APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Anantakrishna Ayyar.

JAFFAR HUSSAIN KHAN SAHEB AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

KRISHNAN SERVAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1929, December 16.

Right to worship—Suit by Muhammadans against Hindus of a village for declaration and injunction—Mosque adjoining a Hindu temple—Mosque built subsequent to temple—Right to worship in the mosque undisturbed by playing of music by Hindus in their temple and in their religious processions in public streets.

Where certain representative Muhammadans of a village sued certain representative Hindus of the same village for a declaration that they were entitled to carry on their worship, in a mosque which was closely adjoining a Hindu temple, undisturbed by the playing of music in the temple and in the religious processions of the latter in the public streets, and also prayed for an injunction, and it appeared that the Muhammadans chose to erect their mosque close to the temple which was built and was in existence long before the mosque and that service with music formed part of the usual religious worship in the temple and in the processions in the public streets,

Held, that, where a new sect or body of worshippers invade a locality already occupied by another religious body, it is not a reasonable exercise of their right to undisturbed worship, that the former should claim to curtail the service or worship of the latter which had been customary long before the former had invaded the locality; and that, consequently, the plaintiffs were not entitled to prevent the defendants from playing music in the temple or in the procession in carrying on their customary worship.

Sundram v. *The Queen*, (1883) I.L.R., 6 Mad., 203, and *Manzur Hasan* v. *Muhammad Zaman*, (1924) I.L.R., 47 All., 151 (P.C.), referred to.

* Second Appeal No. 105 of 1926.

HUSSAIN KHAN v. KRISHNAN SERVAI.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Trichinopoly in A.S. Nos. 252 and 256 of 1923, preferred against the decree of the Court of the District Munsif of Srirangam in O.S. No. 157 of 1920.

B. Pocker for appellants.

M. S. Vythinatha Ayyar for respondents.

JUDGMENT.

WALLACE, J.

WALLACE, J.—The plaintiffs are representative Muhammadans of Lalgudi and neighbouring villages. They sued for a declaration that they are entitled to carry on public worship in the suit mosque, at hours stated by them, undisturbed by Hindu processions of music, or playing of music in the adjoining Pilliar Kovil, and they sued further for an injunction restraining the defendants, who are representative Hindus of these villages, from so disturbing their worship. Both the lower Courts have dismissed the suit and the plaintiffs' appeal.

Although the plaint prayer is indefinite as to the period of time for which the plaint relief is desired, the plaintiffs' learned Advocate stated at the bar that the plaint case relates to the period of the Mari Amman festival. The plaintiffs claim that the relief they seek for was in effect granted in a former suit, filed by the Hindus against the Muhammadans, to set aside a Government Order restraining the Hindus from playing music in front of the suit mosque during stated hours of the day at the time of the Mari Amman festival. The decree in that suit was in favour of the Hindus, but the plaintiffs' argument is that the point on which they now seek relief must be taken to have been decided against the Hindus in the former suit, either because it was there specifically sought for and refused, or because it ought to have been sought for and was not. They thus claim that on this point there is a matter of constructive

res judicata, and that the lower Courts have on this point committed an error of law.

The former suit was O.S. No. 226 of 1911 and ended in the High Court in Second Appeal No. 112 of 1914. The Judgment and Decree in the former suit are Exhibits H and H-1. It was finally decided by the High Court that the scope of that suit was confined to music at a *medai* which was in the public street in close proximity to the mosque, and to the alleged interference with the mosque worship which the playing of music at that *medai* during the Mari Amman festival occasioned. The High Court decided that the Hindus have the right of celebrating the Mari Amman festival at the *medai* "without any restriction as to the time of playing music." That would seem to be a decree entirely in favour of the Hindus, but the plaintiffs here claim that it must be taken that the Hindus have no other right of playing music during the Mari Amman festival than that which has been declared by the High Court, because, if any such further right existed, it was either implicit in the subject-matter of the former suit or ought to have been made the subject-matter of that suit. I am unable to accept that argument. As to the first contention it is not open to the plaintiffs, since they themselves in the former suit contended that that suit was confined to playing at the *medai* and that even the right to take the procession with music *past the mosque* was not included there, and on that very ground they persuaded the High Court to modify the decree of the lower appellate Court. It is not open to them now to turn round and say that any other matter was included in the former suit. As to the contention that it ought to have been made the subject matter of the suit, I find no substance in this either. The cause of action in the former suit was based on a definite Government order which infringed the present defendants' right of playing music at the

HUSSAIN KHAN v. KRISHNAN SERVAI.

WALLACE, J.

medai in the public street. On that point they succeeded. The Government Order did not touch the general right of playing music in the public street or inside the Pillayar Kovil which is made the subject-matter of the present case. It was not incumbent on the Hindus in the former suit to seek for a relief which had not been denied to them by the Government Order which formed their cause of action. I, therefore, cannot find that the plaintiffs' present claim can be based on any theory that the rights now claimed by the Hindus were denied to them in the former suit.

Some question was raised as to whether the Hindus have not shifted the position of the *medai*, but the lower Courts have found that there has been no change and that is a pure question of fact binding on us in Second Appeal. The points in the present suit, which were not in the former suit and decided there in favour of the Hindus, are the alleged disturbances caused by the Hindus playing music, not at the *medai* which is in the public street, but in the public street itself and inside the Pillayar Kovil which adjoins the mosque. The plaintiffs allege first that the playing is in itself a nuisance which they have a civil right to stop, and secondly that this playing which is a part of the Mari Amman festival takes place on days outside the proper fifteen days for that festival. As to the first point, the plaintiffs' contention set out in paragraph 32 of the plaint is that any loud playing of music during their religious service is an infringement of their civil rights. No authority is advanced for that proposition. As to the right of procession in public streets with music the law on the subject has been finally laid down by the Privy Council in *Manzur Hasan* v. *Muhammad Zaman*(1). The Hindus have the

(1) (1924) I.L.R., 47 All., 151.

right to conduct such processions so long as they do not interfere with the ordinary use of the street by the public and subject to lawful directions by the Magistrates. So far as the right of the Muhammadans to stop the playing of music inside a Hindu temple is concerned, I find no direct authority in point, but it appears to me that that can only be decided not as a proposition of law but on the stated circumstances in each case. The plaintiffs rely strongly on a sentence from *Muthialu Chetti* v. *Bapun Saib*(1),

> "It is on the one hand a right recognized by law that an assembly lawfully engaged in the performance of religious worship or religious ceremonies shall not be disturbed."

That, no doubt, is a general right, but, obviously, it can be modified by circumstances, so that the exercise by each party of its legal rights shall be reasonable and with due regard to the rights of the others. [*See Sundram* v. *The Queen*(2)]. If, for example, two places of worship of different sects have been existing side by side from time immemorial, then each, no doubt, must exercise its rights of worship with due regard to the rights of the other and submit to curtail its own rights in consideration of the other party also curtailing its rights. The *modus vivendi* is a compromise of competing rights and the Courts will enforce, as the real civil rights of each party, the mutual compromise, instead of putting both parties in an impossible position by declaring the formal civil rights of both. But where, for example, a new sect or body of worshippers invades a locality already occupied by another religious body, it is not reasonable that it should, in the name of ensuring quietness for its own worship, claim to curtail the service or worship which had been customary long before it invaded the locality. *That is the present case.* It is found as a fact by the

(1) (1880) I.L.R., 2 Mad., 140. (2) (1883) I.L.R., 6 Mad., 203.

HUSSAIN KHAN v. KRISHNAN SERVAI.

WALLACE, J.

lower Courts that the Muhammadans chose to erect their mosque close to an existing Pillayar temple where service with music forms part of the usual public religious worship, and they now claim that such service shall be stopped during their own service hours. The lower Courts have found that the Pillayar Kovil was built long before the mosque and that the mosque, therefore, was built with the full knowledge that it would be close to the Hindu temple. It was urged that, when the mosque was built, the Pillayar Kovil was not actually being used, but I do not see that that makes any practical difference. The Muhammadans deliberately built their mosque cheek by jowl with the Hindu temple, and in such a case the new-comer must respect the religious sentiments and services of the older inhabitant. It would be different if the service in the Pillayar temple amounted to a general public nuisance, but no such case is put forward here. The Muhammadan sect alone cannot and does not represent the general public; it is only one section of the general public.

As to the alleged extension of the Mari Amman festival days, that is a point which seems to me irrelevant. The only ground, on which the extension is attacked and can be attacked in this suit, is that it is an infringement of the former decree. I cannot find that time is of the essence of the former decree nor is the period of fifteen days mentioned. In any case that decree, as I have held, applied only to music at the *medai* and has no concern with music played in the public street or inside the Pillayar Kovil.

The appellants therefore fail on the points raised by them. The lower appellate Court has committed no error of law. I would, therefore, dismiss the appeal with costs.

ANANTAKRISHNA AYYAR, J.—I agree.

K.R.