NOTE.—Please substitute for copy of Judgment previously issued.

Privy Council Appeal No. 118 *of* 1921.

Khawaja Muhammad Hamid - - - - - *Appellant*

v.

Mian Mahmud and others - - - - - - *Respondents*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER, 1922.

Present at the Hearing:

VISCOUNT CAVE.
LORD PHILLIMORE.
LORD JUSTICE CLERK.
SIR JOHN EDGE.
MR. JUSTICE DUFF.

[*Delivered by* VISCOUNT CAVE.]

This appeal raises questions as to the existence of a *khankah* (a Mohammedan religious institution) at Taunsa in the district of Dera Ghazi Khan in the Punjab, and as to the rights of the *sajjadanashin* (or superior) of such an institution. The nature and origin of *khankahs* were described in the judgments of the High Court of Bengal in *Piran* v. *Abdool Karim* (1892, I.L.R. 19 Cal. 203) and *Mohiuddin* v. *Sayiduddin* (1893, I.L.R. 20 Cal. 810), and in the judgment of this Board in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1921, 48 I.A. 302, 322), and need not be further elaborated. It is enough to say that a *khankah* is a monastery or religious institution where dervishes and other seekers after truth congregate for religious instruction and devotional exercises. It has generally been founded by a dervish or a *sufi* professing esoteric beliefs, whose teachings and personal sanctity have attracted disciples whom he initiates into his doctrines. After his death he is often revered as a saint, and his humble *takia* (or abode) grows into a *khankah* and his *durgah* (or tomb) into a *rauzah* (or shrine). The *khankah* is usually under the governance of a *sajjadanashin* (the one seated on the prayer mat) who not only

acts as *mutwalli* (or manager) of the institution, and of the adjoining mosque, but also is the spiritual preceptor of the adherents. The founder is generally the first *sajjadanashin*, and after his death the spiritual line (*silsilla*) is extended by a succession of *sajjadanashins*, generally members of his family chosen by him or according to directions given by him in his lifetime, or selected by the *fakirs* and *murids*, and formally installed; and the income of the institution is usually received and expended by them.

In the present case events followed closely the course above described. Khawaja Muhammad Suleman, who was a disciple of Nur Muhammad Muharvi of Mahar in the State of Bahawalpur (a member of the well-known Chishti family of *sufis*), came to dwell at Taunsa, a place situated in a sandy desert under the Suleman range and then uninhabited. It is recorded in a book called Manakab-ul-mahbubin (the history of the beloved of God), which was written in or about the year 1860 by one of his disciples and was referred to by both parties in the suit, that Suleman built a house and a *dalan* (or gallery) for his lodging, a *hujra* (or room) for his worship, and a *dalan* for the society of *fakirs*, and further that he erected a *katcha* mosque where he said prayers in congregation, and to the east of the mosque a wooden canopy shaded by reeds, under which he held court. Mention is also made of other *hujras* and a *langar* (or kitchen) for the use of his adherents, and a well; and it is said that an auditor of accounts and a legal adviser and a counsellor were appointed. Suleman was much revered as a religious teacher and made many disciples, including the Nawab of Bahawalpur, who demolished the *katcha* mosque of earth and built a *pacca* mosque in its place.

Suleman died in or about the year 1849; and, his sons having predeceased him, he was succeeded by his grandson (the elder son of his elder son) Khawaja Allah Bakhsh, who on the third day after the death of Suleman was "made to sit on the *musalla* of Hazrat Suleman" with the usual ceremonies, including the tying of the turban, and with the assistance of holy men who had come from Ajmere. Khawaja Suleman was buried in his house at Taunsa, and his tomb became a sacred place of pilgrimage, particularly on the occasion of the *urs* or celebrations held on the anniversary of his death; and Taunsa became known as Taunsa *sharif*, or holy Taunsa. In memory of Suleman, the Nawab of Bahawalpur erected a marble shrine over his place of burial and rebuilt the mosque in marble.

Khawaja Allah Bakhsh carried on his grandfather's work with zeal and success, and with the assistance of a number of *pirs* and *khalifas* who had been ordained by him, and made many disciples; and many thousands of pilgrims were attracted to the shrine. Allah Bakhsh obtained grants of more land from the tribes in the district, and with the help of his followers put up huts and bungalows for the *fakirs* and dervishes, and *serais* and *langars* for the accommodation of the pilgrims, so that at the time of his death the mosque and shrine, with the buildings used in connection

with them, occupied some acres of ground. Remission of revenue was granted to Allah Bakhsh as *sajjadanashin* of the *khankah* at Taunsa, and he was exempted under that designation from appearing personally in a civil court.

On the 13th September, 1901, Khawaja Allah Bakhsh died, and his eldest son Hafiz Muhammad Musa was duly installed as *sajjadanashin* in his place. Shortly afterwards differences arose between Muhammad Musa and his half-brother Mian Mahmud (the first respondent in this appeal) as to the position and authority of Muhammad Musa as *sajjadanashin* and the rights and interests of the two brothers in the property left by their father Khawaja Allah Bakhsh ; and at the instance of the Deputy Commissioner, these differences were referred under the Frontier Crimes Regulation to the Tumandars (or headmen of the district) with a view to a settlement. The Tumandars, after hearing the parties, made an award, dated the 30th September, 1903, whereby they determined (in effect) first, that Muhammad Musa was *sajjadanashin* of the *khankah* with the right to manage the mosque and shrine ; secondly, that the income of the shrine, consisting of the offerings of the pilgrims, should belong as to one-fifth to Muhammad Musa as *sajjadanashin*, and as to the balance to the two brothers equally ; and, thirdly, that while the mosque was *wakf* property and the shrine, with its inner and outer *astanas* (or courtyards) and certain other properties were joint and impartible, the remaining properties, including the *serais*, bungalows and *langars*, were divisible between the brothers equally. The following clauses in the award, which relate to the properties above-mentioned, have a bearing on what follows :—

"4.—The building of the Astana kalan (which includes the Astana of the khankah shrine), and as well as the houses of the Muharwi people situate on the northern side of the mosque, shall be considered joint. However, the compound of the Astana of the Rauza Mubarik, which is situate on the west of the mosque and is attached to the Rauza, shall not be considered as liable to partition, because it is an Ibadat-khana. The dervishes who formerly lived there shall, in future, also stay there in accordance with the previous practice.

5.—The mosque is wakf property. The appointment of its Imam and Muzan shall be in the hands of the Sajjada-nashin. Saying of prayers and call to prayers shall be in accordance with the practice of the previous Sajjada-nashins, in the hands of the Sajjada-nashin for the time being. The prayers should be said during that portion of the time in which they were formerly said, according to the practice of the Sajjada-nashins. The same practice shall be acted upon in future.

* * * * * * *

8.—The residential buildings, consisting of Haram Sara, dwelling-houses, guest-houses, and langar khanas

(charitable kitchens) shall be the property of both the parties in equal shares. But the langar khana and Makan-i-Itikaf, which are in front of the shrine, and where the Kuran and Wazifas are recited, are specifically declared, with the consent of Mian Mahmud, to be the exclusive property of the Sajjada-nashin. Mian Mahmud shall have no concern with these buildings. There are also two kharas (mills for grinding corn) in the langar khana (charitable kitchen). They shall also belong to the Sajjada-nashin. The boundaries of the langar khana (charitable kitchen) are as follows :—

On all three sides, namely, west, south and east, there is a public thoroughfare. The said building is confined within a wall with the exception of shops.

9.—Haram Sara buildings, outer residential houses and guest-houses have all been held to be the property of the parties in equal shares. They shall be divided accordingly in a gentlemanly manner.

10.—Dah Dardah well and Thalawala well shall be joint property. None of the parties shall be entitled to interfere with the supply of water for the time being.

* * * * * * *

16.—The place " Musallah " in front of the shrine where the late Hazrat sat and recited his prayers should be considered as specially meant for the Sajjada-nashin, and in his absence the person whom he authorises can sit there."

These decisions were apparently accepted by Muhammad Musa, and to some extent by Mian Mahmud, and they proceeded to partition between them by arrangement the properties declared to be divisible. But further differences arose, and the whole matter was again referred to the arbitration of a *maulvi* named Najam-ud-din, who, after hearing the parties, made his award, dated the 17th June, 1904. This award went into much detail, and it is unnecessary to state its conclusions at length ; but the short effect of it was to confirm the decisions of the Tumandars except as to the income from the shrine, which the arbitrator directed to be divided equally, and to confirm with certain modifications the partition arranged between the parties. This award was accepted by Muhammad Musa, who applied to have it filed in Court ; but the application was opposed by Mian Mahmud, who was still not content, and was rejected on the ground that the award was incomplete.

Meanwhile, the two brothers, being still in difference, joined in a request to Nawab Ahmad Yar Khan to endeavour to bring about a settlement ; and the latter prepared a deed of compromise under which both parties were to accept the award of Najam-ud-din, subject to some small modifications of detail. Muhammad Musa by a letter to Ahmad Yar Khan assented to this proposal,

and Mian Mahmud was apparently willing to agree to it; but before formal effect could be given to the compromise, Muhammad Musa died on the 9th February, 1906.

Upon the death of Muhammad Musa a further quarrel broke out between his eldest son Khawaja Mohammad Hamid (the appellant in this appeal) and the respondent Mian Mahmud as to the right of the former to succeed his father as *sajjadanashin*, and as to the rights and interests of the disputants in the property of Khawaja Allah Bakhsh; but on the intervention of Mr. Casson, the Deputy Commissioner, terms were arranged, and a few days after Muhammad Musa's death the following agreement was signed :—

> "I, Mian Hamid, very willingly consent to Mian Mahmud sitting in front of me and shall have no objection thereto, but he should not sit on my Mussallah. On every occasion I shall consider him, who is my uncle, as deserving respects from me. I shall be going to my uncle once a day. I shall act upon and abide by the settlement made by Ahmad Yar Khan with my deceased father.
>
> (Sd.) FAKIR HAMID,
> Sajjada-nashin of Taunsa.
>
> I would very willingly take part in the Dastarbandi and installation on gaddi of Mian Hamid and shall perform the ceremony with my own hands. I shall ever be loving my dear nephew Mian Hamid.
>
> (Sd.) FAKIR MAHMUD."

The effect of this agreement was that the appellant was to be installed as *sajjadanashin* in succession to his father, and that the settlement proposed by Ahmad Yar Khan was to be accepted and carried into effect.

In pursuance of the last-mentioned agreement the appellant was duly installed as *sajjadanashin* by the ceremony of *dastarbandi* (the tying of the turban), the respondent Mian Mahmud and a number of *pirs* assisting in the ceremony; but a few days later the respondent Mahmud, apparently repenting of his bargain, procured himself to be invested by other *pirs* with the like rank, and thenceforth began to usurp some of the functions of the *sajjadanashin* and in other ways to interfere with the rights secured to the appellant by the agreement. This new quarrel continued for some years, and ultimately on the 22nd July, 1911, the appellant commenced this suit against the respondent Mian Mahmud and the two younger brothers of the appellant (who also claimed an interest in the succession of Hafiz Musa), alleging in effect that the shrine and all the property used in connection with it, including a great part of the properties which had been partitioned, were dedicated to the religious purposes of the *gaddi*, and that the respondent Mian Mahmud was interfering with such property and with the appellant's rights as *sajjadanashin*, and claiming an injunction and possession of the property. The defendants

filed written statements in answer and a number of issues were framed, of which the most important were the following :—

" (1) Is there a religious institution (gaddi) at Taunsa, and is plaintiff its manager (muntazim) ?

(2) Does property 1–31 of the plaint belong to this institution, and (*or* or) is this property wakf and is plaintiff its mutwalli ?

(3) Is plaintiff sajjadanashin of this institution, and what are his rights as such ?

(4) Is the partition invalid ? "

The suit was heard by the District Judge of Multan (Mr. H. F. Forbes) who decided the first and third issues and the greater part of the second and fourth in favour of the plaintiff-appellant, holding that there was a religious institution at Taunsa of which the plaintiff alone was the manager, and that the shrine with its inner and outer *astanas* and the schools, bungalows, *serais* and *langars* used in connection with it, were religious buildings and *wakf* property under the plaintiff's sole control. He accordingly on the 4th February, 1913, made a decree containing a declaration that the properties above-mentioned were under the management of the plaintiff as *sajjadanashin* and that the defendants had no proprietary rights in them, an injunction restraining the defendant Mian Mahmud from interfering with the plaintiff's management of the above property and an order for possession and for the costs of the suit.

The defendants having appealed to the Chief Court of the Punjab, the learned judges of that Court (Sir Donald Johnston C.J., and Leslie Jones J.) differed from the District Judge on all the above points, and held that (apart from the mosque), there was no such religious institution as alleged, that the plaintiff was no *sajjadanashin*, and that none of the property in suit was *wakf*, but that all of it was ordinary property of Allah Bakhsh divisible among his heirs. They accordingly reversed the decree of the District Judge with costs and dismissed the appellant's suit, except that (the defendant Mahmud not objecting) an injunction was granted restraining the defendant Mahmud from attempting to lead prayers in the presence of the plaintiff when the latter was there with the intention of leading prayers. The plaintiff thereupon appealed to His Majesty in Council.

The appeal was strenuously argued on behalf of the appellant and of the respondents. Difficulty is caused by the contradictory evidence given by the witnesses, including the *maulvis* who were called as experts in Mohammedan law, and by the difference of opinion in the Indian courts ; but their Lordships, after considering all the arguments brought before them, have come to clear conclusions upon the several points raised, which may be stated in the following order :—

1. Is there at Taunsa a religious institution (a *khankah* or *mazhabi gaddi*) for devotional exercises, and the instruction of pupils in the Mohammedan faith ?

In their Lordships' opinion there is such an institution. The history of the foundation of the institution by Suleman and Allah Bakhsh agrees closely with the history of other institutions always recognised as *khankahs* and is consistent only with the existence of such a foundation. The life and teaching of Suleman, his recognition as a saint, the thronging of pilgrims to his shrine, the swarm of fakirs and dervishes who have been there engaged in teaching and devotional exercises, the large number of disciples constantly present, and the recognition of Allah Bakhsh, Muhammad Musa and the appellant successively as *sajjadanashins* of the institution—these and other facts which are beyond dispute show that a religious institution such as described by the plaintiff has existed and flourished at Taunsa for many years past. The foundation is expressly referred to in some of the documents, such as the award of the Tumandars, as a *khankah*, and has been described by the respondent himself as a *gaddi*; and the evidence shows that it is acknowledged by Mohammedans throughout India as a legitimate off-shoot of the *khankah* at Mahar and of the great shrine at Ajmere, and as the mother of a number of other shrines which are frequented by the faithful. Upon the whole, their Lordships consider that the existence of this foundation must be taken as established.

2. Is the appellant *sajjadanashin* and manager of the *khankah*?

With deference to the opinion of the learned judges of the Chief Court, their Lordships feel no doubt that he is. Notwithstanding the practice hitherto followed at Taunsa, they would hesitate to say that on the death of a *sajjadanashin* his eldest son is entitled as of right to succeed him; but the eldest son, if qualified, is the natural successor of his father. And, however that may be, the evidence is clear that the appellant was formally recognised and installed by the *pirs* with the express consent and assistance of Mian Mahmud; and this being so, it is not now open to Mahmud to question the appellant's position as *sajjadanashin* or his right to manage the mosque and the property attached to the *khankah*.

3. What property is attached to the *khankah*? or, in other words, what properties were made *wakf* by Khawaja Suleman or Khawaja Allah Bakhsh and dedicated to the religious purposes of the institution?

This is a question of considerable difficulty, as it is not proved by direct evidence that either Suleman or Allah Bakhsh used the word *wakf* or made formal dedication of any property to religious uses. But, as pointed out in *Jewan Dass Sahro* v. *Shah Kubeer-ood-deen* (1840, 2 Moore I.A. 390), dedication may be inferred although the word *wakf* is not shown to have been used and there are facts proved in this case from which the dedication of some property to religious purposes may be inferred.

First, as to the shrine of the saint, with its *astana*, the place of worship for the *sajjada*, and the surrounding *hujras* and gates—being the property shown in the plan P 1—their Lordships are of opinion that this is wakf. Not only is

the shrine the burial-place of the founder, but the tomb with its adjuncts have been used and recognised for upwards of half a century as a place of pilgrimage and as the home and centre of the religious and educational community founded by the saint and continued by his grandson. The marble shrine erected by the Nawab was obviously intended to be used, not as private property, but as a place of pilgrimage and a focus of religious teaching. The place of worship in the courtyard has been reserved for the *sajjadanashin*, and the *hujras* for the use of the *fakirs*. Some of the buildings contain inscriptions pointing to a religious use. The Tumandars, who had local knowledge, held these buildings to be impartible; and their view was confirmed by Najam-ud-din and Ahmad Yar Khan and accepted by all persons concerned, including the respondent Mahmud. In view of all these facts it is difficult to believe that this property is now to be treated as the absolute property of the heirs of Allah Bakhsh, so that it would be in the power of any of them to claim his share and practically to destroy the religious foundation; and it seems reasonable to infer a dedication to the purposes of the *khankah*.

Secondly, as to the mosque, with its inner and outer courtyards, well, tanks, *hujras* and schools, and the Maharwi bungalow—being the property shown in the plan P 2—like considerations apply. The mosque is admittedly *wakf* property. The *astanas* are used by the *fakirs* and pilgrims, and are holy ground; for Allah Bakhsh directed that shoes should be taken off there. The huts are for the use of the dervishes, and the schools are religious schools connected with the Khankah. The Maharwi bungalow was given by an adherent for the use of the superior of Mahar, the parent shrine, on his visits to Taunsa. This property therefore must also be held to be wakf.

As to the remaining properties in dispute, such as the *serais* and *langars*, these stand in a different position. They have, no doubt, been used for the accommodation of the pilgrims, but they were never appropriated to the religious purposes of the *khankah*. There is no evidence showing that they were erected out of the offerings at the shrine. The Tumandars and the arbitrators, all of them skilled in Mohammedan law, treated these houses as private property and partible, and the parties to the dispute accepted this view and agreed to a partition. As to these items, therefore, that is to say, all the properties except Nos. 1 and 2, the appellant's claim fails.

4. To whom do the offerings at the shrine belong?

It was stated in the judgment of this Board in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1921, 48 I.A. 302, 323) that "ordinarily speaking, the *sajjadanashin* has a larger right in the surplus income than a mutawalli, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the mahant of a Hindu math, has full power of disposition over it." But this does not mean that in every case the whole income from a *khankah* is at the disposal of the *sajjadanashin*; and it is plain from the authorities, as well as from the evidence in this suit, that at certain shrines the members of the founder's family other than

the *sajjadanashin* are treated as entitled to share in the surplus offerings which remain after payment of expenses. Thus, it is stated in the Fatawa Azizi (page 90) that " the offerings daily made at the Dargah should be spent in connection with the expenses of the descendants of the saint and the service of the Dargah according to their needs. An honest person should be appointed as mutawalli in order to collect the offerings and distribute them properly " ; and it appears from the evidence that at Mahar—the parent shrine of Taunsa—and at some of the shrines which have sprung from Taunsa, the right of the descendants of the founder to share in the offerings is recognised. In the case of Taunsa itself, it is difficult to draw from the evidence any clear rule. Allah Bakhsh disposed of the whole income as he pleased ; but Musa's right to do so was challenged, and the claim of Mian Mahmud to a share in the offerings was admitted by the Tumandars and the arbitrators. Further, the appellant was installed as *sajjadanashin* upon an express undertaking by him to carry out the award of Ahmad Yar Khan ; and under that award, which confirmed in this respect the award of Najam-ud-din, the surplus offerings were to be shared equally with Mahmud. Upon the whole, their Lordships think that the appellant must be held to his undertaking, and accordingly that he must share the surplus offerings, after deducting all outgoings (including a reasonable remuneration to the *sajjadanashin*), with the respondent Mian Mahmud during their joint lives.

In the case of these offerings, as in the case of the immoveable property, their Lordships have dealt only with the rights of the appellant and the first respondent *inter se*, and have not considered the rights of the other respondents.

For the above reasons their Lordships are of opinion that this appeal should be allowed, and that the decree of the Chief Court should be set aside, except so far as it grants an injunction against the first defendant enjoining him in future not to enter the mosque with his congregation and lead prayers in the presence of the plaintiff when the latter is there with the intention of leading prayers with his congregation, and that in lieu thereof it should be declared that the properties numbered 1 and 2 in the list attached to the decree of the District Judge are under the management of the plaintiff as *sajjadanashin*, and there should be a decree for the delivery of possession of those properties to the plaintiff, and for an injunction restraining the first defendant from interfering with the management of those properties by the plaintiff, or with the exercise by him of his rights and duties as *sajjadanashin*. There should also be a declaration that the defendant Mian Mahmud is entitled during the joint lives of himself and the plaintiff to one-half of the surplus offerings at the shrine after deducting all outgoings (including a reasonable remuneration to the *sajjadanashin*), with liberty to him to apply for an account and payment of what may be found due. Their Lordships will humbly advise His Majesty accordingly.

As both parties have throughout the proceedings put forward claims which cannot be supported, there will be no order as to the costs of the proceedings in the Courts below or of this appeal.

In the Privy Council.

KHAWAJA MUHAMMAD HAMID

v.

MIAN MAHMUD AND OTHERS.

DELIVERED BY VISCOUNT CAVE.

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