A. I. R. 1917 Lahore 105

SHAH DIN, C. J. AND LE-ROSSIGNOL, J.

Zinat Bibi—Plaintiff—Appellant,

v.

Mt. Emna and *another*—Defendants—Respondents.

First Appeal No. 964 of 1914, decided on 15th May, 1917, from the Decree of Dist. Judge, Montgomery, dated 23rd January, 1914.

Mahomedan Law—Religious office—Property held by owner of shrine—Right to succeed—Property was held under proprietary right and right to entitle share under Mahomedan Law held.

One *I.*, who made a living by *piri muridi* and owned in a graveyard the tomb of an ancestor of his, executed a will whereby he left the whole of his property to his wife with a reversion after her death to her brother *K.* He also appointed *K.* manager of the estate on behalf of his wife after his death and also his own successor and representative for the continuation of the *urs* and for carrying out the duties and receiving the offerings connected with the *piri muridi*. On his death his daughter by an earlier wife sued for possession of her share of the property:

Held, that there was nothing to show that the testator appointed *K. sajjada nashin* in the usual acceptance of the term or that the property in dispute was ever dedicated to the upkeep of the shrine, but that it was held by the testator in proprietary right and not as a keeper of the shrine and that the plaintiff was entitled to her share under the Muhammadan Law.

[P. 106, C. 2.]

Muhammad Shafi and *Nur-Ud-Din*—for Appellant.

Muhammad Iqbal and *Mohsin Shah*—for Respondents.

Judgment.—Ilahi Bakhsh, a *Kureshi* who resided at Pakpatan town, made a living by *piri muridi* and owned in a graveyard outside the city of Pakpatan the tomb of Hafiz Kaim, his ancestor. On the 12th of July, 1910, he executed a will whereby he left the whole of his property to his wife, *Must.* Emna Bibi, with reversion after her death to her brother Karam Din. In the said will he appointed the said Karam Din, manager of the estate on behalf of his sister after the death of the testator, and further he appointed Karam Din as his successor and representative for the continuation of the *urs* or death day festival of Hafiz Kaim and also for carrying out the duties and receiving the offerings connected with the *piri muridi*. Having made this will he died some eight months later, and his wife and her brother took possession of his estate.

The present suit was brought by *Must.* Zinat Bibi, daughter of the testator by an earlier wife, and it has been defended by Karam Din, brother-in-law of the testator, alone, for *Must.* Emna the widow has let the case proceed against her *ex parte*. The Court below has dismissed the suit, holding that Muhammadan Law is not the rule of succession followed by this family, that the testator held the position of *gaddi nashin* and that Karam Din having been nominated by the deceased as his successor to the *gaddi* was entitled to the succession. The property left by the testator, apart from movable property, consists of a *pacca* house, a house known as *dera*, a two-storied shop, all these three being situated within the town of Pakpatan, and finally, the *rauza* or tomb of Hafiz Kaim situate in a graveyard lying outside the city walls.

For all practical purposes there is but one issue in the case, and that is whether this immovable property was attached to the tomb of Hafiz Kaim and whether the testator held it as keeper of the tomb or whether he held it in full proprietary right, and on behalf of the plaintiff-appellant it was strenuously urged that inasmuch as *prima facie* the property was private property and the burden of proving any particular fact lies on the person who wishes the Court to believe in its existence, the burden of proof should have been laid upon the defendant in the first instance. It is to be noted that the defendant-respondent does not rely at all upon the will executed by the testator, for obviously that would not suit his purpose. His contention is that the testator had no power to dispose of the property by will and that defendant is entitled to it not by inheritance but as the testator's nominated successor in the office of *sajjada nashin* of the shrine. The oral evidence is voluminous but, in our opinion, very untrustworthy, for in most cases it represents merely the opinions of the persons who gave it and who from their own evidence clearly are little qualified to give any opinion at all in the matter. If the testator can be called *sujjada nashin* of the tomb, such a title can be recorded only as a courtesy title, for the tomb or the shrine cannot by any stretch of language be regarded as a public religious institution. As stated before, it consists of an old tomb in the last stages of disrepair, in the neighbourhood of which there is neither well nor shop nor refuges for the accommodation of any pilgrims; and it is in evidence that only once a year, *viz.*, on the

death day of Hafiz Kaim did persons proceed to the spot. Estimates of the persons who so attended vary extensively from 100 to 1000, but it is quite clear that the tomb lay deserted except for one or at most two days during the year and that it was not a regular place of pilgrimage. It appears to be merely the tomb of a reputed saintly man whose descendants make a little money from the offerings received there during one day in the year. Such a tomb cannot be compared in any respects, especially in respect of the rules governing the rights in it, with the large institutions which are presided over by *mahants* who in their turn are controlled by brotherhoods. Such a comparison in a case of this kind would be quite fallacious. On behalf of the defendant-respondent it has been urged that the tomb was originally owned by *Sayyids* and that the testator and his father came into possession of it not in accordance with the rules of ordinary succession but as *murids* or disciples and successors of the first *sajjada nashin*. That Hafiz Kaim, whose remains are said to be covered by the tomb in question, was a *Sayyid* is, however, not proved, for whilst plaintiff asserts that Hafiz Kaim was a *Kureshi*, the defendant avers that he was a *Sayyid*. The only piece of documentary evidence upon the record, an old sale-deed, which is more than thirty years old and which appears to be *prima facie* genuine, shows that Pir Bakhsh was the son of Ghulam Resul; and we are quite unable to find it established that Hafiz Kaim Din was a *Sayyid* and was not a *Kureshi* and the blood ancestor of the testator. That being so, the respondent's argument that the testator received this property from Hafiz Kaim Din as the keeper of the shrine and not in absolute proprietary right falls to the ground. The plaintiff and the testator are *Kureshis* by caste, and as regards them there exists a strong presumption that they followed Muhammadan Law. The site of the tomb is recorded in the revenue papers as the personal property of the testator and it is therein described merely as a graveyard, and not as a shrine. If we turn now to the will executed by the testator, we find that the whole of the property including the tomb and its site is therein described as the personal property of the testator and he proceeds to dispose of it as such, leaving it in the first instance to his wife and after her death to the respondent. In his will he does not describe himself as *sajjada nashin* nor does he describe the respondent as his successor in the *sajjada nashini*, but he does describe him as his representative and successor in the *piri muridi* and in the celebration of the *urs*.

Respondent himself does not contend that the property is *wakf*. Indeed, he asserts that it is not *wakf* and drawing a distinction, which we find to be too fine to appreciate, asserts that the property though not *wakf* is attached to the shrine.

Our conclusion then is that there is no reason to hold that the property in dispute is not the personal property of the testator, that there is no proof that the testator appointed the defendant *sajjada nashin* in the usual acceptance of the term, and that there is no proof that the property was ever dedicated to the upkeep of the shrine or that, in fact, the income of the property was used for the upkeep of the shrine. But we find it proved that the property was held by the testator in proprietary right.

On these findings we accept the appeal and decree the plaintiff's claim with costs throughout.

R.M./R.K.

Appeal accepted.

A. I. R. 1917 Lahore 106

SHADI LAL AND BROADWAY, JJ.

Amar Nath—Defendant—Appellant.

v.

Bulaki Das and *another*—Plaintiffs and Defendants - Respondents.

Second Appeal No. 2771 of 1916, decided on 16th December, 1916, from the Decree of Addl. Dist. Judge, Delhi, dated 14th July, 1916.

Hindu Law—Joint family—*Hundi* executed by manager—Necessity of loan—Presumption regarding necessity of loan given to manager for family business varies with circumstances of each case—No general rule as to burden of proving necessity can be laid down.

There can be no general and inflexible rule as to the burden of proof regarding the necessity for a loan advanced to the manager of a joint Hindu family carrying on a joint business. The presumption to be made in such a case must vary with and be dependent upon the circumstances of each case. 23 Cal. 766 (P. C.), foll. [P. 101, C. 2 & P 102, C. 1.]

Plaintiff sued the manager of a joint Hindu family and his minor nephew on the basis of a *hundi* executed by the manager. It was found that the latter had been on very bad terms with the minor and his mother, which fact was known to the plaintiff, who was nearly related to the manager. The suit was brought nearly six years after the execution of the *hundi*: