Supreme Court of India
Mohammad Shah vs Fasihuddin Ansari And Ors. on 9 May, 1956
Equivalent citations: AIR 1956 SC 713
Author: Bose
Bench: Bose, Imam, C Aiyar
JUDGMENT Bose, J.

1. This appeal marks the culmination of a series of acrimonious disputes that have been going on between a section of the Mahommedan community at Jabalpur and one Gulabshah and his son the defendant since the year 1880 about portions of land that adjoin a mosque in Jabalpur known as the Kotwali Masjid. It is now admitted that the masjid proper and the ground on which it is built is wakf property.

At one time Gulabshah had claimed even the masjid as his own property but that was decided against him in the year 1881 and since then he, and after him, the present defendant, have admitted that the masjid proper is wakf; but the dispute about the rest continues.

2. The suit is supposed to be a representative suit under Order 1, Rule 8, Civil P. C. although it would be impossible to gather that from the plaint and the subsequent pleadings; and even now it is difficult to know exactly who the plaintiff's are supposed to represent; nor is there any order on record evidencing the permission of the Court.

However, as the learned Additional District Judge of Jabalpur said in his judgment that the suit was filed in a representative capacity under Order 1, Rule 8, and as the other side did not challenge that in appeal, we must take it that they are satisfied on that point.

3. The present suit was filed on 12-8-1936 and the decision of the High Court was given on appeal on 28-9-1945. The certificate of admission was signed on 9-4-1945 (sic). The appeal here has taken eleven years" to come on for hearing and it is twenty years since the suit was filed. Most of the delay after the decision of the High Court was in the Nagpur High Court, for the records did not reach this Court till 12-10-1953, but even here it has taken 3 years. This is most unsatisfactory.

4. The plaintiffs' case, as set out in the plaint, is that the masjid proper belongs to the Sanni community of Mahommedans of Jabalpur city and that the defendant was appointed its mutwalli by the District Judge of Jabalpur on 3-8-1927.

The plaintiffs' case is that the lands and other properties that surround the masjid and are adjacent to it are also part of the masjid property, but the defendant claims them as his own personal property. Hence the plaintiffs sue for a declaration that the property is wakf property and not the defendant's and that the defendant is only a mutwalli or trustee of this property as well as that of the masjid proper.

5. The plaintiffs admit that the defendant is in possession of these properties but they assert that he is there as mutwalli and that his possession is on behalf of the Sunni Mahommedan community. For

that reason, the plaintiffs say that a declaratory suit will lie and that they need not sue for possession. They also claim that no question of limitation or adverse possession can arise because, firstly, the possession is, and always has been, that of the community through the defendant; and secondly, because the defendant is a trustee under a trust for a specific purpose and so cannot set up a title hostile to the trust.

6. Neither side has any document of title. In their plaint, the plaintiffs rely solely on the following facts:

(1) that the masjid proper is now admitted to be wakf property;

(2) that these other properties surround the mosque and adjoin it; and (3) on five specific acts of user that are set out in para. 7 of the plaint.

There is also a general assertion that "these buildings and lands have always been used for the benefit of the community".

7. The first Court found in favour of the defendant and against the plaintiffs and dismissed the plaintiffs' suit. On appeal the High Court reversed this and decreed the claim. The defendant appeals.

8. Now it is evident at the outset that the burden lies on the plaintiffs. The defendant is admittedly in possession and except for the fact that the plaintiffs claim that he is in possession on their behalf (a fact which the defendant denies) the plaintiffs are out of possession. Hence they must prove that the defendant is in possession on their behalf. The only way in which the plaintiffs can do that is by showing that the properties in suit are wakf property.

9. In their written rejoinder the plaintiffs admitted that "they are unable to state since when and how the masjid and its adjacent land and houses became wakf property, that is to say, property dedicated for the worship of God by the Muslim community".

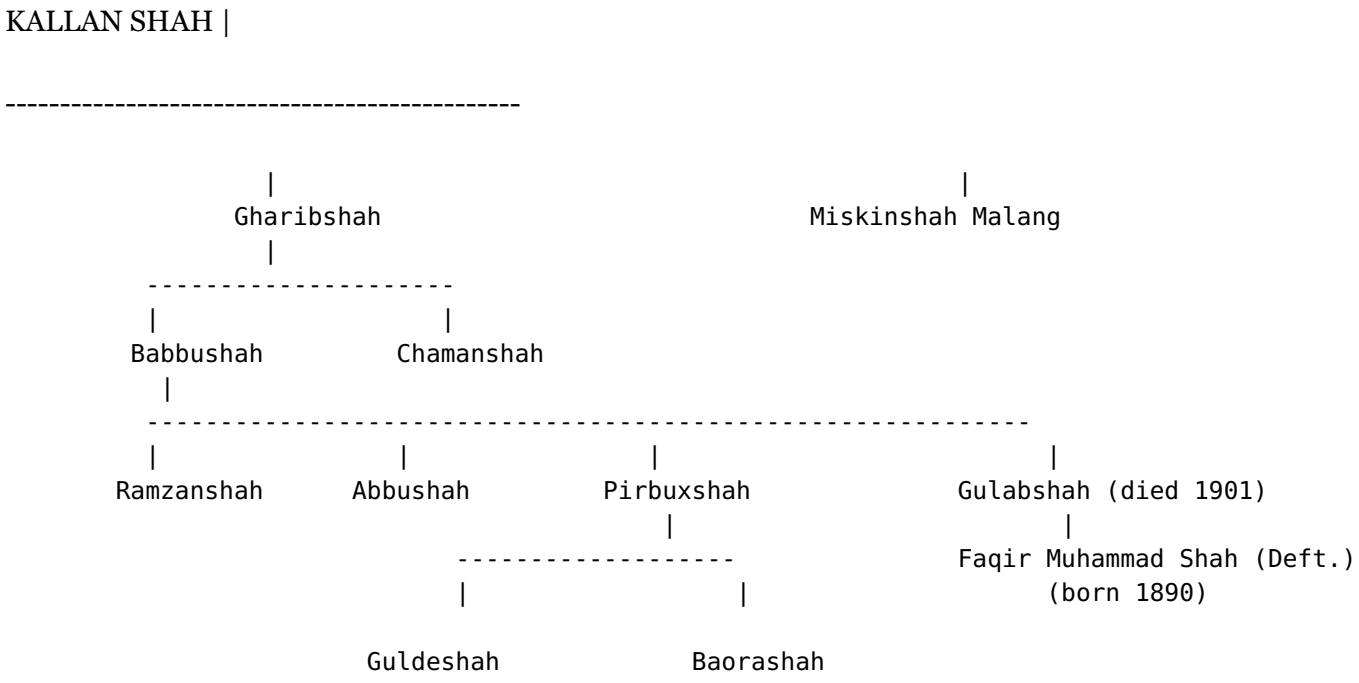
And also, "The plaintiffs do not know to whom the land belonged on which it" (the masjid) "was built".

10. They went on to pin their case down to a single assertion namely "But they do assert that these properties have been used and regarded as wakf from time immemorial".

Broadly speaking, therefore, that is the simple and single issue to which we have to confine ourselves. All the other matters follow, almost as a matter of course, from that.

11. The earliest reference that we have on record to these properties is Ex. D-197, a plaint by the Anjuman Islamia on 23-9-1880 against three persons, Gulab Shah (the present defendant's father), his uncle Chaman Shah and his brother Pir Bakhsh, in a suit filed under Section 539 of the old Civil Procedure Code, corresponding to Section 92 of the present Code.

12. It will be convenient at this stage to set out the genealogical table of the defendant's family.



13. The plaint states that the mosque belongs to the Sunni community and that in it there are a takiya and other public buildings. The plaintiffs stated that the three defendants live in that takiya as fakirs and that they have begun to assert their proprietary right over the buildings and compound of the mosque. The plaintiffs asserted that "The mosque and the buildings attached to it are all waqf and charitable endowments... and do not belong to any individual."

The plaint prayed that the management of (1) the mosque and (2) the buildings attached to it be carried out properly and that the defendants be turned out and that trustees be appointed.

14. The dispute was referred to arbitration. The arbitrators differed, so the Sarpanch made an award on 8-3-1881. His award purports to set out the history of the mosque and, according to the Sarpanch, this history was given by the witnesses of both sides. He held that the mosque was built about 200 years before 1881, that is to say, about 1681.

Before it was built the compound in which the mosque stands was the takiya of one of the defendants' collateral ancestors, Miskeen Shah Fakir. (It will be seen from the family tree that Miskeen Shah was the defendant's great-grand uncle). One of his disciples was a Hindu patwa Sukhlal. Out of reverence for the fakir Sukhlal constructed a mosque on the site of the takiya. Ever since its construction this takiya and the mosque have been in possession of Miskin Shah and the defendant's family as well as the house opposite the mosque (that is the present imambara).

The Sarpanch found that there was no proof of dedication either by Sukhlal or Miskin Shah or anyone else and so held that the property belonged to the three defendants in that suit who were the heirs of Miskin Shah. He also found that when Miskin Shah died he was buried in front of the mosque.

15. These facts about the origin of the mosque were substantially accepted by the section of the Muslim community, whom the plaintiffs claim to represent, in a hand bill issued on 15-10-1925 (Ex. D-149). This hand bill was signed by the first plaintiff in the present litigation along, with other persons. It says--

"It is an admitted fact that a long time ago one Patwa constructed a small three arched mosque...for Fakir Mohammad Shah's great grand-father Hazrat Sufi Miskin Shah Sahib. The tomb of the said Shah Sahib is in front of the mosque".

16. It can therefore be accepted that this was the origin of the mosque. It can also be accepted as a matter of law that a wakf normally requires express dedication but "if land has been used from time immemorial for a religious purpose.....then the land is by user wakf although, there is no evidence of an express dedication". (Mulla's Mahomedan Law, Edn. 14, p. 173).

It is evident that there was no proof of express dedication up to the year 1880 nor has any been produced since, therefore the only question is whether there is evidence of user and if so, user of what.

17. It will now be necessary to turn to the map filed with the defendant's written statement. It sets out the different stages of development of this property. In the year 1880, when the suit of that year was filed, the mosque proper stood on some open land. There were houses to the south and east of this open land and on a part towards the north. On the west was a drain and a road.

Miskin Shah's tomb was to the east and in between the tomb and the mosque was a well. There was another tomb to the south of the mosque and there was an imambara still further south. The mosque was only 21'x 13'9" at that time. There is nothing to show that this land was fenced in or that these properties formed an integrated whole. Such demarcations as we have are of the compounds belonging to the surrounding houses and not of this open land in which these several structures stood dotted about.

It is true this is the defendant's map but the point we are making is that the plaintiffs have not produced any evidence to show that those properties were an integrated unit in 1880 or even that they were regarded as such.

18. We now go back to the further stages of the 1880 suit. The award was placed before the trial Judge and he said that on reading it through it seemed that the masjid was erected by a Hindu for the special benefit of Miskin Shah Fakir and not for a public charitable purpose. The learned Judge therefore held that the salt did not lie under Section 539, Civil P. C., and dismissed it.

19. On appeal the learned Additional Commissioner set the dismissal aside because the ground on which the suit was dismissed had never been raised or tried. He therefore remanded the case for trial of those facts.

20. After remand, the trial Judge framed an issue asking whether the masjid was an institution used for public charitable purposes and he held that the masjid must "now" (that is in 1881) be considered an institution used for public charitable purposes because of the evidence of user produced before him. Despite that he accepted the award and giving judgment in terms of the award, dismissed the plaintiffs' suit.

21. Now it will be remembered that this suit was not only in respect of the masjid but also about the buildings which, according to the then plaintiffs, were attached to the mosque.. The complaint of the plaintiffs was that the three defendants claimed both sets of property as their private property. The Sarpanch held that the defendants offered no disturbance to the worshippers who came there to take a bath and say their prayers and also held that "In my opinion the land to which the plaintiffs assert as appertaining to the mosque did not in fact appertain to the mosque as would be clear from Para. No. 4".

"Paragraph 4" sets out the history we have already outlined and embodies the opinion of the Sarpanch that the whole property, including the mosque, was not wakf property and that it was the personal estate of Miskin Shah and after him of Miskin Shah's heirs. This was the award that was upheld after remand and on appeal the appellate Court affirmed the decree of the first Court dismissing the plaintiffs suit. The appellate Court dismissed the appeal and upheld this decree.

22. Despite this finding about the mosque, we find Gulab Shah and his family still calling, not only the surrounding property but also a part of the mosque itself, their private property. The first plaintiff admitted in the hand bill he signed on behalf of the Muslim community (Ex. D-149) that after Miskin Shah's death "Gulab Shah Sahib, the father of Fakir Mohammad Shah Sahib, extended the mosque after spending thousands of rupees".

Part 2 of the defendant's map shows that the masjid proper was extended from 18 feet in length to 27 2/3 feet and that a second hall 11 2/3 feet deep was added in front of the old one; also that a room marked A and a varandah were added to the south of the old portion of the mosque. Gulab Shah and his family let out this room to tenants and took rent notes from them.

Exhibition D-17 dated 24-5-1886 is one of them and Ex. D-18 dated 20-11-1892 is another. In both the tenants speak of "your Kotha" and in the second of "your Kotha adjoining the mosque". The first is in favour of Gulab Shah's uncle Chaman Shah and the second in favour of Gulab Shah and his two nephews Guldeshah and Baorashah.

23. Then there is a notice of demand for house tax in respect of the Imambara addressed to Gulab Shah: Ex D-28 dated 2-1-1895. Ex. D-20 dated 5-2-1895 is the Municipal receipt for house tax given to Gulab Shah.

24. There is also a sale deed, Ex. D-199 dated 4-12-1894, executed by a stranger to these proceedings to another in which he has described the northern and eastern boundaries of the property sold as "the mosque of Gulab Shah".

25. The strongest evidence of all in these fourteen years is Ex. D-198 dated 3-5-1893. Some third party purchased an option for catching fish and taking singhadas (water nuts) from the Municipal Committee of Jabalpur. Gulab Shah stood security for this person and he offered as security Boom A which he said was "owned by me personally". He called the eastern boundary of this "house" the "mosque of self" and said that its northern boundary was "mosque".

The mosque on the north of room A was the old masjid which was declared to be public charitable property in the 1880 litigation. The "mosque" to the east, which Gulab Shah claimed was Ms mosque, comprised part of the extensions to the old mosque which admittedly Gulab Shah had made himself "after spending thousands of rupees". It is fair to assume from these documents that Gulab Shah made a distinction between the old mosque and the new extensions and that he claimed the extensions and room A as his own property. The fact that members of his family joined in the leases of room A places this beyond doubt.

26. It is to be noted that in all the documents up to that date Gulab Shah is addressed personally and not as Mutwalli. It is also to be noticed that down to this time (1895) there is no evidence of public user except of the mosque proper as it stood in 1880.

27. In the year 1896 Gulab Shah made an application to the Municipal Committee for permission to repair a chabutra. (Ex. P-14). The inspection note endorsed on the application shows that this was at the back of the mosque. Gulab Shah signs the application as '-Gulab Shah, the mutawalli of the mosque," but in the application he refers to the chabutra as "the chabutra of my masjid-land".

It seems to us that he is again drawing the distinction here that he had drawn in Ex. D-198, executed by him three years earlier, between the mosque proper and the rest of the land. Ex. P-15 is the notice issued by the Secretary of the Municipal Committee on Gulab Shah's application and so naturally addresses him in the terms in which he had signed, namely "Mutawalli of the mosque". He was ordered to demolish the chabutra. This has reference to the portion of the property that is immediately behind the mosque. It adjoins the mosque proper but lies behind it.

28. In 1898 Gulab Shah made another application in a document that was the subject of much discussion before us. The document is Ex. P-18. It ends as follows:

"Application by the mutwalli of the Kotwali mosque, resident of Jubbulpore.

Gulab Shah".

29. As regards the body of the document we will split it into paragraphs because of the controversy that raged around it in this Court.

A. "The beams of the ceiling of the mosque ..... have become worn out; The same, and also an ordinary arched chabutra, are to be constructed on the drain for passage".

Then the document continues--

B. "And within the compound of the Imambara masjid the house of the Imambara is to be dismantled and built two storeyed high".

And next the document says--

C. "And the parchhi which is to be built within the compound of the Imambara near the tomb"

And it continues--

D. "And the tiled parchhi which stands built in the compound of the Imambara masjid north south in the length of the mosque have become worn out, etc."

30. It is not possible to understand this application until we look at the map, Ex. P-19, which accompanied it. It will be observed that in the paragraph which we have marked A Gulab Shah speaks only of the "mosque". His plan shows that in black colour and calls it the "Kotwali mosque". That part is confined to the old mosque which was 18 feet north to south in the year 1880. By this time the length had increased. But except for that the area is the same.

31. Next, we notice that in para. C Gulab Shah speaks of a parchhi to be built in the compound of the "Imambara". The map shows that this parchhi does not join the Imambara but embraces the eastern end of Miskin Shah's tomb. This area is not referred to as the "Imambara masjid compound" but merely as the Imambara compound. It does not adjoin either the old portion of the mosque or any of its extensions.

32. Lastly, we have paras. B and D. They speak of constructions in the "Imambara masjid compound". A reference to the map will show that the constructions to which these paragraphs refer are attached to the extensions of the mosque proper but do not form part of the old mosque as it stood in 1880. The chabutra extends along the east of the mosque and is between the old mosque and the courtyard which by now has been demarcated and has been either fenced in or walled in, and the parchhi extends to the south of room A with its eastern extremity in continuation of the north-south boundary of the old portion of the mosque as it stood in' 1880.

33. In our opinion, Gulab Shah was speaking loosely when he spoke of the "mosque" in one place, of the "Imambara compound" in another and. of the "Imambara mosque compound" in a third. In view of his consistent assertions and conduct up to the date of this document, and in view of the confused expressions that he has used there, we are not able to regard this as a sudden abandonment of the position that he had consistently adopted before and continued to adopt after the document.

It will be remembered that he claimed everything in the 1880 litigation. We have already set out a series of documents ranging from 1880 down to 1896 in which he and his family used, and he claimed, these properties as his own. Inadvertent expressions of dubious and ambiguous meaning cannot be twisted into admissions against the maker's interest when the surrounding circumstances indicate that he had been consistently asserting the contrary over a series of years. Something stronger than that would be required. Had the assertions been clear and unambiguous the matter would have been different but "Imambara mosque compound" is anything but clear.

34. Gulab Shah died in 1901 or 1902 and about that time the Municipal Committee granted him a receipt for house tax paid by him in respect of the Imambara for the year 1901/02. The document (Ex. D-24) is headed--"Receipt granted to Gulab Shah owner of house 241 etc." So far as it goes, it shows that Gulab Shah claimed this as his own property. It is to be observed that he did not pay the tax as Mutwalli.

35. We think that a fair conclusion about the position as it existed at that date is this. First, Gulab Shah and his family claimed everything up to the year 1880. In that year they gave up their claims to the mosque as it stood in 1880 because of the judgment, Ex. D-2, after remand. There is no evidence of any demarcation of a compound to the mosque at that date, so it must be taken that all that was admitted to be public property was the mosque proper and the area on which it was then built. Gulab Shah and his family continued to claim the rest of the property as theirs. "

36. After this Gulab Shah extended the mosque and by 1898 its boundaries were demarcated as shown in the map, Ex. P-19. Room A and a verandah appertaining to room A were added to the south of the old mosque. Some additions were made behind the mosque and to the west of it on a triangular strip of land, and a courtyard was added towards the east while the old mosque was extended by two feet north-south. But there is nothing to show that public as such had any hand in these extensions and it seems to us that Gulab Shah claimed these extensions to the mosque (as distinct from the old mosque as it stood in 1880) as his property. He also claimed all the property in this area as his.

37. There is no evidence at all of public user (apart from the old mosque) and still less of public user for a religious purpose. But we think that though there is no direct evidence about this it will be fair to assume that the public did use a part of the extensions, namely the courtyard in front of the mosque and the area covered by the chabutra to the east of the mosque when they used the mosque proper, and it will be a fair deduction that this was done for the same religious purposes as in the case of the mosque proper.

But room A was cut off from the mosque and so were the constructions behind the mosque on the west. Room A was rented by Gulab Shah and his family and there is no evidence at all about user of the part behind the mosque towards the west. We cannot regard the renting of rooms to tenants for residential purposes as user by the public for religious purposes.

38. We now_ pass on to the next stage. When Gulab Shah died the defendant was a minor and his affairs were managed by his guardian Gharibullah Shah. At this stage, certain members of the

Muslim community stepped in and began to* assert a right to deal with a part of the property. Up to the year 1907 there was a urinal and a bathroom (detached from the mosque proper and its extensions, as also from the Imambara) to the south of the mosque and to the west of the Imambara. Certain members of the community wanted these to be shifted to another spot, so they made an application to the Municipal Committee for permission to do so. The application is Ex. P-11 dated 10-9-1907.

Permission was granted on 29-10-1907 (Ex. P-12). But close on the heels of this followed an application by the defendant's guardian to make certain alterations and constructions. This application is Ex, D-42 and is dated 21-4-1908. It says that "marzaz and Kothas etc. of my mosque..... are in a dilapidated condition". Ex. D-43 is the map attached to it and among the alterations for which permission was sought was the construction of a latrine and bathroom in the same position as shown in Ex-P-12.

39. We do not know which of the two made the, construction. All we know is that notices were later sent to the defendant for failure to construct the latrine according to the proper pattern. These notices are Ex. D-59 dated 13-8-1910 and Ex. D-61 dated some time in 1913 : and on 24-5-1914 the defendant was given permission to repair this latrine (Ex. D-44). The first notice speaks of the latrine in connection with '"your house". We also know that the conservancy tax was paid by the defendant throughout: see Exs. D-107, 65, 108, 66, 70, 77, 83, 84, 86, 126, 91, 115, 96 and 119. These documents range from 24-8-1908 to 17-11-1935. We also know that the defendant was again allowed to repair the latrine on 24-5-1914 (Ex. D-44).

40. As against this, there is nothing to show that any members of the Muslim community other than the defendant ever paid the taxes or actually made the alterations. Further, in the hand bill (Ex. D-149) put out by the first plaintiff and others, it is admitted that--

"during the time of his (Fakir Mohammad Shah's) minority his guardian Gharibullah Shah extended one part (of the mosque) only about 12 years ago at the most. And only about six or seven years ago, he (Fakir Mohammad Shah) made a considerable improvement in the courtyard, drain, water-pipe etc. by constructing the same".

This curious document does not state that the Muslim community ever did anything or paid for it, and in particular it is silent about the construction of the latrines.

41. The oral evidence about the removal of these latrines is not worth much. The defendant says as D. W. 1 that he made the most recent constructions in 1923-24 but says nothing about the earlier construction. The plaintiffs' evidence is to the effect that the construction of 1907 or 1908 was by the signatories to the application, Ex. P-11. But we do not think this matters much because the defendant admits as D. W. 1 that the "urinals and bathroom shown in the second stage must have been for the use of the persons who used to attend the masjid for prayer".

It is therefore evident that the worshippers at the mosque have been using the urinal and bathroom and that they were constructed for their use.

42. As regards the rest of the property, there can be no doubt that the defendant continued to lay claim to the Imambara, kothas and shops in the vicinity. He took a series of rent notes, issued notices and gave a lease deed. They all indicate that he was claiming those properties as his own. They range from May 1910 down to June 1935. The documents are Exs. D-178, 161, 162, 179, 177, 189, 163, 186, 188, 191, 196, 193 and 40.

43. There is no evidence, apart from some vague and worthless oral evidence, about any user of these properties by the Muslim community. So far as the kothas and shops are concerned, it can hardly be pretended that the user was for religious purposes, therefore, unless the plaintiffs can show that these properties appertained to the wakf, that is to say, to the original mosque and formed a part of its estate, or an accretion to it, they cannot succeed. As we have shown, their sole source of title so far as this Court is concerned is long continued public user for religious purposes.

The only user they have been able to establish for that purpose is of the old mosque as it stood in 1880 plus certain extensions to it. We have therefore now to devote our attention to these extensions. But before we do that, we will examine the position about the two tombs, one of Miskin Shah and the other of Dara Shah, and of the Imambara.

44. So far as the Imambara is concerned, it was in existence in, Gulab Shah's time and it is clear that he dealt with it as his own property. It is also clear from the various maps that in the beginning there was no compound or other demarcated areas around any of these structures. They merely stood as isolated entities on a piece of open land surrounded on three sides by bungalows of other persons.

Even at the date of suit, the first witness for the plaintiffs, Abdul Salam, admitted that "the Imambara is separate from the mosque". It is also clear from the various documents to which we have referred that after Gulab Shah the defendant's guardian, and later the defendant, claimed and used this property as their own. They paid the taxes, they repaired it and they erected a second storey on the old one-storeyed building.

45. The documents show no public user of the Imambara and the only evidence from which public user is sought to be established is the statements of certain witnesses in this case. They prove, and that is admitted, that tazias are prepared there. Bat the defendant says he pays, for this and there is nothing to refute that. The plaintiffs have not produced a single witness to say that he ever contributed anything towards it or that he collected money for the purpose.

Muhammad Khan (P. W. 5) admits that the defendant prepares these tazias and says that he does not know where he gets the money from, while Abdus Samad (P. W. 13) admits that the defendant bears all the costs, and Haji Alabux (P. W. 15) admits that the Jamaat does not pay anything towards this. He says the cost is met from offerings but that is vague because even if it is true offerings may be to the defendant personally to help him make the tazias.

46. The only other evidence is that a school was once situate there. Qazi Fasihuddin (P. W. 21 says it was for "1, 11/2 or 2 years". Abdul Ghaffar (P. W. 4) says it was for "2 or 21/2 years" while Sheikh Kalloo (P. W. 3) it was only for "2 or 4 or 6 months". That is not long continued public user.

47. The documents show that the extensions to the Imambara were carried out by the defendant and even the plaintiffs' witnesses admit that he paid for them and also that he has been letting out the upper portion and collecting the rent: see P. Ws. 4 and 15. The latter admits that the Jammat has never had any of these rents over the last 40 or 45 years.

48. Some evidence was produced to show that the defendant used the beams from the roof of the old masjid for the Imambara when an arched roof was placed over the old masjid. But this evidence is vague and the important point is that nobody protested. Also the reason why the roof of the old masjid was turned into an arched roof was because the beams of the old roof were worn out (see Ex. P-18). If that was the case, it is likely that they would have been used for the Imambara.

49. The only question now is whether the Imambara was made an accretion to the old mosque or any of its later extensions. The only evidence in support of that is an inspection note dated 30-10-1938 made by the trial Judge in this case. He says that " the masjid and the adjoining places appear to be inter-connected with each other".

That observation is justified because the extensions that have been made to the various items of property in this area have brought them all so close together that they now adjoin each other. But the force of this is displaced when the plaintiffs' witness, P. W. 1, admits categorically that the Imambara is separate from the mosque.

50. In our opinion, public user of this item of the property is not satisfactorily proved nor is it proved that the Imambara is an adjunct of the mosque.

51. We turn next to the two tombs, one of Miskin Shah and the other of Dara Shah. Both are tombs of members of the defendant's family. There is evidence of public user so far as they are concerned and except for the fact that they are near the mosque, there is nothing to indicate that they are part and parcel of it.

In the circumstances, we hold that the plaintiffs have not established their right to this. And this finding decides the dispute about the structures and rooms to the east of Miskin Shah's tomb. These structures were built by the defendant and he has been receiving rents for the shops and rooms situate there. There is some evidence to the effect that gahwaras are sometimes kept in the parchhi that is there. But that sort of user is not enough to indicate that the owner of the property divested himself of all interest in it and dedicated it to God or intended to make it an accretion to property already dedicated.

52. We now come to the shops and rooms and other structures in the triangular strip of land behind the old mosque and to the west of it. These were built by the defendant and he has claimed them as his own and has realised the rents. But though they are separate from the mosque in the sense that they do not lead into it there is a lot of evidence, which we see no reason to disbelieve, that proves (1) that the beams of these buildings rest on the masjid wall and have been inserted into it, (2) that the back of the mosque forms the back wall of these rooms, (3) that the minarets of the mosque have been scraped so as to make these rooms bigger and (4) that there were some pushtas there had been

removed so as to enlarge the area for the rooms.

53. Now it is evident that the space on which the pushtas and the minarets stood was part of the mosque property. The defendant has, therefore built on a part of the mosque estate and as he has not demarcated those portions from the rest we are bound to treat them as accretions to the mosque estate. It is true that a stranger to the trust could have encroached on the trust estate and would in course of time have acquired a title by adverse possession. But a Mutwalli cannot take up such a position.

Both Gulab Shah and the defendant have described themselves Mutwallis of the mosque, therefore, if they choose to build on part of the mosque property in such a way as to integrate the whole into one unit (that is to say, the parts of each room that stand on the mosque property and the remainder that does not so as to form one composite room) then we are bound to regard this as an accretion to the estate of which they were trustees, and they will be estopped from adopting any other attitude because no trustee can be allowed to set up a title adverse to the trust or be allowed to make a benefit out of the trust for his own personal ends.

54. This applies equally to Room A. In its origin it was separate and severable from the mosque and so could have been regarded as distinct from it even though it was constructed by a Mutwalli. But the inside walls that separated it from the mosque were pulled down in 1908 and the old mosque was extended into it so that the room now forms an integral part of the old mosque. That made it an accretion to the mosque, and as the Muslim public have been using it ever since for religious purposes along with the mosque proper, dedication by the defendant must be presumed despite his claim that the old mosque was part of his private estate. He was making these claims as late as 1921 and 1927.

In 1921 he sued a third party who claimed to be the Mutwalli for the key of the mosque and in 1927 he was the defendant in a suit instituted under Section 92, Civil P. G. in which he set up that claim as an answer to the suit. But his assertions in 1921 and 1927 cannot outweigh his conduct in 1908 so far as room A is concerned.

55. The portion of the land marked A-1 in the plaint map is a yard. There is no evidence of public user of this part of the property for a religious purpose. All that can be said about it is that worshippers in the mosque pass over this plot to obtain ingress to the mosque. The map, Ex. D-43, shows that there is no other access. There is some oral evidence to the effect that prayers are occasionally offered there at a funeral but the same evidence shows that that is also done on the road, so that kind of user is not enough to indicate dedication.

56. The same applies to the portion marked A-6. The defendant has let this out to Government and in the lease (Ex. D-40 dated 25-6-1935) he claims to be the ostensible owner, and it is admitted that he collects and keeps the rent. There is no clear evidence of long and uniterrupted public user. Some witnesses say that the worshippers sometimes overflow into this land and that prayers are sometimes said there over dead bodies at funerals. We do not think that is enough to indicate dedication.

57. After a careful survey of the evidence, we have reached the following conclusions:

(1) that the old mosque as it stood in 1880 is proved to be wakf property but that nothing beyond the building and the site on which it stood is shown to have been wakf at that date;

(2) that this property has been added to from time to time and the whole is now separately demarcated and that the additions and accretions from a composite and separate entity as shown in the plaintiffs' map. This is the area marked ABCD in that map;

(3) that this area is used by the public for religious purposes along with the old mosque and as the area has been made into a separately demarcated compact unit for a single purpose, namely collective and individual worship in the mosque, it must be regarded as one unit and be treated as such. The whole is accordingly now wakf.

(4) that the accretions were made by Gulab Shah and the defendant both of whom claimed to be Mutwallis of the mosque;

(5) that this area also includes the shops and chabutra shown to the west of the mosque in the plaint map on a triangular piece of land;

(6) that the urinal, water pipe and bathroom were constructed for the use of the worshippers and so must be regarded as an adjunct of the wakf ;

(7) that the rest of the property in suit is not shown to be wakf or accretions to the wakf estate. It is separately demarcated and severable from the wakf portion ABCD and the shops to the west of the mosque;

(8) that the worshippers at the mosque have a right of way as an easement over the plot A-1 to obtain ingress to and egress from the mosque, and also a right of way to the urinals, the water tap and the bathroom.

58. There remain for consideration the pleas of res- judicata and limitation raised by the learned counsel for the defendant.

59. So far as res judicata is concerned, the argument is that the, Muslim community sued Gulab Shah in 1880 for the whole of the present property and as their suit was dismissed in toto Explanation V to Section 11 Civil P. C. applies.

60. We need not go into this question because it is now admitted, and was so found in the 1880 litigation, that the old mosque was wakf property. It can be assumed that the rest was not wakf at that date and indeed that is also our conclusion on a review of the evidence. But much happened since the 1880 litigation and there have been subsequent additions, and accretions to the original estate so that now the whole of those additions and accretions form part and parcel of the original wakf.

61. On the point of limitation, it was contended that Article 120, Limitation Act applies and that the cause of action accrued in 1880 and at several times thereafter beyond the six years contemplated by that Article. The answer here is that Section 10, Limitation Act applies. The proviso says that-- .

"For the purposes of this section any property comprised in a.....Muhammadan .....religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of any such property shall be deemed to be the trustee thereof."

Therefore, no question of limitation can arise in respect of those parts of the property in dispute which, according to our findings, are now comprised in the wakf estate.

62. The result is that the appeal succeeds in part. The High Court's--decree will be modified as follows:

63. It will now be declared that the area ABCD in the plaint map together with the shops and chabutra on the triangular patch behind and to the west of the mosque are wakf property and that the urinal, water pipe and bathrooms are also part of the wakf estate. The rest of the plaintiffs' claim will be dismissed except that it will be declared that the worshippers of the mosque have a right of way as an easement over the portion of the property marked A-1 to obtain ingress to and egress from the mosque and its precincts and to and from the urinal, water tap and bathroom shown on the plaint map.

64. As success and failure in the litigation is almost equal, each side will bear its own costs.