

in the other appeal, No. 256 of 1885." What order was passed in appeal suit No. 256 of 1885 is not apparent; but in the printed paper the order passed in appeal suit No. 257 of 1885 is as follows:—"Withdrawn with permission to institute a fresh suit on the same cause of action. Each party to bear his own costs." From the wording of this order, which was passed five days before the order above quoted, it would appear that defendants were present.

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MUTTE.

We are of opinion that the District Judge acted with material irregularity in permitting the plaintiff to withdraw his suit after a decree had been passed against him in the Court of first instance, without assigning any reasons for acceding to the plaintiff's application. The decree, passed by the Munsif has not been set aside and is still valid and operative against the plaintiff.

We set aside the order of the District Judge and direct him to hear and dispose of the appeal (257 of 1885). Costs in this Court will follow the result.

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## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and  
Mr. Justice Parker.*

MUHAMMAD MUSALIAR (PETITIONER),

and

KUNJI CHEK MUSALIAR AND OTHERS (DEFENDANTS).\*

1887.  
October 28.

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*Criminal Procedure Code, s. 147—Dispute concerning right to officiate in a mosque.*

Where a dispute likely to cause a breach of the peace is shewn to exist concerning the right to perform a religious ceremony in a mosque the Magistrate may exercise the powers conferred by s. 147 of the Code of Criminal Procedure.

APPLICATION under s. 439 of the Code of Criminal Procedure to revise the proceedings of F. E. K. Wedderburn in charge of the Joint Magistrate's Office, North Malabar.

The facts are set out in the judgment of the Magistrate which was as follows:—

"In 1880 the kazi of the Quilandi Mapillas died and for the following two years there were two candidates for the post.

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\* Criminal Revision Case 400 of 1887.

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“In 1882 Government appointed one of the candidates, Muhammad Musaliar, as Government kazi, and the Jama mosque was put into his possession.

“The other candidate, Kunji Chek Musaliar, put in several petitions asking that he might be appointed instead; but his petitions were rejected by the District Magistrate. From this date, down to the present time, Kunji Chek Musaliar and a party seceded from the Government kazi party.

“On 3rd June 1887, a riot took place in the Moidin Palli mosque; the fight arose out of the attempt on part of Kunji Chek Musaliar to celebrate Jama or Kutba in the Moidin Palli mosque. The parties were convicted on both sides and the decision of the lower court has been upheld on appeal. The evidence showed that a bench and lamps in the Moidin Palli mosque were broken in the fight.

“As it appeared to this Court that a dispute concerning the right of Kunji Chek Musaliar to perform the Jama ceremony in the Moidin Palli mosque existed, and as both parties asked for an order, an enquiry under s. 147 has been instituted and both parties have been heard. The mosque was inspected by the Court in the presence of counsel on either side. The Jama mosque is a large tiled building in possession of the Government kazi. The Moidin Palli mosque is a small thatched building about 100 yards away from the Jama mosque. The following fact is admitted by both sides; that the Moidin Palli mosque is in actual possession of one Mussa Kutti Musaliar. It is claimed by the Government kazi that his appointment under the Kazi Act gives him constructive possession over this mosque.

“Mussa Kutti Musaliar, however, has given permission to Kunji Chek Musaliar to officiate in this mosque and Kunji Chek Musaliar at the time of the Court visiting the mosque was in actual possession of it. The questions raised are :—

“(1) Whether any one, besides the Government kazi, can perform the Jama ceremony. It appears to me that under the Kazi Act the Government kazi is not given any sole power to perform any of the functions of a kazi. I see no reason to find that no one but the Government kazi can perform the Jama.

“(2) Whether two Jamas can take place in the same neighbourhood. It is no doubt contrary to Muhammadan

custom to allow two Jamas to exist in the same place; but Government have recognized the fact that where there is a dispute the Jamas may be performed, and, in several places, two kazis have been recognized by Government. I decide this in the affirmative as there is no question of a dispute existing at Quilandi.

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“(3) Whether Moidin Palli mosque is in exclusive possession of Kunji Chek Musaliar.

“There is no doubt that the Moidin Palli mosque is in the charge of Mussakutti Musaliar, and that he has given sanction to Kunji Chek to hold this Jama ceremony there. Mussakutti's possession is sufficient in my opinion to warrant his granting the permission to Kunji Chek.

“(4) Whether the Government kazi has general control over all the mosques in his jurisdiction.

“The Kazi Act does not, in my opinion, grant the Government kazi administrative powers over the mosques in his division.

“Lastly, the question is raised, whether Kunji Chek Musaliar has exercised the right within three months.

“The previous Friday to the riot (26th May) he applied to the police for protection, and police were sent to the mosque and he swears that he performed Jama in this mosque on that day. He likewise swears that ever since he gave up the keys of the Jama mosque he has been celebrating the Jama in this mosque. He says the reason of the present objection was the approaching enlargement of the Moidin Palli mosque. I find (1) that the Government kazi, with reference to his functions as Government kazi, has no right to prevent Kunji Chek Musaliar from performing Jama and (2) that he has no right to interfere with the management of the ceremonies in Moidin Palli mosque, which is in possession of Mussakutti Musaliar, and that, therefore, Kunji Chek Musaliar has, with the consent of Mussakutti Musaliar, a right to perform the Jama in this Moidin Palli mosque and I find that he has exercised this right within three months from institution of the enquiry. Under s. 147, I issue an order permitting Kunji Chek Musaliar to perform Jama ceremony in the Moidin Palli mosque till the party objecting obtain a decree of the Civil Court entitling them to prevent the celebration.”

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Muhammad Musaliar objected to this order on the following grounds :—

- (1) Section 147 of the Code of Criminal Procedure is not applicable, because there was no dispute concerning the right to do or prevent the doing of anything in or upon any tangible immovable property.
- (2) The right was not exercised during the season next before the institution of this enquiry, and therefore the Magistrate erred in passing the order.
- (3) The Magistrate failed to receive all the evidence adduced before him.

*Sankaran Nayar* for petitioner.

*Desikacharyar* for Kunji Chek Musaliar.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—We are not able to hold that s. 147, Criminal Procedure Code, is inapplicable to this case.

A dispute likely to cause a breach of the peace is shown to exist concerning the right to perform a religious service in the Moidin Palli mosque, *i.e.*, upon tangible immovable property and the Magistrate finds that (in his opinion) the right exists and that it has been exercised within three months next before the institution of the enquiry.

The Moidin Palli mosque is found to be in the possession of Mussa Kutti Musaliar, and it is further found that Kunji Chek Musaliar has, with his consent, performed the religious services therein.

The claim of the petitioner, who is the kazi appointed by Government, is that he alone is authorized to perform this religious service within a given area; but we find nothing in Act XII of 1880 declaratory of such a right, and it should, if it exists, be established by a regular suit brought for that purpose in due course of law.

The Magistrate's order appears to be legal, and there is nothing before us to show that any further evidence was tendered before him.

We decline to interfere and dismiss this petition.

Ordered accordingly.

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