B. G. Shirke and Company and others (2), *Thakur Papers Mills Ltd. Samastipur* v. *Kailash Chand Jain* (3) and *Hind Mercantile Corporation Pvt. Limited* v. *J. H. Rayner and Company Limited* (4). No judgment taking a contrary view has been brought to my notice by the learned counsel for the applicants.

(5) In the light of the discussions above, this Company Application No. 88 of 1990 is dismissed but with no order as to costs.

R.N.R.

Before : G. R. Majithia, J.

DWARKA DASS (DECEASED) REPRESENTED BY HIS L.RS., —*Appellants.*

versus

THE PUNJAB WAKF BOARD AND OTHERS,—*Respondents.*

Regular Second Appeal No. 243 *of* 1977

4th September, 1990.

Code of Civil Procedure, 1908—*S.* 9—*Suit for permanent injunction and possession as co-sharer—Suit land once used as graveyard brought under cultivation after* 1947 *by Hindu Proprietors—Change of character of property—Property cannot be treated as Wakf property—Wakf cannot be created by user—It can be treated only by dedication—In absence of evidence establishing public graveyard property held to be private.*

Held, that under Mahomedans Law, Wakf cannot be created by user. It can only be created by dedication. Even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user, i.e. where corposses of the members of the Mahomedans community have been buried in a particular gravevard for a large number of years without any objection from the owner. In order to prove that a graveyard is public by dedication, it must be shown by multiplying instances of the character, nature and extent of the burials from time to time.

(2) 1981 P.L.R. 732.

(3) A.I.R. 1968 Patna 289.

(4) 1971 (Vol. 41) Company cases 548.

Dwarka Dass (deceased) represented by his L.Rs. *v.* The Punjab Wakf Board and others (G. R. Majithia, J.)

In other words, there should be evidence to show that a large number of members of the Mohamadans community had buried their corposes from time to time in the graveyard. Once this is proved, the Court will presume that the graveyard is public one. Where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive proof to show the public character of the graveyard.

(Para 6)

Held. the land which was earlier used as graveyard of the Muslims by the Mohamadans reverted to the proprietors of the Patti and the character also changed since it was brought under cultivation after 1947 by its Hindu proprietors.

(Para 7)

Held, the essential ingredients for establishing a public graveyard are non-existent in the instant case.

(Para 9)

Regular Second Appeal from the decree of the Court of Shri Mewa Singh, Addl. Distt. Judge, Ludhiana, dated 2nd August, 1976 reversing that of Shri Shamsher Singh Sohal, PCS Sub Judge Ist Class, Ludhiana, dated 3rd October, 1974 and dismissing the suit of the plaintiff with no order as to costs.

Claim : Suit for the grant of a decree of mandatory injunction against the defendants No. 1 to 3 for directing them to vacate the land measuring 16B 1B 0B Kham described as khasra No. 1625, 1626. 1627 khewat No. 273, khata No. 370, 370/1 and 371 entered in the jamabandi for the year 1967-68 situated in the area of village Payal, Tehsil and Distt. Ludhiana and for permanently restraining defendants Nos. 1 to 3 from interfering in the above said land after vacating the possession thereof, now and in furture in any way, on the basis of the oral and documentary evidence or in the alternative if the licence is not proved then for possession of land measuring 16B-1B-0B described as khasra No. 1625, 1626, 1627 khewat No. 273. khata No. 370, 370/1, 371 entered in the jamabandi of the year 1967-68 situated in the area of Village Payal, Tehsil and Distt. Ludhiana on the basis of ownership.

Claim in Appeal : For reversal of the order of the lower appellate Court.

Dated the 4th September, 1990.

M. L. Sarin, Sr. Advocate with D. R. Mahajan, Advocate and Miss Jaishree Thakur, Advocate, *for the Appellant.*

Hemant Kumar, Advocate with Rajesh Kumar, Advocate, *for Respondent No.* 1.

Achra Singh, Advocate, *for Respondent No.* 3.

JUDGMENT

G. R. Majithia, J.

(1) This Regular Second Appeal is directed against the judgment and decree of the first appellate Court reversing on appeal those of the trial Judge and dismissed the suit filed by the plaintiff-appellant for a decree of permanent injunction against defendants No. 1 to 3 directing them to vacate the disputed land.

(2) The facts : The appellate (hereinafter referred to as 'the plaintiff' filed a suit for mandatory injunction or in the alternate for possession against respondents No. 1 to 3 (hereinafter referred to as defendants No. 1 to 3) directing them to vacate the suit land measuring 16 Bighas 1 Biswa. It was stated in the plaint that the suit land was jointly owned by the plaintiff, defendants No. 4 to 13 and one Puran Devi who has Since died and whose share was inherited by defendants No. 4 to 13 being her legal heirs. The plaintiff had one half share in the suit land while defendants No. 4 to 13 were owners of the remaining one-half share. The suit land was originally given to the Mohamadans as licensees by the fore-fathers of the plaintiff and defendents No. 4 to 13 who were the owners thereof at that time, with a permission to use the said land as a burial ground while granting the said licence, it was clearly mentioned that the land could not be cultivated and the same could not be used for any other purpose except the one specified above. The terms of the licence were mentioned in the Wajab-Ul-Urz prepared at the time of settlement in the year 1964 BK of village Payal, which was previously known as Sahibgarh in district Amargarh. After the migration of the Mohamadans to Pakistan in the year 1947, the suit land remained no longer with the mohamadans and the licence given to them for burial of their dead bodies stood terminated. In the year 1967-68, defendant No. 2 illegally and without any right, title or interest in the said land gave the same on lease to defendant No. 3 for cultivation at an yearly rent of Rs. 210. The plaintiff moved the Wakf Board through its Secretary who admitted,—*vide* order dated June 27, 1967, that the said laid was not meant for cultivation and that the Wakf Board had no interest or right with regard to the said land and consequently the aforesaid lease granted by defendant No. 2 in favour of defendant No. 3 was cancelled,—*vide* order dated June 27, 1967, and defendant No. 3 was informed accordingly by defendant No. 2 to take back his lease money. In spite of the above admission made by defendent No. 2 with regard to the nature and character of the suit land and the rights

of the plaintiff and defendants No. 4 to 13, it again leased out the suit land for the year 1968-69 in favour of defendant No. 3 without any right or interest. Thus, defendant No. 3 interfered in the actual possession of the plaintiff though the lease in his favour was illegal and was not binding on the plaintiff and other co-owners. It was further alleged that although defendant No. 1 has been shown in the revenue record as 'Muzara Awal' in possession of the land in dispute but as the suit land was Gair Mumkin (Qabristan) and not cultivable by its character and nature and was given to the Mohamadans to use the same as burial ground for their dead bodies, so according to law there could not be any tenant much less the Custodian who had no right or interest left in the suit land after the migration of the Mohamadans to Pakistan in the year 1947, as the licence in their favour stood terminated because no Mohamadans were left to use the land as burial ground and consequently the entries in the revenue record about the Custodian as the tenant-in-chief were absolutely wrong, illegal and not binding on the plaintiff and defendants No. 4 to 13 and Custodian had no right to claim any interest in the suit land. As defendants No. 1 and 2 had no right or interest in the suit land, defendant No. 3 had no right to interfere in possession of the plaintiff over the suit land. On these premises the plaintiff prayed for a decree for mandatory injunction directing defendants No. 1 to 3 to vacate possession of the suit land and not to interfere in their actual possession.

(3) The suit was contested by defendants No. 2 and 3. Defendant No. 2 maintained that the land in dispute was used as Muslim graveyard from the very outset and was used as such from time immemorial and that after the partition of the Country in the year 1947, Muslims continued to live in the village and the character of the land in dispute remained a graveyard. It was further asserted that the suit land vested in the Punjab Wakf Board and it has every right to use for any purpose, it thought fit, and that the lease granted by it in favour of defendant No. 3 was perfectly valid. The suit property

firstly vested in the Custodian under the law as Trust for the Punjab Wakf Board and with the constitution of the Wakf Board, its management and control was transferred to it.

(4) On the pleadings of the parties, the following issues were framed :—

1. Whether the plaintiff is the owner of the land in suit ? OPP

2. If issue No. 1 is proved, whether the land in suit was given to the Mohamadans for the specific purpose of using it as a burial ground as a licensee ? OPP

3. Whether the plaintiff is entitled to the injunction prayed for ? OPP

4. Whether the suit is within limitation ? OPP (onus objected to).

5. Whether the plaintiff has *locus standi* to file the suit? OPD

5-A. Whether the suit is barred by adverse possession, as alleged? OPD.

5-B Whether the suit is properly valued for purposes of Court fee and jurisdiction ? OPP

6. Relief.

(5) Issues No. 1, 2 and 5 were disposed of together by the trial Judge and were decided in favour of the plaintiff. Issue No. 3 was answered against the plaintiff. Issues No. 4, and 5A were answered against the defendants. Issue No. 5-B was not pressed by the defendants. In view of the findings on issue No. 6, the trial Court found that the plaintiff being a co-sharer was entitled to a decree for possession of the suit land. On appeal, the first appellate Court reversed the decision of the trial Court under issues No. 1, 2 and 5 basically on the ground that the plaintiff had admitted in the plaint that the land was given by the owners to the Mohamadans for use as graveyard and that it was used as such till 1947, so the dedication of the property in dispute for graveyard by the owners and its use as such after several years stood established and the land in suit has

to be treated as Wakf by user. The mere disuse of the property after 1947 as a graveyard cannot take away the character of the property.

(6) The entire approach of the appellate Judge is erroneous. Under Mohamadans Law, Wakf cannot be created by user. It can only be created by dedication. Even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user i.e. where corposes of the members of the Mohamadans community have been buried in a particular graveyard for a large number of years without any objection from the owner. In order to prove that a graveyard is public by dedication, it must be shown by multiplying instances of the character; nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mohamadans community had buried their corposes from time to time in the graveyard. Once this is proved, the Court will presume that the graveyard is public one. Where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive proof to show the public character of the graveyard.

(7) Abundant documentary evidence in the form of Jamabandis Exhibits P-23 to P-26 shows that the land reserved for use as a graveyard in the village out of the land of the different Pattis reverted to the proprietary body after 1947 since it had ceased to be used as a graveyard and a part of this land was allotted to different persons who migrated from Pakistan and the remaining was shown to be under cultivation of different persons. The land which was earlier used as graveyard of the Muslims by the Mohamadans reverted to the proprietors of the Patti and the character also changed since it was brought under cultivation after 1947 by its Hindu proprietors.

(8) In the instant case, the trial Judge after referring to the voluminous documentary evidence came to the following conclusion :

> (i) Extract from the Wajab-Ul-Urz Exhibit P-13 proves that the area so reserved for use as graveyard by the Muslims of the village was temporarily given to them as licensees, and no permanent dedication was made in their favour, since the usefruct of this land and the proprietary rights in the same were retained by

the proprietors of the said Pattis with them. It was also clearly mentioned in Wajab-Ul-Urz that the area so reserved was impartible; that no sole proprietor could reclaim it; that the trees grown in the said Shamilat area belonged to the proprietors unless any specific portion of the land was in exclusive possession of a single proprietor; that the trees standing in the area reserved for graveyard and cremation ground etc. could be used by the Mutwalli for the maintenance of the old existing house meant for the Mutwalli or a person who rendered services there; that such person or Mutwalli could not sell the trees and that the proprietors as a whole had a joint interest in the same and no proprietor alone, without the consent of the others could sell the same. If any cosharer in the Shamilat wanted to instal a well or build a house for public use, he could do so without the consent of the other proprietors, but said well or a building would be deemed to be property of the whole proprietary body. This Wajab-Ul-Urz was attested by Hindus and Muslim respectables of the village on 27th Katik, Sammat 1964 Bk. in the presence of the Superintendent Bandobast.

(ii) Jamabandi Exhibit P-14 prepared at the time of Settlement indicates that land comprised in Khasras No. 2217 (20 Bighas 5 Biswas) and 2219 (0 Bigha 8 Biswas) was reserved for use as a graveyard for the Muslims by the proprietors of Patti Purian out of the Shamilat land of the said Patti. The land in suit is admittedly situated in Patti Purian. In the ownership column of Exhibit P-14 Shamilat Patti Hasab Rasad Khewat is entered as owner of the aforesaid land. The other entry in this column shows Dewa Dass son of Hari Singh to be the owner of 63/71 shares and Ghulam Hussan *alias* Gahi etc. Sheikh Puris as owners of 8/71 shares. This entry shows that Patti Purian comprised of Hindus and Muslims proprietors and their respective shares in the shamilat of this Patti were as given in Exhibit P-14.

(iii) The entries in Jamabandis Exhibits P-1 and P-13 prove that portion of Shamilat land in each Patti of this village was reserved by the proprietors of the Patti for use for various public purposes, though the proprietary rights were retained by the proprietors and the usufruct of the land so reserved was also retained by them accordingly.

(9) The essential ingredients for establishing a public graveyard are non-existent in the instant case. A somehow identical question arose in *Panchayat Deh* v. *Punjab Wakf Board, Ambala and another* (1), where it was held thus :—

> "The entries in the Jamabandis carry a presumption of correctness but in this case the Jamabandis for the years 1957-58 and 1960-61 cannot be said to be correct because the old entries were repeated although since 1947 no Muslim is living in this village and the land in dispute was never used as a graveyard. It had been encroached upon by the defendants in the suits other than the Gram Panchayat and the Gram Panchayat itself filed applications for their ejectment after the land had vested in the Panchayat. The entries in the other Jamabandis produced in the suits do not prove that the dedication had been made by any Muslim. It has also not been shown that any mutwalli had ever been appointed to look after the wakf property and to arrange for the burial of the dead bodies in this land."

This judgment was affirmed by the Letters Patent Bench in *The Punjab Waqf Board, Ambala* v. *The Panchayat Deh and another* (2), wherein it was held thus:

> "On the basis of the entries in the records of rights it can be said that a few dead bodies had been buried in this piece of land during a period of 35 to 40 years before the partition of the country but the circumstances are such that we can believe that the user of this land for this particular purpose had discontinued for about two decades after the partition of the country apparently because the minority community had evacuated from the village. It cannot be said that the user before the partition of the country had lasted upto a point of no return and if the land could assume a certain character by user over a period of years, then the discontinuation of that user at a particular time could have

(1) A.I.R. 1969 Punjab and Haryana 344.
(2) A.I.R. 1971 Punjab and Haryana 482.

cured the land of its consecrated character as waqf so as to justify the vesting of this land in the Gram Panchayat for the benefit of the present residents of the village. The minority community that could have occasion to use the land as a graveyard having evacuated from the village and the particular user having discontinued, there is no point in maintaining or administering the land as a graveyard. The consecration of the land by the burying of a few dead bodies has come to an end with the descration and obliteration of all traces of these graves and the land has been cured by continued disuser of the character that it may have acquired by indifferent user as a graveyard for a few decades before the partition of the country."

(10) The learned counsel for the respondents relied upon *Syed Mohd. Salie Labbai (Dead) by L.Rs. and others* v. *Mohd. Hanifa (Dead) by L.Rs. and others* (3) and contended that in the present case, the Wakf was created. In this judgment. it was held that under Mahomedan Law, Wakfs can only be created by dedication, although dedication can be inferred by long user and the other question which arose was as to what was the distinction between a private and public graveyard. In view of my findings above that there was no dedication, the ratio of this judgment does not apply to the instant case. The learned counsel for the respondents also relied upon *Punjab Wakf Board* v. *Chhailu* (4). The learned Judge in view of the observations in *Syed Mohd. Salie Labbai's case* (supra) disposed of the appeal. He did not rely upon the judgment in *Panchayat Deh's case* (supra), which was affirmed by the Letters Patent Bench. The Letters Patent Bench's judgment was not brought to the notice of the learned Single Judge. The judgment rendered by the Division Bench in *The Punjab Wakf Board's case* (supra) is binding on me sitting Singly. In *Pritam Kaur* v. *Surjit Singh* (5), reported as a Full Bench of this Court held thus :

"From the above, it would follow as a settled principle that the law specifically laid down by the Full Bench is binding upon the High Court within which it is rendered and any and every veiled doubt with regard thereto does not justify the reconsideration thereof by a larger Bench and thus put

(3) A.I.R. 1976 S.C. 1569.
(4) 1986 P.L.J. 455.
(5) 1984 P.L.R. 202.

the law in a ferment afresh. The ratios of the Full Benches are and should be rested on surer foundations and are not to be blown away by every side wind. It is only within the narrowest field that a judgment of a larger Bench can be questioned for re-consideration. One of the obvious reasons is, where it is unequivocally manifest that its ratio has been impliedly overruled or whittled down by a subsequent judgment of the superior Court or a larger Bench of the same Court. Secondly, where it can he held with certainty that a co-equal Bench has laid the law directly contrary to the same. And, thirdly, where it can be conclusively said that the judgment of the larger Bench was rendered per incuriam by altogether failing to take notice of a clear-cut statutory provision or an earlier binding precedent. It is normally within these constricted parameters that a smaller Bench may suggest a reconsideration of the earlier view and not otherwise. However, it is best in these matters to be neither dogmatic nor exhaustive, yet the aforesaid categories are admittedly the well-accepted ones in which an otherwise binding precedent may be suggested for reconsideration."

In view of the judgment in *Pritam Kaur's case* (supra) the Single Judge judgment in *Chhailu's case* (supra) cannot be preferred over the Division Bench judgment in *The Punjab Waqf Board's case* (supra), which has not been rendered per incuriam.

(11) For the reasons aforementioned, the judgment and decree of the first appellate Court are set aside and those of the trial Court are restored but with no order as costs.

R.N.R.

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