BHAI BEEBI AND OTHERS

v.

A. M. M. NAEEM AND OTHERS

COURT OF APPEAL
SOZA, J. AND RANASINGHE, J.
C.A. (S.C. 55/73(F)
D. C. RATNAPURA NO. 4806/L
MARCH 18, 19, 23 AND 25, 1981.

Muslim Law— land claimed as held in trust— Wakf property for benefit of mosque and use as a graveyard for Muslim public— dedication — Wakf.

The word 'wakf' literally means detention. It signifies appropriation of the subject-matter in such a manner as subjects it to the rules of divine property.

The wakf must be created by dedication for which no formalities are required. The dedication can be in writing or oral or inferred from long user and the surrounding circumstances. The law looks only at the intention whatever the language.

As a concept, in Sri Lanka, the expression wakf is treated as akin to the concept of a charitable trust. Even after dedication legal title to the mosque property remains in the wakif or dedicator but he becomes a trustee holding the property in trust for the benefit of the objects of the dedication. A deed of dedication can provide for the appointment of trustees. Where there is no such provision the wakif is the trustee.

In the concept of wakfs, law and religion are interwoven and changing social needs have by the operation of statute and custom brought about certain changes and modifications in the pristine doctrine relating to wakfs. Burial grounds reserved for the Muslim community do have the attributes which with appropriate dedication can constitute them wakfs. The graveyard in suit is an adjunct of the mosque and held along with the mosque which is wakf property and the substituted plaintiffs as trustees were entitled to sue for its recovery.

Cases referred to:

(1) *Vidya Varuthi Thirthia Swamigal v. Baluswami Ayyar AIR 1922 Privy Council 123, 127.*
(2) *Jewan Donn Saboo v. Shah Kubeerooddeen (1837)2 M.I.A. 390.*
(3) *Ambalavana Pandara Sannidhi v. Meenakshi Sundareswaral Devastanam [1920] Indian Appeals 191, 198.*
(4) *Court of Wards For The property of Makhdum Hassen Baksh v. Ilahi Baksh [1912] LR 40 1A 18.*
(5) *Mehraj Din Ghulam Muhammad AIR 1931 Lahore 607.*
(6) *Lala Jhao Lal v. Ahmudullah AIR 1934 Allahabad 335.*
(7) *Munshi Abdul Rahim Khan v. Fakir Mohammed Shah AIR (33) 1946 Nagpur 401.*
(8) *Kwaja Muhammed Hamid v. Mian Mahmud [1922] LR 501A 92.*
(9) *Sammugam v. Arumugam (1936) 15 C.L. Rec. 222.*
(10) *Kumarasamy Kurukal v. Katthigesa Kurrukal (1923) 26 NLR 33. (3 Times*

of Ceylon Law Reports 120).

(11) Maula Buksh v. Hafiz-ud-Din AIR [1926] Lahore 372.

(12) The Mosque Known as Masjid Shahid Ganj v. Gurdwara Parbandhak Committee, Amristrar (1940) 67 1A 251.

Appeal from the District Court, Ratnapura.

H. W. Jayewardene, Q.C. with S. C. Chandrahasan and W. Siriwardena for the defendant appellants

C. Ranganathan Q.C. with M. S. M. Nazeem and M. Yogasunderam for Substituted plaintiff respondents.

Cur adv vult

May 29, 1981

SOZA, J.

The original plaintiff in this suit sued the defendants for a declaration that the land called Madamewatte alias Andigewatte depicted as Lots 1 and 2 in plan No. 997 of 16.12.1968 marked X belongs to the Janneth Mosque and is vested in him as its trustee. He also prayed for ejectment of the defendants and damages. During the pendency of the action the original plaintiff died. The present substituted plaintiffs who are respondents to this appeal are the duly appointed trustees of the mosque in succession to the original plaintiff. The learned District Judge at first refused to allow them to be substituted and dismissed the action. On appeal the order of the learned District Judge was set aside. Thereafter the present substituted plaintiffs were duly substituted in the room of the original deceased plaintiff.

The case of the substituted plaintiffs as set out in their amended plaint of 28.11.1969 is that the premises depicted in Plan X are vested in them as the trustees of the Janneth Mosque. The premises are claimed as a graveyard of the Muslim Public of Ratnapura belonging and appertaining to and/or appropriated to the use of and/or held in trust or a Wakf property exclusively for the benefit of the Janneth Mosque at Ratnapura.

The plaintiffs trace title to the original ownership of Colonda Marikar Cumister Uduaman Lebbe Marikar Mudaliyar and Colonda Marikar Cumister Hassana Marikar Notary. These two persons obtained Certificate of Quiet Possession No. 3035 dated 14.4.1874 (P3). The land as referred to in P3 however bears the name Andigewatte and is depicted in Plan No. 91011 – T 202 of 7.6.1873 (P4). There are differences between the land depicted in P4 and the land depicted as Lots 1 and 2 in Plan X. But the defendants have admitted the original ownership and the identity of the land

depicted in Plan X – see the amended answer of 8.7.1970. Hence the Court is relieved of the duty of considering these questions.

The burden of setting out and proving the devolution of title is on the substituted plaintiffs. They rest their claim on dedication by the original owners. They plead that the land has been held by the trustees of the Janneth Mosque for use by the Muslim Public of Ratnapura as a graveyard. The land has been consecrated or exclusively set apart for burials of Muslim persons and is Wakf property vested in the substituted plaintiffs as trustees.

The word "wakf" literally means detention. According to the Muslim jurists it signifies the appropriation of the subject-matter in such a manner as subjects it to the rules of divine property. Conceptually, when a property is described as wakf, it signifies extinction of the appropriator's ownership in the thing dedicated and the detention of the thing in the implied ownership of God. A wakf extinguishes the right of the dedicator or wakif and transfers ownership to God. The land becomes God's acre for the benefit of the community. The manager of the wakf is the mutawalli or modimayar but the property does not vest in him as it would in a trustee in English law. To constitute a valid wakf there must be a dedication of the property to the ownership of God or to religious or charitable purposes. The endowment must be permanent, inalienable. It cannot be contingent or revocable or subject to an option. If for instance, the wakfnama contains a condition that in case of mismanagement the property should be divided among the heirs of the settlor, the intended dedication is void. The object of the wakf must be one recognized by the Mahomedan Law as religious, pious or charitable and must be indicated with reasonable certainty.

There is no essential formality nor is the use of any express phrase or term requisite for the constitution of a wakf. A wakf can be created by a writing or orally. The law looks only to the intention of the donor. Where a dedication is intended the law will give effect to it, in whatever language it may be couched or in whatever terms the wish may be formulated. It is not even essential that the word "wakf" should be used in the dedication if from the general nature of the dedication a wakf can be inferred. Further, the dedication can be implied from the circumstances just as much as it can be express – see the **Hedaya** (Hamilton's translation) 2nd Ed. 1870 pp. 231, 234, 235; **Ameer Ali**, **Mohamedan Law** 3rd Ed. (1904) Vol. 1 pp. 132, 148. 158, 159. 163; **Fyzee: Outlines of Muhammedan Law** 2nd Ed. (1955) pp. 239 241 to 245.

The Mahomedan law on the subject has been well summarised by Mr. Ameer Ali in the Privy Council decision in *Vidya Varuthi Thirthia. Swamigal v Baluswami Ayyar:*[1]

> "But the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings.' When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows as in the case of *Jewan Doss Sahoo v. Shah Kubeeroodeen*[2] that a dedication to pious or charitable purposes is meant, the right of the wakf is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the wakf is the Mutwali the governor, superintendent, or curator. In Jewan Doss Sahu's case the Judicial Committee call him 'procurator.' It related to a Khankha, a Mahommedan institution analogous in many respects to a Mutt where Hindu religious instruction is dispensed. The head of these Khankhas, which exist in large numbers in India, is called a sajjada-nashin. . . . . But neither the sajjada-nashin nor the Mutwalli has any right in the property belonging to the wakf; the property is not vested in him and he is not a 'trustee' in the technical sense."

Referring to the Hindu Law Mr. Ameer Ali declared as follows at page 126:

> "It is also to be remembered that a 'trust' in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple."

On the question of the legal personality of the Hindu deities His Lordship said at p. 126:

> "Under the Hindu law, the image of a deity of the Hindu pantheon is, as has been aptly called a 'juristic entity,' vested with the capacity of receiving gifts and holding property."

On the question of the capacity of a Hindu deity to receive gifts, His Lordship made the following observations at page 126:

> "When the gift is directly to an idol or a temple, the seisen is complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoy-

1. A.I.R. (1922) Privy Council 123, 127.
2. (1837) 2 M.I.A. 390.

ment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him; nor is he a 'trustee' in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration."

A similar view of the Hindu Law was expressed by Lord Moulton in the Privy Council decision in *Ambalavana Pandara Sannidhi v. Meenakshi Sundareswaral Devastanam*[3] where His Lordship pointed out that the general trustee is only a representative of the idol who is a juridical personage, and who is true owner.

As I said before a dedication can be implied from the circumstances. A dedication sufficient to create a wakf can be implied by immemorial or long user. As Fyzee says where land has for long been used as a wakf proof of express dedication is not necessary, and the legal dedication will be inferred – see Fyzee ibid pp. 239, 241, Mulla: Principles of Mohamedan Law 14th Ed. (1955) pp. 173 to 175. The Courts in India have often upheld the wakf of mosques and graveyards on this ground.

The decision of the Privy Council in the case of *Court of Wards For The Property Of Makhdum Hassan Bakhsh v. Ilahi Bakhsh*[4] is relevant on the question of long usage. This was a suit to restrain the appellant from selling as his private property certain land in a place called Multan of which he was the nominal owner. There was an entry on record to the effect that an area of which the land in suit formed part was a graveyard which had been set apart for the Mussulman Community. It was agreed in that case that the area described as a graveyard was not one continuous burial ground but merely an area of uncultivated land in which here and there were to be found graves or clusters of graves. It was claimed that the vacant ground unoccupied by graves remained the private property of Makhdum Hassan Bakhsh and that the Court of Wards should deal with it for the benefit of his estate without regard to the claim advanced by or on behalf of the Mohamedans of Multan. Lord Macnaghten delivering the Judgment of the Board said as follows at page 23.

"Their Lordships agree with the Chief Court in thinking that the land in suit forms part of a graveyard set apart for the Mussulman community, and that by user, if not by dedication, the land is waqf. The entry in the record of rights seems conclusive on the point. It is obvious that, if it were held that within the area of the graveyard land unoccupied or apparently unoccupied by graves was private property and at the

3. (1920) Indian Appeals 191, 198.
4. (1912) LR 40 IA 18.

disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government in setting aside land as an open graveyard for the Mahomedan community in Multan would be frustrated."

This decision was followed in the case of *Mehraj Din v. Ghulam Muhammad.*[5] Where a long period has elapsed since the origin of the alleged wakf, user can be the only available evidence to show if the property is wakf. Where there is no evidence to show how and when the alleged wakf was created, the wakf may be established by evidence of long user. In this case Shadi Lal C. J. said as follows at page 608:

"When a long period has elapsed since the origin of the alleged wakf user can be the only available evidence to show whether the property is or is not wakf."

In the case of *Lala Jhao Lal v. Ahmudullah*[6] it was held that where there is a finding that the land has been used as a graveyard from time immemorial, a dedication of the land as wakf for this purpose is presumed. It is not necessary in such cases to prove a dedication.

In the case of *Munshi Abdul Rahim Khan v. Fakir Mohammad Shah*[7] the history of the wakf claimed by the plaintiff was lost in antiquity. The defendant admitted the mosque premises were wakf but asserted he retained ownership over the other parts of the property. Grille C. J. said as follows at page 407:

"The contention of the defendant also appears to us to be baseless. In a case of this nature where ancient history is not available a decision will have to be based on such evidence as can be gathered from how the public regarded this property, its environment and the conduct of the parties."

In this case the plaintiffs were not in a position to trace the dedication of the properties as wakf but they were entitled to rely on immemorial user of these properties as wakf. The mosque and the other properties were within one compound with one gate and they were so inter-connected as to form one property. As it was admitted the mosque was wakf the Court, it was held, was entitled to presume that the other properties were also wakf. It is relevant to observe that the Court did not accept the facts that the defendant received the rents from the tenants who occupied parts of the

5. A.I.R. (1931) Lahore 607.
6. A.I.R. (1934) Allahabad 335.
7. A.I.R. (33) 1946 Nagpur 401.

property or that he constructed kothas and shops on the property as proving that it was in his ownership -- see page 416 of the judgment.

In the case of *Khwaja Muhammad Hamid v. Mian Mahmud*[8] the Privy Council held that where the mosque was admittedly wakf property the astanas used by the fakirs and pilgrims being holy ground, the huts used by the dervishes, the religious schools connected with the Khankah and the Maharwi bungalow given by an adherent for the use of the superior of Mahar, the parent shrine, on his visits are all wakf.

The weight of authority therefore favours the proposition that once it is admitted that a mosque is wakf, properties belonging to or pertaining to it or appurtenant to it are also wakf.

An examination however of our legislation regarding Wakfs shows that we in Sri Lanka have veered away from some of the basic principles relating to wakfs laid down by the Islamic jurists. The Muslim Intestate Succession and Wakfs Ordinance No. 10 of 1931 impliedly accorded wakfs the same standing as Muslim Charitable Trusts. A charitable trust as defined in this ordinance included any trust or wakf for the benefit of the Muslim public or any section of it or any of the following categories:

(a) the relief of poverty, or
(b) the advancement of education or knowledge, or
(c) the advancement of religion or the maintenance of a mosque, takkiya or shrine, or the maintenance of religious rites and practices; or
(d) any other purposes beneficial or of interest to mankind in general.

A burial ground will fall at least under (d) above if not under (c). A trustee under this Ordinance was a person appointed to be a trustee of a charitable trust either orally or under any deed or instrument by which such trust has been created or by a court of competent jurisdiction and includes any person appointed by the trustee to perform the duties of the trustee and any person who is for the time being administering any charitable trust property – see section 5 of the Ordinance. Sections 15 and 16 make provision for application to be made to the Court for formulating schemes of management of trusts and also for appointing trustees. The same principles with greater elaboration were retained in the

8. (1922) LR 50 1A 92.

Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 – see especially part V. Section 109(b) of our Trusts Ordinance stipulates that Chapter X of the Ordinance will not apply to religious trusts regulated by the Muslim Intestate Succession and Wakfs Ordinance No. 10 of 1931 in so far as this Chapter is inconsistent with the provisions of the Ordinance. The expression "charitable trust" includes not only religious trusts but also other categories of trusts – see section 99 of the Trusts Ordinance. Thus a muslim charitable trust which is not a religious trust can be governed by section 107 relating to *de facto* trusts which occurs in Chapter X of the Trusts Ordinance. Even where the origin of the trust is not traceable but the circumstances of the case warrant it, the Court can hold that a trust in fact exists or ought to be deemed to exist – see *Summugam v. Arumugam.*[9] In *Kumarasamy Kurukal v. Karthigesa Kurukal.*[10] the Supreme Court had occasion to consider whether a charitable trust was created by the circumstances of that case. There was evidence that a Hindu temple had been publicly dedicated with the traditional ceremonies. No instrument of trust appropriating the property for the purpose of the trust was executed. In 1898 however a deed of management had been drawn up providing for the trusteeship to vest in B and C together and thereafter in the survivor of them and then in B's son R. On a dispute to the title arising the Court held that although no formal instrument of trust had been executed a *de facto* trust could be inferred from the circumstances and legal title vested in K subject to the religious trust under which the temple was founded and subject to the deed of management of 1898. Bertram, C. J. who was in fact the author of the Trusts Ordinance stated the legal position as follows at page 36:

> "According to Hindu religious law, the position is perfectly clear. The temple is conceived as being the property of the deity to whom it is dedicated. Or, to put it in another way, the foundation, as in Roman law, is personified, and the temple is conceived as belonging to the foundation. We are no doubt authorized in these questions to have regard to the religious law and custom of the community concerned (see Trusts Ordinance, section 106(ii)), but I take it that in so 'having regard' we cannot subordinate to any such law or custom our own express law. According to our own law as declared and defined by the Trusts Ordinance, the dominion of the property remains vested in the legal owners, but is so vested on behalf of the beneficiaries, and the beneficiaries consist of that section of the public for whose benefit the trust was founded.

9. (1936) 15 CL Rec. 222.
10. (1923) 26 NLR 33 (2 Times of Ceylon Law Reports 120).

> Though there is a difference in form between our own conception and that of the Hindu religious law, there is no difference in substance."

Regarding the scheme of management His lordship said at pages 37 and 38:

> "It is perfectly clear that subject to any arrangement made by the founder, the right of the management of the foundation vests in the founder himself and his heirs, but the founder himself is entitled to make express provision for its future management."

Although the Hindu deity is a juristic person the principles applicable to Hindu religious trusts are analogous to those applicable to Wakfs or Muslim charitable trusts. This is so even in regard to devolution of trusteeships under Muslim law and Hindu law. In Karthigesa's case (supra) Bertram C. J. had the following comments to make in regard to the devolution of the trusteeship (page 39):

> "In Hindu religious law, the manager is the trustee. Although the property is conceived of as vested in the deity, the manager has all powers of a proprietor subject to a trust, and according to Hindu religious law the control of the property passes with the office (see Mayne, p. 601). According to our own law, however, the legal ownership is actually vested in the trustee, but it does not under ordinary circumstances devolve with the office. This only takes place in certain defined cases (see section 113 of the Trusts Ordinance and in particular subsection (2)). In cases within that section, upon the execution of a prescribed memorandum of appointment, the trust property passes from trustee to trustee without the necessity of any conveyance or vesting order. That sub-section, however, does not provide for trusteeships which under the instrument of trust devolve according to a family succession. Upon the death of a trustee holding office under such an agreement, the legal ownership does not pass to the new trustee, but in the absence of any formal instrument it would pass to the trustee's heirs, and in the absence of a transfer the only way of vesting it in a succeeding trustee is to obtain a vesting order under section 112. It will thus be seen that in a trust of this sort confusion is always likely to arise on the death of a trustee, unless he provides for the devolution of the trust property either by will or by an instrument executed during his lifetime. If he does not do so, the legal ownership passes to his heirs. The

heirs, it is true, hold it subject to the trust, and can be made to transfer the legal ownership to the new trustee, but it must always be very troublesome to induce them to do so."

The rights of the trustee would be affected if a mosque could be regarded as a juristic person. In the case of *Maula Buksh v. Hafiz-ud-Din*[11] Shadi Lal C. J. held that a mosque is a juristic person. In the case of *The Mosque Known As Masjid Shahid Ganj v. Gurdwara Parbandhak Committee, Amritsar*[12] the Privy Council discussed the question but did not pronounce upon it. Yet the discussion in the case shows that the view of the Lahore High Court did not commend itself to the Board. Their Lordships however held that suits cannot be brought by or against mosques as artificial persons.

In Sri Lanka a mosque is not recognised as a legal person. Title is vested in trustees. Succession to a trusteeship can according to the circumstances be by inheritance or conveyance or vesting order under the Trusts Ordinance or where there is a scheme of management in operation, according to such scheme.

What is a Wakf in Muslim law is not necessarily a wakf in our law. A burial is not a religious rite and in Sri Lanka we have not accepted the principle that dedication to God is the foundation of a wakf. This is a fundamental departure from the law of wakfs as propounded by the early Muslim jurists. The principles relating to wakfs have received differing modifications in India and in Sri Lanka. In India the Mussalman Wakf Validating Act No. 6 of 1913 (s.2) defines a wakf as a permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable. The Privy Council held that this was a definition for the purpose of the Act and was not necessarily exhaustive. Our Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 (amended by Act No. 21 of 1982) does not attempt to define the expression "wakf." As a concept, in Sri Lanka, it is treated as akin to the concept of a charitable trust. Even after dedication legal title to the mosque property remains in the wakif or dedicator but he becomes a trustee holding the property in trust for the benefit of the objects of the dedication. Of course the deed of dedication (where there is one) can make provision for the appointment of trustees. Where no such provision is made the wakif is trustee and the observations of Bertram C. J. which I have cited in regard to the devolution of trusteeship though made in connection with

11. A.I.R. (1926) Lahore 372.
12. (1940) 67 I A 251.

a case relating to a Hindu religious trust apply on the question of succession.

Although a dedication to God is not essential to create a wakf in our country there is no authority to say that the other principles do not apply. The endowment must be permanent, inalienable and irrevocable. It cannot be contingent or subject to an option – The object must be religious or charitable and reasonably certain. The wakf must be created by dedication for which no formalities are required. The dedication can be in writing or oral or inferred from long user and the surrounding circumstances. The law looks to the intention whatever the language used.

In the case before us the burial ground is being claimed by the trustees as a wakf on the footing that it is part of the property of the Janneth Mosque which admittedly is wakf. Hence it is not necessary to go into the question whether burial grounds per se which are not adjuncts of a mosque must be treated as wakf. But in passing it must be observed that in the concept of wakfs, law and religion are interwoven and changing social needs have by the operation of statute and custom brought about certain changes and modifications in the pristine doctrine relating to wakfs. Burial grounds reserved for the Muslim Community do have the attributes which with appropriate dedication can constitute them wakfs even in Sri Lanka.

Section16(i)(a)(i)of our Wakfs Act vests in the trustees of a registered mosque movable or immovable property which belongs to, or in any wise appertains to, or is appropriated to the use of that mosque. There is no dispute that the Janneth Mosque is a registered mosque. If the land shown as Lots 1 and 2 in Plan X can be proved to belong to or in any wise to appertain to the Janneth Mosque then plantiffs as its duly appointed trustees can by virtue of section 25 of the Wakfs Act with the approval of the Mosques and Muslim Charitable Trusts or Wakfs Board sue for the recovery of the said land.

The substituted plaintiffs claim that there has been a valid dedication of the disputed land by deed and user. Further, as trustees the land is vested in them and they are entitled to sue for its recovery. This is the title pleaded by them which if they establish they are entitled to succeed. The land depicted in Plan X is separated from the Janneth Mosque premises only by a road. Lot 1 as shown in Plan X comprises the burial ground, vacant land and a row of boutiques. Three of these buildings are said to have been put up in 1952. The 1st defendant occupies one of them.

The 2 – 5 defendants are her children. Although they do not claim title to any portion of the land in suit, still the burden of proving title is on the plaintiffs.

In the instant case an examination of deed No. 931 of 27.1.1866 (P5) which is the source of plaintiffs' title shows that it cannot be regarded as a deed of dedication. Far from being a deed of dedication it is an agreement between Pakeer Thamby and the two owners of the property to grant an usufruct of the property and the right to build a house. The mere exclusion of the burial ground from the grant cannot amount to a dedication of the burial ground. The grant to Pakeer Thamby was conditional on good administration by him and obedience to the donors. My view that this is not a deed of dedication is further strengthened by the fact that long after the so-called dedication these two original owners claimed the land before the Crown and obtained Certificate of Quiet Possession No. 3035 of 14th April 1874 (P3) in their favour. Further, one of the donors revoked the deed P5 by executing deed No. 3993 of 23.9.1870 (P6). There is in addition evidence that in 1910 Hassana Marikar Notary's son Mohammed Mowjood sued one Pakir Pulle Pitche a son of Pakeer Thamby seeking a decree for half the land referred to in Certificate of Quiet Possession and ejectment of the defendant. Pakir Thamby Pitche filed answer laying claim by prescription to the Northern portion of the land which he described as bounded on the north and west by roads, south by canal and east by Sannasigewatte. The Court gave judgment for plaintiff holding that Pitche was a mere squatter – see D9, D9(a) to D9(c).

Although the plaintiffs have not established dedication by deed, their claim to title rests also on user.

On 21.2.1898 one Mahallam Ibrahim Lebbe Mohammadu Lebbe Priest of the Ratnapura Mosque on behalf of the Mohamedam community moved that the land shown in the sketch marked P2A be registered as a Mohamedan burial ground. This was in terms of regulations published in the Ceylon Government Gazette No. 5583 of 11.11.1898 (P1). The application was granted and Mohamadu Lebbe was informed by letter P2B of 1.3.1899 that his cemetery was duly registered. The shape of the land, the extent and the northern boundary shown as a main road and the southern boundary as a canal in the sketch P2A are sufficient to lead one to the inference that the sketch is a representation of Lots 1 and 2 of the land shown in Plan X. The tenement list P8 shows the registration of this land in the books of the G.A. as a burial-ground. The letter P8A indicates that the land depicted in Plan P4 (No.

91011 – T 202) attached to the Certificate of Quiet Possession is separated "as a burial-ground of the Muslim Mosque." From the admission by the defendants of the original ownership and of the identity of the corpus in dispute as depicted in Plan X, it can be inferred that the land depicted in Plan P4 is identical with the land depicted in Plan X. Hence the conclusion is justified that the burial-ground of the Muslim Mosque referred to in P8A is none other than the land depicted in Plan X. There is also the evidence that there was a criminal case (P11) filed on 24.9.1934 against two persons – Abdulla Mohideen and H. M. Zackariah – for criminal misappropriation of the collections of the shrine and mosque of the Janneth Mosque. The dispute in the case was referred to Mr. T. B. Jayah for arbitration. Mr. Jayah made his report (P10) for the management of the mosque which was filed in the case on 11.11.1935 and the criminal case was compounded by all parties agreeing to abide by Mr. Jayah's recommendations (P10). It has been submitted by learned senior counsel for the respondents that the recommendation (P10) made by Mr. T. B. Jayah for the management of the mosque cover the burial-ground also. The internal evidence in the Jayah report itself is inconclusive on the point. H. M. Mackariah however appears to have acted contrary to the scheme recommended by Mr. Jayah. On a petition (P16) filed on 18.2.1937 in the District Court of Ratnapura in proceedings No. 150/Special under section 16 of the Ordinance No. 10 of 1931 the Court made order directing inter alia that all property of the mosque shall vest in the 1st respondent I. L. M. Ibrahim Lebbe – see P18. The 2nd respondent Y. M. Zackariah stood removed from office as from 8.7.1936. Thereafter the trustee of the mosque carried on the management of the burial-ground also and one A. L. M. Thahir Marikkar the Trustee of the Janneth Mosque on 1.3.1947 gave a letter of authority (P19) to Ossen Lebbe Seinadeen father of 2 to 5 defendants and husband of the 1st defendant to look after and clear the land. This letter gives the northern boundary of the land as Main Road and Western boundary as Mosque Road clearly taking in the portion where the buildings which are the bone of contention in this case stand. On 31.12.1959 S. M. Subair the 4th defendant wrote to the Trustee of the Janneth Mosque for permission to erect a temporary shed on the "non-burial portion of the mosque burial-ground" (emphasis mine) undertaking to pay a rent of Rs. 10/- and to abide by the rules and regulations of the mosque committee. The 4th defendant appended a sketch to his application which is marked P20 and this depicts the portion of land which was proposed to be built on as lying between the mosque road and main road. In the same year, that is, in 1959 an inquiry was held by the Commissioner of Wakfs in connection with the registration of the Jan-

neth Mosque. In connection with this application Sheik Ibrahim Lebbe the Katheeb gave evidence and so also did S. M. Zubair the 4th defendant supporting the Katheeb. The taxes in respect of the buildings on this land have always been paid in the name of the trustee of the mosque —see P22 to P31. On 14.10.1960 the trustee for the time being of this mosque by Deed P32 leased an extent of twenty-five feet by twenty feet out of the vacant land in Lot 2 of Plan X to the 3rd defendant subject to the usual conditions. The 1st defendant however made application P33 to the local authority to build on the corpus. This application was obviously sent up by the 1st defendant when one Cyril made an abortive attempt to build on this land. In P33 the 1st defendant for the first time claimed to be owner but even in the present case she does not claim ownership of the land.

It will be seen that the father of the 2 to 5 defendants as well as the 4th defendant has recognized that the burial-ground belongs to the mosque. So also have the Government Agent and the local authority. It is significant that the father of the 2 to 5 defendants (and husband of the first) was one of the five persons who petitioned the District Court of Ratnapura on 18.12.1937 in case No. D. C. 150/Special praying *inter alia* that the Court do settle a scheme for the management of the mosque, sanction and confirm the appointment of I. L. Ibrahim Lebbe as Trustee and vest in the trustee the mosque and land on which it stands. The Court approved the scheme of management which had been proposed by Mr. T. B. Jayah in his report P10. This provided for the election of trustees every two years by the congregation in ordinary general meeting. In addition the properties of the mosque were vested in the trustee. At the relevant time Mr. M. L. A. Jabbar functioned as trustee and in 1961 wrote to the father of the 2 to 5 defendants and to another asking for ground rent (see D2 and D3). It has been pointed out that no income has been shown in the accounts of the trustee from the properties of this mosque — see D4, D5. The 2 to 5 defendants claimed that their great grandfather Pakir Thamby who was given an usufruct on deed No. 931 (P5) built house marked C in plan X (Assessment No. 53). Pakir Thamby died leaving his son Sheik Madar who died leaving two children Asia Umma and Abdulla who continued to live on this land. Asia Umma built house marked B in Plan X (Assessment No. 51). The 2 to 5 defendants whose mother the 1st defendant was a daughter of Asia Umma built house marked A (Assessment No. 49) and E (Assessment No. 55) in Plan X and possessed them.

Although no deed of dedication has been produced, there is cogent evidence of long user which serves just as well to establish

that the property in question is wakf as that term is understood in Sri Lanka. Dedication must be presumed from long user and the parties in their conduct and dealings have acted on this presumption. The land in suit is Wakf property and an adjunct of the mosque. The next question is whether the original plaintiff and after him the substituted plaintiffs are trustees.

Learned senior counsel for the appellant complained that the original plaintiff has not set out the devolution of his title. After the first trustee Ibrahim Lebbe's demise who became the trustee? Who was elected trustee after Ibrahim Lebbe? These questions remain unanswered. But I do not think such continuity in the trustees need be proved. The title of the trustees does not proceed on the basis of devolution from trustee to trustee. Rather the trustee for the time being holds his title on the basis of appropriate direct appointment. The appointment of Jabbar the original trustee as stated in paragraph 2 of the original answer was denied by the defendants but when the 4th plaintiff gave evidence that Jabbar and the plaintiffs were duly appointed trustees there was no serious attempt to dispute that assertion. In fact the defendants marked documents D2 and D3 which Jabbar had written as trustee. One of these letters was to the 4th defendant and apparently evoked no challenge to Jabbar's capacity as trustee. No special conveyance is required as the succession is regulated by the scheme of management put into operation by the of Court in D.C. Ratnapura case No 150/Special – see also s 113(2) of the Trusts Ordinance.

It must be remembered that the defendants do not claim the land for themselves. The evidence that Jabbar was trustee cannot be said to be discredited. The graveyard in question is, as I said before, an adjunct of the mosque and held along with the mosque which is wakf property even as known to our law. Therefore the findings of the learned District judge are sustainable and should be upheld.

The award of compensation has not been challenged. Hence it is not necessary to get into the question whether compensation is legally payable.

The judgment and decree appealed from are affirmed. The appeal is dismissed with costs.

Appeal dismissed

Note by Editor:

An appeal was preferred from this judgment to the Supreme Court (S.C. No. 44/81) but the case was settled on the payment of compensation. The Court wrote no judgment with reasons but Cadet J who was one of the members of the Supreme Court Bench that heard the appeal made the following observations:

ABDUL CADER J.

The original plaintiff sued the defendants for a declaration that the land in dispute belonged to the Janneth Mosque and is vested in him as trustee and for ejectment of the defendants and damages. The portion in dispute is a part of the graveyard. The defendants have put up buildings on the northern portion of the graveyard and they claim to be entitled to the right to possess these buildings on some form of nebulous right which is not clear. The defendants stake their claim to these buildings on P5 whereby the grandfather of these defendants Meera Pulle Pakir Thamby was given and granted charge of this said portion of land and was authorized to live thereon and enjoy and possess all the produce and plantations from the graveyard and while "doing and discharging well and truly the duties incumbent on him as Modimiyar of the mosque called Janneth Palli, Ratnapura, during his incumbency reserving the right of burial within the said premises for the Mussalman public." Pakir Thamby promised and bound himself to do and perform these duties well and truly "according to the rules and customs of their religion all the duties and services allotted to Modimiyar aforesaid," always acting under the orders of the grantors and he also agreed to keep the garden clear and in good order refraining from all kinds of work and acts thereon which may hinder or render inconvenient the interment and burial above reserved for the benefit of the Mussalaman Public excepting such portion as may be justly necessary for a house and compound. In consideration of the services to the mosque, Pakir Thamby was granted "the sole use of the usufruct of the garden aforesaid" and "the right to live in it by building a house at the public expense of Mussalamans." It was also provided in this deed that if Pakir Thamby died or was removed, this right would accrue to any of his sons who shall succeed him in office as Modimiyar and when the office of Modimiyar shall go to a person other than a member of his family, all the benefits granted by this deed shall cease to this particular family.

Counsel for the appellant agreed that this was a land which has been used for public burial before this deed was executed in 1866. Therefore, it is clear that this land has been given to Pakir Thamby to live on it and enjoy the produce more or less as a caretaker. A Modimiyar is a minor functionary in a mosque. He chants the call to prayer five times a day (which is today heard through loudspeakers (Azan); he recites the second call to prayer five times a day (Iqamat); if there is a burial ground, he must attend to the burial of deceased Muslims assisted by labourers who dig the grave. His duty is to attend the home of any deceased Muslim to prepare the body for burial first by washing the body clean immediately after death and then after all the materials have been procured to bathe and clothe the body in accordance with the rites as prescribed and then to assist the members of the deceased's family to carry the body to the graveyard. Before burial he will participate in the funeral prayers which is normally done in the mosque or in a building specially built for that purpose in the graveyard and after the body is buried he will recite a certain prescribed recital (Thalquen) which refers to the life in the grave and beyond and ends with a prayer for the repose of his soul unless the priest does it. In addition to these he is obliged to visit homes of the worshippers of that mosque for recitals from the Quran or from songs in praise of the Prophet and saints (Moulood) for which he will be compensated. These are the main functions of a Modimiyar. He is a paid employee appointed by the trustees and removable by the trustees and subordinate to the priest of that mosque who will have immediate control of him, if there is such a priest attached to that mosque.

The Janneth Mosque referred to is situated to the West of the graveyard and is separated from this graveyard by a road (vide X). For the performance of duties in this mosque and the duties in the graveyard, Meera Pulle was permitted to occupy the house put up along the road which is marked X. It was in these premises that his grandchildren have erected these various buildings which form the subject-matter in this case.

It is clear that the usufructuary rights to take the produce and the right to occupy the house which does not even belong to Meera Pulle were given to him for and during the performance of his duties as functionary of this mosque. Counsel for the appellant attempted to claim some form of right for these appellants on the basis of this deed which he was unable to support and very rightly abandoned. Then, it became a question of how much compensation the appellants were entitled to. The Court of Appeal had said that the award of compensation has not been challenged and,

therefore, it was not necessary to go into the question whether compensation was legally payable.

Before us, Counsel for the respondents agreed to pay a sum of Rs. 35,000/- as compensation and the terms of settlement were recorded by this Court.

Counsel for the respondents then drew our attention to a statement made by the Court of Appeal that "what is Wakf in Muslim Law is not necessarily Wakf in our Law." He submitted that this is not a correct statement of law. Since it was not necessary to hear parties on the law in view of the settlement before us, the Court did not go into this question whether the law as stated by the Court of Appeal is a correct exposition of the Muslim Law as applicable to Sri Lanka. I, therefore, agreed to make my own observations as regards the statements made by the Court of Appeal, not only on this particular question, but in respect of other matters, too, so that the position may be made clear in the event of the Judgment of the Court of Appeal being cited as authority for the propositions contained therein.

In the first instance, in the circumstances that I have outlined above, all the discussion on the Muslim Law appears to me to be unnecessary and, therefore, *obiter*. However, I deem it necessary that I should put forward my understanding of the Muslim Law as applicable in Sri Lanka, so that it will have some persuasive value if the Court of Appeal decision is cited. I have stated above the functions of a Modimiyar who is a subordinate official. Therefore, the statement that the manager of the Wakfs is "the mota-walli or modimiyar" (page 3) is an error insofar as it refers to the Modimiyar.

In view of the various types of Muslim communities following different forms of thought in India the law of Wakfs has been reduced to a Statute in India, and, therefore, it would be unsafe to depend on the Indian decisions unless we have similar provisions in our Statute Legislation to declare that our law is different from the pristine Muslim Law.

When the Court of Appeal held that what is Wakfs in Muslim Law is not necessarily a Wakfs in our law, it appears that this proposition has been influenced also by the definition of Wakfs in chapter 5 of Act No. 51 of 1956. It is significant that except for Section 32 of this Chapter, all the other Sections in that chapter are in respect of administrative matters and have nothing to do with the law of Wakfs. Thus, Sections 33 and 35 deal with the

duty of trustees to furnish statements, 34 with contents of such statements; 36 with auditing of accounts; 37 inspection of certain documents; 38 power of the Board to call for information; 39 which has been amended substantially by Section 33 of 1982 deals with rights of certain defined persons to take action against the trustees, and Sections 40 and 41 deal with the powers of the Tribunal. If at all there is any Section in this chapter which deals with the Muslim Law of Trust other than Section 32, Section 42 states that "the Court" (Tribunal) "shall not be debarred from exercising any of its powers by the absence of evidence of the formal constitution of such trust or Wakf, if the Court is of opinion from all the circumstances of the case that such trust or wakf in fact exists or ought to be deemed to exist." In this case, it may be noted that it was not denied that this land was used as a burial-ground even before P5.

Section 32(1) reads as follows:—

"The provisions of this Part shall apply to every Muslim charitable trust or wakf created for all or any of the following purposes other than a Muslim charitable trust or wakf which is solely for the benefit of a registered mosque:—

(a) the relief of poverty among Muslims or any section thereof;
(b) the advancement of the education of Muslim or any section thereof;
(c) the advancement of Islam generally;
(d) the management of any mosque or Muslim shrine or place of religious resort or the performance of religious rites or practices at such mosque, shrine or place; and
(e) any other purpose beneficial to Muslims or any section thereof.

Even as the Court of Appeal has stated a burial-ground will fall within Section 32(1) (d) or under (e) so that there would be no need to go to the Trust Ordinance for the purpose of deciding the question whether this particular property is a Muslim Trust. It may be noted that Section 32(2) excludes the applicability of Section 51 of 1956 to a charitable trust or Wakf created before January 1st, 1956 where it is expressly declared that the general law relating to trusts shall apply to such trusts or Wakf, so that in all other cases it is the Muslim Law that applies.

It may also be noted that Chapter 5 is a distinct chapter dealing with Muslim Charitable Trust or Wakf, while the earlier Chap-

ters deal with mosques and shrines. Therefore, the provisions of Chapters 1 to 3 will not apply to Part 5. It may also be noted that in Part 4, provision is made for the applicability of Parts 2 or 3 of the Act to Muslim shrines and places of religious resort while similar provision is not found in Part 5 as applicable to Muslim Charitable Trust or Wakf. This distinction is maintained in Section 57(B).

I have already said that the Indian authorities will not be helpful unless we have similar provisions in this country.

Taking all these circumstances into consideration, I am of the view that it is wrong to state "what is Wakf in Muslim Law is not necessarily Wakf in our law."

Various religious rites are performed before, during and after the burial of the body – cleansing the body, burying the body, dressing the body, compulsory funeral prayer, burial according to certain prescribed rites, the head facing a particular prescribed direction, certain recitals to be made when the body is lowered into the grave and the recital of Thalqeen after burial. It is not correct, therefore, to say that "burial is not a religious rite" (page 13).

I am not aware of any cases in Sri Lanka where it has been held "that we have not accepted the principles that dedication to God is a foundation of Wakf." Nor has the Court of Appeal referred to any such decision. It is possible that the Court of Appeal may have made this statement with reference to Indian authorities. I am unable to express an opinion on this proposition as I have not heard Counsel on this question, and I am of the view that this is a matter on which a decision should be made only after arguments are heard in a case where this question arises. *(vide* however Ameer Ali, page 191).

The Court of Appeal had also resorted to judicial decisions relating to Hindu Trusts and particularly referred to the observations of Bertram C. J. in a case relating to Hindu Religious Trust. The principles of Hindu and Muslim religious laws are far different, and it would be dangerous to resort to a decision on Hindu Law to find analogous principles as stated in the Judgment of the Court of Appeal. (page 12).

As I have not heard Counsel on these matters, I have expressed these various views from my personal knowledge because I deem it necessary that certain statements in the Court of Appeal, which

I consider to be in error, should not go unchallenged. These views do not constitute an order of this Court but I trust that they will have some persuasive value if anyone attempts to use the pronouncements of the Court of Appeal on the Muslim Law of Wakf as authority. Nor do I say that my views are final and conclusive.