensus; in other words, the dedication may be effectuated in either way, viz., by the actual declaration of the wakif or by delivery, in other words, by the use of the place by a single person.

25. In *Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others*, , Hon"ble Fazal Ali, J., speaking for the Court summarised the law on the subject, quoting the previous decisions as well as Privy Council judgment at page 1590 as follows:

In order to create a valid dedication of a public nature, the following conditions must be satisfied:

(1) that the founder must declare his intention to dedicate a property for the purpose of a mosque. No particular form of declaration is necessary. The declaration can be presumed from the conduct of the founder either express or implied;

(2) that the founder must divest himself completely from the ownership of the property, the divestment can be inferred from the fact that he had delivered possession to the mutawalli or Imam of the mosque. Even if there is no actual delivery of possession of mere fact that members of the Mohammedan public are permitted to offer prayers with azan and ikamat, is sufficient to hold that the wakf is complete and irrevocable; and

(3) that the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque.

26. In *Molvi Abu Naeem Mohammad Ibrahim Vs. Bashir Ahmad and Others*, , Hon'ble, S.J. Hyder, J., held with reference to the operation of the Consolidation of Holdings Act on the graveyards, relying upon *Syed Mohammad S. Labbai* (supra) that even if a graveyard was a private or a family graveyard, but once the owners of a graveyard permits other persons to bury their dead therein, the graveyard sheds its character as a private graveyard and becomes a public graveyard. A notice u/s 9 of the Consolidation of Holdings Act is required to be sent to the tenure-holders and objections under sub-section (2) of Section 9 can also be filed by a person who claims to be interested as a tenure-holder. A person who claims that a certain plot of land is a graveyard is not claiming the rights of a tenure-holder and an objection at his instance against any entry in the statement of principles cannot be entertained by the Consolidation Officer. The bar of Section 49 of the Consolidation of Holdings Act could only apply with regard to matters which could be adjudicated and in respect of which objections could be filed before the Tribunals. The suit was thus not held to be barred by Section 49 of the Consolidation of Holdings Act.

27. In *State of Uttar Pradesh Vs. Kunwar Sri Trivikram Narain Singh*, , considering the effect of Sections 4 and 6 of the U.P.Z.A. and L.R. Act on the allowance of Harnarain Singh's villages (12 Mahals) given by a letter dated 13.9.1837 of Lt. Governor of N.W.F. Province in the form of a remission of revenue to the amount of one-fourth, the Jamma being fixed at Rs. 17,130 and in the villages settled with Zamindars (166 Mahals) of which Harnarain Singh was to be paid annually a pension of one-fourth of the collections after deducting the tehsildari charge, it was held that the remission in which a decree of declaration was passed would not be a "estate". He was not a proprietor, who was the assignee of the land revenue and in any event his name was not entered in the revenue record under Clauses (a) to (d) of Section 32 of the U.P. Land Revenue Act. The provisions relating to computation of gross and net assets will not apply

to him. There was no provision to grant compensation to persons holding interest and that such interest by operation of Section 6(b) of the Act of 1951 would not be extinguished. The rights of Shri Harnarain Singh in the 166 Mahals would, however, be extinguished as the rights in these Mahals was by way of one-fourth of the revenue assessed after deducting the tehsildari expenses. The Supreme Court referring to the provisions of the U.P.Z.A. and L.R. Act and U.P. Land Revenue Act, 1901 held as follows:

9. The question which falls to be determined in this appeal by the State of Uttar Pradesh, is whether the right of the respondent to receive the allowance under the arrangement of the year 1838 was extinguished as a consequence ensuing from the vesting of the "Sudpore Bhettree" parganas in the State of Uttar Pradesh u/s 4 of the Act.

10. By the preamble, it was recited that the Act was enacted to provide for the abolition of the zamindari system which involved intermediaries between the tiller of the soil and the State and for the acquisition of their rights, title and interest and to reform the Law relating to land tenure consequent upon such abolition and acquisition and to make provisions for other matters connected therewith. By Section 3 (8) which was retrospectively amended by Act 14 of 1958. "estate" was defined as meaning the area included under one entry in any of the registers described in Clauses (a) to (d) and in so far as it relates to a permanent tenure-holder in any register described in Clause (e) of Section 32 of the U.P. Land Revenue Act, 1901 as it stood immediately prior to the coming into force of the Act or subject to the restrictions mentioned with respect to the register described in Clause (e) in any of the registers maintained under any other Act. Rule. Regulation or Order relating to the preparation or maintenance of record of rights in force at any time and included share in or of an estate. "Intermediary" was defined as meaning with reference to any estate, a proprietor, under-proprietor, sub-proprietor, the kadam, permanent lessees in Avadh and permanent tenure holder of such estate or part thereof. "Land" was defined as meaning, except in Sections 143 and 144, as land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which included pisciculture and poultry farming. By Section 4, provision was made for vesting of estates in the State of Uttar Pradesh. By sub-section (1), it was enacted, insofar as it is material, that the State Government may by notification declare that as from a date to be specified, all estates situate in Uttar Pradesh shall vest in the State and from the date so specified, all such estates shall stand transferred to and vest, except as provided in the Act, in the State free from all encumbrances. Section 6 provided for the consequences of an estate in the State. On the publication of a notification u/s 4 of the Act, notwithstanding anything contained in any contract or document or in any other law for the time being in force-and, have as otherwise provided in the Act, the consequences set forth in Clauses (a) to (j) of Section 6 were to ensue in the area to which the notification related. By Clause (a), all rights, title and interest of intermediaries in every estate in such area and in the sub-soil in such estate including rights, if

any, in mines and minerals ceased and vested in the State. Clause (b) on which the dispute primarily turns, provided:

All grants and confirmations of title of or to land in any estate so acquired, or of or to any right or privilege in respect of such land or its land revenue shall, whether liable to resumption or not determine.

11. By Clause (c), all rents, local rates and sayar in respect of any estate or holding therein for any period after the date of vesting and which, but for the acquisition, would be payable to an intermediary, vested in and became payable to the State Government and not to the intermediary; and where under an agreement or contract made before the date of vesting any rent, cess, local rate or sayar for any period after that date had been paid to or compounded or released by an intermediary, the same, notwithstanding the agreement or the contract, became recoverable by the State Government from the intermediary. By Clauses (d) and (e), liability of intermediaries in respect of any estate incurred for any period prior to the date of vesting remained enforceable. By Clause (f), the interest of intermediaries in any estate was exempt, from attachment or sale in execution of any decree or other process of any Court and any attachment existing at the date of vesting or any order for attachment passed before such date, subject to the provisions of Section 73 of the Transfer of Property Act, 1882, ceased to be in force. By Clause (a), mortgages with possession on any estate or part of an estate on the date immediately preceding the date of vesting were to be deemed to have been substituted by simple mortgages without prejudice to the rights of the State Government". By Clause (h), no claim or liability enforceable or incurred before the date of vesting by or against an intermediary for any money charged on or secured by a mortgage of an estate or part thereof was, except as provided in 73 of the Transfer of Property Act, to be enforceable against his interest, in the estate. By Clause (i), all suits and proceedings of the nature to be prescribed pending in any Court at the date of vesting and all proceedings upto any, decree or order passed in any such suit or proceeding previous to the date of vesting were stayed. By Clause (j), all mahals and their sub-divisions existing on the date immediately preceding the date of vesting and all engagements for the payment of land revenue or rent by a proprietor, under-proprietor, sub-proprietor, co-sharer, or lambardar as such determined and ceased to be in force.

12. Sections 37 to 40 of the Act provided for the preparation of the Compensation Assessment Roll of intermediaries as respects mahals and for preparation of gross assets of mahals. It was on this Compensation Assessment Roll that the compensation payable for loss of interest of the intermediaries was to be computed and paid. Section 42 provided for computation of gross assets of an intermediary and Section 44 for computation of the net assets of an intermediary. Section 45 provided that in the case of proprietors to whom Section 78 of the U.P. Land Revenue Act, 1901 applied or who were assignees of land revenue whose names were recorded in the record of rights, maintained

under Clauses (a) to (d) of Section 32 of the said Act, under-proprietors, sub-proprietors, permanent tenure-holders and, permanent lessees in Avadh, the provisions of Sections 39 to 44 were to apply subject to such incidental changes and modifications as may be prescribed and the gross assets and net assets of such intermediaries were to be computed accordingly."

13. By the definition, in Section 3(8) of the Act an "estate" is an area included under one entry in the registers described in Clauses (a) to (d) of the Land Revenue Act. The High Court upheld the contention of the respondent that allowance paid to him could not be regarded as an "estate". That view is not challenged before this Court by counsel for the State of Uttar Pradesh. The right to receive the allowance of Rs. 30,612-8-0 from the Government under the arrangement cannot, in the absence of an express provision to that effect, be called "an area included under one entry in any of the registers" described in the various clauses. The first part of Section 6(b) does not, therefore, assist the claim made by the State.

28. In *Khuda Baksh and Others Vs. Gram Samaj Barotha and Another*, , the plaintiff-appellants had sold certain trees standing in the graveyard in their capacity as mutawallis. On an application made by the Gram Samaj, the Sub Divisional Officer ordered that the money should be deposited by the plaintiffs with the Chairman of the Land Management Committee who will spend the amounts for repairs and upkeep of graveyard in consultation with the persons connected with the graveyard. The plaintiff brought a suit for injunction. The trial court held that the land was graveyard and vested in the Gram Samaj and that the plaintiffs were not mutawallis; consequently it dismissed the suit. In first appeal the findings of Munsif were confirmed and the appeal was dismissed. The High Court after confirming the findings that the plaintiffs were not mutawallis of the graveyard as there was no satisfactory evidence on the point proceeded to consider the question as to whether the graveyard will vest in the State u/s 4 of the U.P.Z.A. and L.R. Act.

29. The Court held that it is true that the graveyard was a property dedicated to the God Almighty, but, the Legislature did not think it advisable to create any special right in favour of the God Almighty regarding graveyards. There were a large number of tenures in the erstwhile State. The Legislature had to put In uniform tenures throughout the State and it was just possible that there might be certain omissions in protecting a right and the right of the God Almighty and graveyards might be one of them. But, by this omission, no serious loss is caused to the persons concerned, provided the old law relating to graveyards and dedicated properties is applied in harmony with the new agrarian legislation. The word "estate" u/s 3(8) will include under one entry in any of the registers described in Clauses (1), (b), (c), or (d) and in so far as it relates to a permanent tenure-holder, in any register described in Clause (e) of Section 32 of the U.P. Land Revenue Act, 1901. The graveyard in that case was entered in a khewat There could be productive and non-productive tenures in a khewat. A

khewat may include cultivable lands as well as rivers, railway lines, graveyards and such other things in it, but they cannot be taken to be outside the khewat because the ownership of each one of the above things vests in the God Almighty or in the Government. All the lands in a khewat are included under different heads and categories in the khatauni such as sir, khudkasht, Exproprietary Tenancy, Occupancy Tenancy, Non-Occupancy Tenancy, banjar, usar, Graveyard, abadi and other lands, belonging to the Government. The fact that a particular area belongs to the Government or is owned by the God Almighty It cannot be said that all such lands are not part of a khewat or a mahal. Such lands were also a part of the "estate" and it vested in the State as soon as the notification u/s 4 of the U.P.Z.A. and L.R. Act was made. After the land vested In the State, the State resettled the same with different persons under different titles such as bhumidhari, sirdari, adhivasi and asami rights. The Act was passed so that the land should go to the tenure holders creating different tenures in favour of persons who were actually cultivating the lands. There were other types of lands in which none of these tenures could be created and they were the lands like hats, bazars, burial grounds, other grounds and grounds used for public utility, graveyards and the like. These lands remained with the Government. u/s 117 of the Act the management of these lands was passed on to the Gram Samaj.

30. The Court further held that the management of graveyards like other public lands passed on to the Gram Samaj, but this did not mean that the Gram Samaj got a right to use the graveyard in any way which was not in conformity with the Mohammedan Law of waqfs. While it may be true that the management of a waqf property under the Mohammedan Law must be in the hands of Muslims but in view of Section 117 read with Section 4 of the U.P.Z.A. and L.R. Act, the management of the graveyard was passed on to Gram Samaj and thus the right of management of the graveyard and the trees standing therein created in favour of the Gram Samaj. The Mohammedan Law is not in conflict with the U.P.Z.A. and L.R. Act regarding the management of the waqf property. The Court relied upon Mohammad Naqi Khan and others Vs. State of UP and another, , in holding that the trees in the graveyard which is not abadi, holding or a grove would vest in the State u/s 6 of the U.P.Z.A. and L.R. Act. Some of the observations of the Court in paragraph 13 of the judgment in Khuda Baksh v. Gram Samaj (supra) are quoted as below:

13.....To my mind, it appears that all lands of public utility such as graveyards, cremation grounds, mela land and other lands of public utility were only given in the management of the Gram Samaj for their upkeep so that the land of a particular kind might be used for the purpose for which it was used and for no other purpose. The graveyard being a dedicated property could not be used for any other purpose except for burying the dead bodies of those Mohammedans who had being burying their dead in that particular graveyard.

31. The appeal was dismissed with the observations that the trees planted in graveyards for shade, and for using their planks in burying the dead bodies and

for utilising the sale proceeds of the trees, if any, for the up keep and maintenance of the graveyard. These trees were the property of the God Almighty and they could not be used for the benefit of any individual. The trees may belong to the Gram Samaj. The Gram Samaj was not permitted to use it for any other purpose. The Gram Samaj will be the owner of the property and was directed to use these trees or their sale proceeds for the purpose which is in conformity with the purpose of the waqf.

32. In the present case, there are concurrent findings recorded on the report of the Amin and the oral evidence that the land was used for burial of the family members of the Zamindar and other members of the Muslims of the village irrespective of the communities to which they belonged. The land will thus, treated to be dedicated to God Almighty. Under the Mohammedan law the land would be deemed to be waqf. The land, however, was recorded as Bheeta of Zamindar prior to abolition of zamindari and was recorded in the record of rights prepared u/s 33 of the Land Revenue Act vide khasra of Settlement (Ext. 3). The land would thus fall within the definition of the word "estate" u/s 3(8) of the Land Revenue Act included in the registers described in Clauses (a) to (d) of Section 32 of the Land Revenue Act. Such land by virtue of Section 4 of the Act stood vested in, and was transferred to the State. The rights of all the intermediaries in the land would thus stand extinguished and it would come in the management of Gram Samaj which is now Gaon Sabha.

33. With these findings namely that with existence of graves of Muslim community in a long period of time, the dedication of the land as public graveyard and consequently creation of waqf, and further that the land continued to be recorded in the khasra of Settlement u/s 33 of the Land Revenue Act, the legal issue stands resolved. The trial court decreed the suit with reasoning that even after vesting since the burial continued the land would again get vested in God Almighty giving right to the members of the Muslim community to claim injunction against the Gram Sabha. The appellate court, however, held that the period after vesting, i.e., after 1951 to 1967 when the suit was brought was not long enough to raise the presumption all over again.

34. The vesting is a legal incident of acquisition or resumption of the land in the State. The substantial question of law, which calls for consideration of the Court is as to whether the presumption in favour of the dedication of the land as graveyard and consequently creation of waqf will amount to exclude the public graveyard with such dedication from out of the definition of the word "land" for its vesting, which would not form part of the estate, and would not thus change its character.

35. On the aforesaid discussion, the Court finds that a graveyard once dedicated as such will always remain a graveyard even no traces of dead may be found. Such a land cannot be divested by non-user and will always continue as such whether it is used for the later period as graveyard, or not. It vests in God Almighty and cannot be divested by non-user. If the members of the community

in general are permitted to be buried on the land and such practice grows, the presumption that the dedication is complete and such a property would get converted into public graveyard, subject to laws relating to waqf. The revenue records may not prove such dedication, but that once it is proved that the dedication is complete, the entries of such land in the revenue records, in favour of the owner of the land would not take away or write off effect of such dedication. It will cease to be a land, with any effect, which any individual may have in it as ownership rights with reference to any estate, or as a proprietor, under-proprietor, sub-proprietor, thekedar, lessee or licensee. Such a land, even if it is recorded in any of the category or registers u/s 32 of the Land Revenue Act, 1901, would continue to retain its character as land dedicated to God Almighty, and for its use for burial by the members of the community. The rights of the members of the Muslim community to be buried on such land will not be affected by Section 4 of the Act.

36. Both the trial court and appellate court, thus erred in law in holding that the vesting u/s 4 of the Act will divest the rights of burial of the Muslim community of the land. I also disagree with the trial court that the rights will revive as against all other persons including the State and Gram Samaj. Once it is proved by the oral and documentary evidence in a representative suit that the land in the plot in question was used from time immemorial for burial of the dead by members of Muslim community, the land would be deemed to have been dedicated to God Almighty and has to be treated as waqf, which would not vest u/s 4 of the U.P.Z.A. and L.R. Act, 1951. So far as trees on the land is concerned it was found by both the Courts that there was no evidence that these trees were planted by the Zamindars or the private respondents. The trees attached to the earth which is dedicated to God Almighty for burial of the dead will continue to be retained as attached to the land which is a public graveyard and a waqf and to be used for the purposes connected with graveyard. The second appeal is allowed. The representative suit is decreed. The defendants are directed not to interfere with the plaintiffs' rights of burial of dead bodies in the disputed land and further they are restrained from cutting away or using the trees. The plaintiffs-appellant would be entitled to costs of the suit throughout from the State quantified at Rs. 20,000 which may be spent on the maintenance of the dedication of the land as public graveyard dedicated to God Almighty.