

*Judgment Sheet*

**PESHAWAR HIGH COURT, ABBOTTABAD BENCH**

**JUDICIAL DEPARTMENT**

*Civil Revision No. 02-A/2014*

***JUDGMENT***

Date of hearing.....**10.09.2020**.....

Petitioner(s)..(Haji Mohammad Riaz & another) by Mr. Muhammad Ayub Awan, Advocate.....

Respondent(s)..(Khalid Mehmood Abbasi & others) by Mr. Sajjad Ahmad Abbasi, Advocate.

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**SHAKEEL AHMAD, J.-** The instant revision petition impugns the judgment dated 31.10.2013, passed by the learned District Judge, Abbottabad, whereby appeal filed by the petitioners against the judgment dated 14.04.2011 passed by the learned Civil Judge-VI, Abbottabad was dismissed.

2. The brief facts out of which C.R.No.02 of 2014 arises are that petitioners brought a suit for declaration, permanent and mandatory injunction against the respondents to the effect that Khasra No.1406 measuring 16 marlas situated in the limits of Qasba Abbottabad is Ghair-mumkin graveyard and the entries of the revenue record showing the same to be the ownership of respondents are wrong and illegal and the registered sale deed No.1241 dated 13.09.2001 and 1425 dated 20.10.2001 and mutation Nos.3682 attested on 13.01.2004, 3708 attested on 13.02.2004, 3770

attested on 05.09.2002 and mutation No.3755 unattested so far are wrong, illegal and ineffective upon the rights of the petitioners. It was averred in the plaint that the dead bodies of the petitioners' relatives and others are buried therein and the sale deeds and mutations are liable to be cancelled. The suit was contested by the respondent No.1 by filing his written statement. The learned trial court after framing issues recorded evidence of the parties and hearing arguments of learned counsel for the parties vide judgment dated 14.04.2011 dismissed the suit of the petitioners. Not contented with the same petitioners went in appeal, which was also dismissed vide judgment dated 31.10.2013, hence, this petition.

3. I have heard arguments of learned counsel for the parties and perused the record with their valuable assistance.

4. It appears from the record that the land measuring 16 marlas in Khasra No.1406 at *Mauza Qasba*, Abbottabad has been used as a Muhammadan graveyard. The use of land as a graveyard since 1934 till today was not disputed, yet in the ownership column of '*Jamabandi*' for the year 2001/2002 (Ex.PW 1/1), the defendant No.1

and predecessors of the rest of the defendants namely Mir Afzal and Walayat Khan are recorded as owners of the land in question. The perusal of 'Fard Jamabandi' and 'Khasra Girdawari' (Ex.PW 1/2) on record establishes that since 1934 'Khasra' No.1406 stood recorded as 'Ghair Mumkin Qabristan'. The long users of the land for religious purpose and especially as a graveyard that too without interruption by the respondents/defendants gives rise to presumption as to the creation of 'waqf'. According to Article 188, of the Muhammadan Law by Mulla:

*"Waqf by immemorial user, if land used from the time immemorial for a religious purpose e.g., for a mosque or a burial ground or for the maintenance of a Mosque, then the land is by user 'Waqf' although there is no evidence of an express deduction."*

In this behalf reliance is placed on the judgments reports as '**Ulfat Butt Vs. Muhammad Arif and others**' (2000 YLR 2753) and '**Sheo Raj Chamar and another Vs. Mudeer Khan and others**' (AIR 1934 Allahabad 868).

5. It is by now established that in order to prove dedication by evidence of burials in a land and to justify the inference that the land is cemetery, it is necessary to prove a number of

instances adequate in character, number and extent, long user, as evidence of a dedication, must be long and absolute and there should be no break. There is no evidence on record regarding discontinuance of the use of land as burial ground that may cause the land to lose its consecrated character. Once a Qabristan has been established to be a public graveyard, it vests in the public and constitutes a Waqf and it cannot be divested by a non-user but will always continue to be so whether it is used or not. The following rules apply in order to determine whether a graveyard is a public or a private one:-

- (i) 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 the corpses of the embers of the Muhammadan community have been buried in a particular graveyard for a large number of years without any objection from the owners. The fact that the owner permits such burials will not make any difference at all.
- (ii) If the graveyard is a private or a family graveyard then it should contain the graves of only the founder, the members of his family or his descendents and no others. Once even in a family graveyard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public graveyard.

- (iii) In order to prove that graveyard is public dedication it must be shown by multiplying instances of the character, nature and extent of the buries from time to time. In other words, there should be evidence to show that a large number of members of the Muhammadan community had buried their corpses from time to time in the graveyard. Once this is found, then Court will presume that the graveyard is a public one; and
- (iv) Where burial ground is mentioned as public graveyard in either a revenue record or historical papers that would be conclusive proof of a public character of a graveyard.

In the case reported as '*Pir Bux Vs. Sher Muhammad*' (1969 All L J 169) it was ruled that land used as graveyard ceases to be private property.

6. Applying all these principles to the facts and circumstances of the present case, it is evident from the record that the burial ground was being used by the people of the locality for burial of their dead without any objection from the respondents' side since 1934 and it would make no difference whether it was recorded in the revenue record as public graveyard or '*Maqbooza Ahle-Islam*' or not or names of defendants were recorded as owners in the said record. Under no

circumstances, its status, nature or use can be changed. In this behalf reference is made to the following *Ahadis* of the Holy Prophet Muhammad (Peace be upon him).

1. *Abu Hurarah* reported: "The Prophet, peace be upon him, said: 'May Allah destroy the Jews, because they used the graves of their prophets as places of worship'" (*Bukhari and Muslim*).

2. *Ibn 'Abbas* reported: "The Messenger of Allah, peace be upon him, cursed the women who visit graves and those who build mosques and place lights on them." (Reported by Ahmad and other compilers of the *Sunah*).

3. The Prophet, peace be upon him, forbade the slaughtering of animals at graves, which was practiced in the Days of Ignorance out of arrogance and self conceit in order to flaunt one's wealth. *Anas* reported: "The Prophet, peace be upon him, said: 'There is no slaughtering (of animals on graves) in Islam'" (*Abu Daw'ud*).

4. It is not permissible to sit on a grave, or lean on it, or walk over it. This is based on a *hadith* reported by *'Amr bin Hazm* who said: "The Prophet, peace be upon him, saw me leaning on a grave, so he said: 'Do not harm the dweller in this grave or do not harm him.'" (Reported by Ahmad,

who considers its chain of narrators as sound). *Abu Hurairah* reported: “The Prophet, peace be upon him, said: ‘It is better for you to sit on a glowing coal that burns through your clothes to your skin than to sit on a grave.’” (Reported by *Ahmad, Muslim, Abu Daw’ud, Nasa’i* and *Ibn Majah*).

5. Jabir reported: “The Prophet, peace be upon him, forbade the whitewashing of a grave, sitting on it, or erecting any structure on it.” (Reported by *Ahmad, Muslim, Nasa’i, Abu Daw’ud*, and *Tirmizhi* who said that it is a sound *hadith*) *Tirmizhi* reported this *hadith* with this wording: “The Prophet, peace be upon him, forbade the whitewashing of graves, writing on them, building on them, or stepping on them.” *Nasa’i* reported it in these words: “The Prophet, peace be upon him, forbade building over a grave, adding anything to it, whitewashing it or writing on it.”

7. The learned lower fora while deciding the suit of the petitioners totally ignored the legal status of the graveyard and the evidence produced in this behalf, the impugned judgment being based on misreading and non-reading of the evidence on record and the law applicable to the

case, are not sustainable in the eye of law. It is also observed that construction, if any, made in the graveyard by either of the parties, the same is liable to be demolished and they are directed to remove it forthwith and the burial ground shall not be used for any purpose, except for burial of dead of the Muslims of the locality. It is further held that sale or purchase if any made in the suit '*khasra*' either through mutation or registered deed is illegal, without lawful authority and without jurisdiction and the same are liable to be cancelled, and the revenue officials are directed to rectify the revenue record in the light of the observations made hereinabove.

8. For what has been discussed hereinabove, the impugned judgments and decrees passed by the learned Courts below are laid to rest, this petition is allowed in the above terms.

Announced:  
Dt.10.02.2020.  
M. Saleem PS\*/

**J U D G E**

*(SB) Mr. Justice Shakeel Ahmad*