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he realized none in execution of that decree. The decree was finally reversed by this Court on the 19th November, 1881, and in executing that decree the lower Courts have restored the respondent to possession and also allowed him mesne profits.

So far as the question of possession is concerned, the order of the lower Courts was right with reference to s. 583 of the Civil Procedure Code. But the question of recovery of mesne profits is governed by the recent Full Bench ruling in *Ram Ghulam* v. *Dwarka Rai* (1), and we therefore partially decree the appeal and set aside the order of the lower Courts so far as it awards mesne profits to the respondent. Under these circumstances we make no order as to costs.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

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December 5.

SHAH MUHAMMAD AND OTHERS (DEFENDANTS) *v* KASHI DAS (PLAINTIFF).*

Declaratory decree—Abstract right—Cause of action—Costs.

A Hindu brought a suit in which he alleged that the Hindu community had acquired by long established custom an exclusive right to use for religious purposes a Ghat situate on the river Ganges, but that the Muhammadans were in the habit of interfering with the exercise of such right by bathing at the Ghat. He prayed for a declaration of the right, and for a perpetual injunction to be issued to the Muhammadans generally forbidding them to resort to the Ghat. No act of trespass was charged against any of the defendants. The defence was that the Muhammadans were entitled to use the place, and that their use of it did not cause any inconvenience to the plaintiff.

Held that the suit was not maintainable, since the Court had no power to pass a decree against persons who had never interfered with the property in dispute, or to issue an injunction against the whole Muhammadan world; but that, inasmuch as the defendants had fought the case all along as if the suit were maintainable, and upon a false issue, both sides must pay their own costs.

THE plaint in this case stated that for many years there had existed in mohalla Mughalpura, in the city of Ghâzipur, a "ghât" on the river Ganges, known as the Pushto Ghat; that close to the ghât there was a "*sangat*" (place of worship) for holy men; that the Pushto Ghât and the "*sangat*" had been constructed by Hindus

* Second Appeal No. 1125 of 1883, from a decree of J. W. Power, Esq., District Judge of Ghâzipur, dated the 12th April, 1883, modifying a decree of Babu Nilmadhub Roy, Munsif of Ghâzipur, dated the 22nd December, 1882.

(1) *Ante*, p. 170.

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more than one hundred years ago, and for the purpose of management of the "*sangat*" the Hindus had created the office of "Mahant," and since the creation of that office the "*sangat*" had been managed by the "Mahant;" that the plaintiff was the "Mahant" and the "*sangat*" was under his management; that it was an ancient custom for "Hindus, holy men, Goshains and Brahmans," to resort to the Ghát for the purposes of worship and bathing, and performance of religious rites; that the repairs of the Ghát and "*sangat*" had been the duty of the "Mahant," and such repairs had been defrayed by subscriptions by the Hindus who used the Ghát for purposes of worship, &c.; that about twenty-five years before the institution of the suit the Ghát had been widened and in other ways improved by the plaintiff with moneys collected from Hindus; that the Ghát had not been used by the Muhammadans at any time; that in the year 1880 Muhammadans, mostly residents of mohalla Mughalpura, began to resort to the Ghát on the pretence of bathing; that this conduct led to a dispute between the Hindus and Muhammadans, which came before the Magistrate; that the Magistrate made an order that the Ghat should be open to the public from 11 A. M. to 4 P. M., and its use for the rest of the day should be confined to Hindus. The plaint then ran as follows:—

"(10). The Muhammadans, taking advantage of this order, which was passed contrary to the old established usage, gave trouble to the Hindus when engaged on the said Ghát in their worship according to their religion; interrupted the performance of the religious duties of the Hindus (who consider the offering of prayers at such a sacred place three times a day, *i.e.*, in the morning, at noon and in the evening, necessary and a part of their duty); and injured their right which they had enjoyed for more than a century, and to maintain which they frequently spent money out of their own pockets.

"(11). When this Ghát has of old been appurtenant to the "*sangat*" of the Hindus, and in exclusive enjoyment of the followers of the "*sangat*" and of other sects of the Hindus, the Magistrate had no power to interfere by fixing a time for the use of the Ghát by Musalmans, and by passing an order giving opportunity to those persons (who have a religion quite opposed to that of the

Hindus), to interrupt and inconvenience the Hindus in the performance of their religious duties.

"As it is not hidden from the Courts of Justice that by the frequent resort of the Musalmans to a place where the Hindus bathe, worship, and perform their religious ceremonies, great interruption is caused, and according to the Hindu religion both the water and the spot are considered polluted and unclean, hence—

"The plaintiff prays for the following reliefs:—(1). That a decree be passed for the establishment of the fact that the ghát known as the Pushto Ghát has been for a long time appurtenant to the "*sangat*," and has been built at the expense of the Hindus; and that by virtue of old established usage, it has been used exclusively by the Hindus for the purposes of bathing and the performances of other religious duties. (2). That after the fact having been proved that the Pushto Ghát has been built solely for the use of the Hindus, by their own exertions, and from their own pockets, and that only the Hindus have for a long time (more than twenty years) enjoyed the right of resorting to bathe and worship at the Ghát, without any specification of time, a perpetual injunction be issued to the defendants, and generally to all the Muhammadans, forbidding them from resorting to the Ghát under the pretence of bathing, and from causing any kind of interruption to the comfort and convenience of the Hindus, by polluting and fouling the water and spot, or from doing any other act. (3). That the orders of the Criminal Court, dated 26th August, 1880, and 4th January, 1881, which have been passed contrary to old established usage and right, and all the orders passed for fixing and specifying the time prejudicial to the plaintiff, be held invalid and inoperative. It may be noticed that Rs. 10 have been paid for establishment of right, Rs. 10 for the injunction, and Rs. 10 for the invalidation of the Criminal Court's proceedings. And as the relief sought, *i. e.*, that the Pushto Ghát be used for the purposes of bathing and performing the religious rites of the Hindus, is of such a nature that it is impossible to value it for the purpose of the jurisdiction of the Court, it has been valued at Rs. 30."

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The suit was instituted in the Court of the Munsif of Ghazipur. The defendants, 58 in number, were all Muhammadans. One of them alone defended the suit. His defence was to the effect that the Ghát was built by Muhammadans; that Muhammadans were entitled to use the Ghát; and that Hindus were not in any way inconvenienced by the use of the Ghát by Muhammadans. The other defendants did not appear. Among the issues fixed by the Munsif were the following:—

"Was the Ghát in dispute built by Hindus alone or by Muhammadans alone?

"Was it built by Hindus or Muhammadans?

"Have the Muhammadans a prescriptive right to use the Ghát in dispute?

"According to Hindu ideas, will the Ghát be polluted if Muhammadans are allowed to bathe at it?"

A preliminary objection to the jurisdiction of the Munsif, regard being had to the value of the Ghát, was overruled by the Court.

The Court found, with reference to the issues set out above, that the origin of the Ghát was unknown; that the Ghát had been widened and improved at the cost of Hindus and Muhammadans alike; that both Hindus and Muhammadans had a prescriptive right to use the Ghát; and that it was not advisable to allow Hindus and Muhammadans to bathe at the Ghát promiscuously. The Court, with reference to these findings, made a decree directing that the plaintiff should be allowed the exclusive use of three-fourths of the Ghát and the Muhammadans of one-fourth, and the Ghát should be partitioned accordingly, and that the Magistrate's order should remain in force so long as the decree did not become final.

On appeal by the plaintiff, the lower appellate Court (District Judge) found that the Ghát had a Hindu origin; that it had been widened and improved at the expense of the Hindus alone; and that for upwards of twenty years the Ghát had been in the exclusive use of the Hindus. With reference to these findings, the lower appellate Court gave the plaintiff a decree as claimed.

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The defendants appealed to the High Court.

Mr. *W. M. Colvin* and Mr. *C. H. Hill*, for the appellants.

Mr. *T. Conlan*, Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the respondent.

For the appellants it was contended that the Munsif had not jurisdiction to try the suit. The value of the ghát and "*sangat*" admittedly exceeds Rs. 1,000. Where the property in respect of which a declaration of right is sought exceeds Rs. 1,000 in value, the Munsif cannot make such a declaration. He cannot give a decree for possession of property exceeding that value, and therefore cannot declare the title to property exceeding that value.

[PETHERAM, C. J.—I should like to hear Mr. *Conlan* on the question whether there is a cause of action disclosed against the defendants. There seems to be none alleged].

Mr. *T. Conlan*.—The provisions of s. 30 of the Civil Procedure Code should have been followed in this case. The defendants should have been sued on behalf of the Muhammadan residents. The injunction sought would then be effectual. [PETHERAM, C. J.—The suit does not seem to be maintainable]. Perhaps, as regards a declaration of right, the suit is maintainable, though not as regards the injunction. The declaration of right is claimed by reason of trespass on the property. [PETHERAM, C. J.—There is no act of trespass charged against the defendants or any of them. I think that the case has gone to trial under a misconception by the parties and the Court as to the real issues. The proper course would be to allow the appeal and order each party to pay their own costs]. It is doubtful whether the Munsif should have tried the suit. When the question is settled as to the Court which should try the suit, then the question as to whether there is a cause of action should be settled, and by that Court. I would suggest that, if your Lordships think the Munsif had no jurisdiction, the plaint should be returned for presentation to the proper Court. [PETHERAM, C. J.—I do not think this can be done. The point is whether a claim for a declaration of abstract right is maintainable.] If the suit is dismissed, it may be that the plaintiff will be barred from bringing a fresh suit. [PETHERAM, C. J.—I do not think so; a suit properly framed might be brought.]

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Mr. *C. H. Hill*, in reply, contended that the objection that the Munsif had no jurisdiction was a good objection. It was taken from the very beginning of the litigation. If a good one, the appellants should be allowed their costs in all Courts.

The Court (PETHERAM, C. J., and BRODHURST, J.) delivered the following judgment :—

PETHERAM, C. J.—I am of opinion that this appeal must be allowed and the suit dismissed. The suit was brought to try a right to use a certain flight of steps in the city of Ghâzipur, which led from a street in the city to the river Ganges. The plaintiff alleges that the steps are his own private property, and that nobody else, without leave from him, has any right to use them. The defendants allege that the steps are not the property of the plaintiff; and further, that even if they were, the public have a right to use them. Now, if the suit had been properly framed, that issue should be tried. But the persons conducting the litigation mistook the powers which the Courts have; and instead of bringing a suit for trespass or asking for an injunction to prevent persons from trespassing, they brought a suit against persons who had never interfered with the steps at all, and prayed for an injunction against the whole world. Now, no Court in existence has or can have such powers, and therefore the suit must be dismissed. Then it is said that, this being so, the defendants should have their costs, and that would be proper if at the beginning the defendants had taken the point that the suit was not maintainable. But instead of doing so they fought the case all along as if the suit was maintainable, and upon a false issue. The litigation, owing to the mistake of both sides, has been wholly fruitless. I think therefore that both sides should pay their own costs.

Mr. *Hill* contended that the appeal should be allowed on the question of jurisdiction, and that his clients should be allowed their costs, the plea that the Munsif had not jurisdiction having been taken from the beginning of the litigation. It seems to me that the relief which the plaintiff claimed was valueless. Had he obtained a decree, it would have been worth nothing to him. Therefore it cannot be said that the relief sought by him exceeded in value the Munsif's pecuniary jurisdiction. If the plaintiff had sued in proper

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form, the relief which might have been granted might have been very valuable.

BRODHURST, J., concurred.

Appeal allowed.

FULL BENCH.

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December 6.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* TAKI HUSAIN.

Defamation—Communication of defamatory matter to complainant only—Act XLV of 1860 (Penal Code), s. 499—"Making"—"Publishing."

Held by the Full Bench (DUTHOIT, J., dissenting) that the action of a person who sent to a public officer by post in a closed cover a notice under s. 424 of the Civil Procedure Code, containing imputations on the character of the recipient, but which was not communicated by the accused to any third person, was not such a making or publishing of the matter complained of as to constitute an offence within the terms of s. 499 of the Penal Code.

THIS was an application for revision of an order of Mr. T. B. Tracy, Sessions Judge of Bareilly, dated the 18th July, 1884, affirming an order of Mr. J. Nugent, Joint Magistrate of Bareilly, dated the 10th July, 1884. It appeared that the house of the applicant, Taki Husain, was searched by the police without a warrant for stolen property. Thereupon the applicant sent by post to Basawan Singh, Inspector of Police and Kotwal of Bareilly City, in a registered cover, a notice, in Urdu, the terms of which were in effect as follows:—

"I, Taki Husain, ... hereby give notice to you, Basawan Singh, Kotwal of Bareilly, under s. 424 of the Code of Civil Procedure Code, that I will sue on the 12th March, 1884, for Rs. 100, as per account given below, to the effect that on the 5th January, 1884, you took away, or caused to be taken away, my property, worth Rs. 30, not in good faith, but in bad faith and maliciously. That property is now in your possession, and it was taken by you with the bad intention that you subsequently restore it to me on taking some money, or that you institute a false suit in the Criminal Court after procuring false witnesses. Rs. 70 are for damages on account of your defaming me, by thus taking away my property. The damages claimed have been undercharged, be-