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who paid them. All three acts of embezzlement were committed within one year, and each was committed in the same circumstances as the others. How can it be said that these offences were not "of the same kind?" They did not merely resemble each other, but were the same offence. I see no reason why they should not be joined in the same trial; and I am of opinion that the Magistrate was right in joining them. As regards the case of *Empress* v. *Murari* (1), to which reference has been made, that was decided by Mr. Justice Straight under a different statute, and his decision in that case will be unaffected by ours in this.

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

JAWAHRA AND OTHERS (DEFENDANTS) *v.* AKBAR HUSAIN (PLAINTIFF.)*

Religious endowment—Mosque—Form of suit—Right to sue—Civil Procedure Code, ss. 30, 539.

Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance, and is competent to maintain a suit against any one who interferes with its exercise, irrespective of the provisions of ss. 30 and 539 of the Civil Procedure Code.

S. 30 of the Civil Procedure Code applies only to cases in which many persons are *jointly* interested in obtaining relief, and not to cases in which an individual right has been violated.

Zafaryab Ali v. *Bakhtawar Singh* (2) referred to. *Jan Ali* v. *Ram Nath Mundul* (3) dissented from.

THE plaint in this case stated that in a village belonging to the plaintiff there was an "old dilapidated mosque intended for Muhammadan worship," which "was protected and looked after" by him and other Muhammadans of the village; that in consequence of the mosque and its appurtenances being "*wakf*," it had been excluded from the partition of the village, and the plaintiff intended to repair the mosque; that the defendants had enclosed a part of the land, and had also erected a mill on a part of it; that they had, by means of certain erections of thatch and mud, con-

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* Second Appeal No. 1499 of 1883, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 13th August, 1883, affirming a decree of Maulvi Muhammad Sayid Khan, Munsif of Muzaffarnagar, dated the 16th February, 1883.

(1) I. L. R., 4 All. 147. (2) I. L. R., 5 All. 497.
(3) I. L. R., 8 Calc. 32.

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verted the mosque into a place for storing straw—all of which acts they had wrongfully done ; that the plaintiff had remonstrated with the defendants and asked them to remove the things, but they paid no attention to this request, and prevented the plaintiff from making repairs ; and that these "unlawful acts of the defendants were calculated to affect the character of the said endowed property, and were an insult to the religion." Upon these allegations, the plaintiff claimed "a declaration of his right to repair the old dilapidated mosque...............by removal of the defendants' interference," and the demolition of the compound, and removal of the mill, the thatches, and the straw stored in the mosque. The plaint concluded with these words :—"Suit brought according to the doctrines of the Muhammadan religion and on written and oral evidence." The defendants did not deny the acts imputed to them by the plaintiff. They defended the suit upon the grounds, amongst others, that the building which was the subject-matter of the suit was not a mosque but an "*atta* or fortress made for the purpose of shelter from robbers in former days" ; and that the plaintiff had no right to repair it. The Court of first instance found that the building was a mosque and not an "*atta*," and held that "the plaintiff, as a Muhammadan and guardian of religious buildings, was entitled to repair the mosque." It therefore gave the plaintiff a decree as claimed. On appeal, the defendants contended that "a claim for endowed property cannot be instituted and heard without the permission of the Advocate-General under Act XX of 1863." Upon this point the Court observed as follows:—"The first ground of appeal must be overruled. In a similar case—*Zafaryab Ali* v. *Bakhtawar Singh* (1)—our own High Court have just ruled that s. 539 of the Civil Procedure Code would not apply, and that the plaintiffs, as persons entitled to frequent the mosque, can maintain the suit. This, however, is quite opposed to a ruling of the Calcutta High Court—*Jan Ali* v. *Ram Nath Mundul* (2)." The Court also observed as follows:—"Respondent said at first that he was the only Musalman in the village, the population of which is variously stated by appellants as 500 or 600, by respondent as only 70. If this be so, of course s. 30 of the Civil Procedure Code would not

(1) I. L. R., 5 All., 497. (2) I. L. R., 8 Calc. 32.

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apply. But it comes out that there is at least one other, Shaikh Jani, the custodian of a shrine or *dargah*, with his son or sons." The decree of the Court of first instance was affirmed.

On second appeal, the defendants contended (i) that the suit was not maintainable in its present form, as no special right to sue in the plaintiff was disclosed; and (ii) that as there were probably other Muhammadan residents in the village, the suit was not maintainable without compliance with the provisions of s. 30 of the Civil Procedure Code.

The Divisional Bench (MAHMOOD and DUTHOIT, JJ.) hearing the appeal made the following order of reference to the Full Bench:—

"The grounds taken in this appeal and the arguments in their support by the learned pleader for the appellants, raise a question of much difficulty and considerable importance. The question relates to the *locus standi* possessed by Muhammadans to institute suits which relate to their religious and charitable endowments and buildings, where the cause of action alleged is stated to be either injury to such buildings, or malversation of the funds, or wrongful alienations of such property, or other similar circumstances which are destructive to, or inconsistent with the objects of such endowments or *wakf* property. The question has become more complicated by reason of the provisions of the law as contained in ss. 30 and 539 of the Civil Procedure Code.

In the case of *Zafaryab Ali* v. *Bakhtawar Singh* (1) a Division Bench of this Court held that a suit to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and the sale of the mortgaged property in execution of that decree, and for the demolition of buildings erected by the purchaser, and the ejectment of the purchaser, was maintainable by Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment. It was also held that s. 539 of the Civil Procedure Code had no application to the case, the endowment being a religious institution within the meaning of s. 24 of the Civil Courts Act (VI of 1871), and therefore governed by Muhammadan Law. On the other

(1) I. L. R., 5 All. 497.

hand, in the case of *Jan Ali* v. *Ram Nath Mundul* (1) the Calcutta High Court applied s. 539 of the Civil Procedure Code to similar suits, by holding that so much of the prayer in the plaint as fell within the provisions of s. 539 of the Code, the plaintiffs were not entitled to sue for, as they were not "persons having a direct interest in the trust" within the meaning of the section. It was also held in that case that, though the plaintiffs might possibly have obtained leave to sue under s. 30 of the Code on behalf of themselves and the other persons attending the mosque, they, not having obtained such leave, were not entitled to institute a suit for the purpose of obtaining the relief asked for. This ruling was referred to in the case already cited, but although there is no express allusion to the case in the judgment of this Court, the ruling was apparently disapproved. Again, in the case of *The Muhammadan Association of Meerut* v. *Bakhshi Ram* (2) a Division Bench of this Court appears to have approved of the rule laid down by the Calcutta Court so far as s. 30 of the Code is concerned.

In view of its great importance we refer to the Full Bench the following question :—

Can any Muhammadan or Muhammadans maintain a suit like the present, irrespective of the provisions of ss. 30 and 539 of the Civil Procedure Code?"

Munshi *Kashi Prasad*, for the appellants.—The property to which the suit relates is endowed property. Such property belongs to the Muhammadan community. The right of Muhammadans in such property is like the right in a public road [PETHERAM, C. J. It is more like the right in a private road.] The plaintiff, as a Muhammadan, has not such an interest in the property, as entitles him to maintain a suit on his own account. He ought to have sued for the Muhammadan community. [PETHERAM, C. J., Your argument would be good if the Muhammadan community were the public.] *Jan Ali* v. *Ram Nath Mundul* (1) is in point.

Mr. *Amiruddin*, for the respondent.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—I have no doubt that the plaintiff was competent to maintain this action. The question has arisen in conse-

(1) I. L. R., 8 Calc. 32. (2) I. L. R., 6 All. 284.

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quence of the peculiar way in which property of this kind is held. According to Muhammadan custom, the property in a mosque and in the land connected with it is vested in no one. It is not the subject of human ownership, but all the members of the Muhammadan community are entitled to use it for purposes of devotion whenever the mosque is open. Now, the Muhammadans are only a part of the population of this country, so that the right is not vested in the general public, and therefore it resembles a right in a private way. Everyone who has such a right is entitled to exercise it without hindrance, and has a right of action against anyone who interferes with its exercise. It is not a *joint* right; it is a right which belongs to many people. S. 30 was meant to apply to a case in which many persons are *jointly* interested in obtaining relief; and where, under the old law, it would have been necessary for all of such persons to be joined, s. 30 prevents the record from being unnecessarily encumbered by many names, and allows one or more, with the permission of the Court, to sue or defend on behalf of all. The rule was introduced in order to prevent rich persons from joining together and putting forward a pauper to conduct the suit, and thus escaping all costs. In the present case it is clear that an individual right has been violated, and that an action will therefore lie.

MAHMOOD, J.—I wish to add a few observations regarding the Muhammadan Law as to endowments generally, and in particular as to mosques. It must, in the first place, be shown that the Muhammadan people have a right to maintain a suit like the present. But authorities on such a point need not be cited, for the principle is too well known among Muhammadan lawyers. The rule of the Muhammadan Law on the subject is that when anyone has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as delivery, &c., an endowment is immediately constituted; his act deprives him of all ownership in the property, and, to use the technical language of Muhammadan lawyers, vests it in God "in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to His creatures."

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A mosque is an endowment of this kind, and the Muhammadan community, or any member of it, has a right to enter the mosque and to pray there. The learned Chief Justice has shown that, under the circumstances in India, a mosque cannot be regarded as vested in the public at large, but in the Muhammadan part of the public, and it cannot be said that any Muhammadan is bound to maintain a suit on behalf of the public generally. The right of a Muhammadan to use a mosque is, as the learned Chief Justice has said, like the right to use a private road; any one who has the right may maintain a suit in respect of it. This settles the question as to s. 30 of the Civil Procedure Code. That section applies only to cases where no *individual* right is interfered with; but here we have the case of a mosque in a small village, and one of the worshippers in that mosque is obstructed in his use of it for purposes of devotion. He had a private right, and it was violated.

In regard to s. 539 of the Civil Procedure Code, I was one of the Bench who made this reference, and I wish to add my reasons for holding that the section does not apply to the present case. There is here no question of trust or trustee, or of malversation of trust funds, or other breach of trust. The object of such a suit as this is not such as is contemplated by any of the various clauses of s. 539. In conclusion, I have a few words to say regarding the case which has been cited—*Jan Ali v. Ram Nath Mundul*, (1)—decided in the Calcutta High Court by Prinsep and Field, JJ. Towards the end of the judgment in that case the following observations occur:—"Now, so far as regards these prayers, we think that the plaintiffs were not authorized to institute this suit merely by reason of having that interest which is set out in para. 10 in the plaint, that is, an interest created by their being followers of the Moslem religion, living in the vicinity of the mosque, and being in the habit of attending the musjid. That interest is common to them with a large number of other persons —common to them with, we will not say all the Muhammadan population of the country, but certainly with all the Muhammadan residents in the vicinity; and we think that this is a case which falls within the provisions of s. 30 of the Civil Procedure

(1) I. L. R., 8 Calc. 32.

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Code. That section enacts that "where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue, or be sued, or may defend in such suit, on behalf of all parties so interested." It may be quite possible that if these plaintiffs had applied to the Court under the provisions of s. 30, they would have obtained permission to institute this suit; but, not having obtained that permission, they certainly were not entitled to institute the suit; and, under the circumstances, we think that the ground of objection taken by the defendants in the second paragraph of their written statement, and which forms the subject of the second issue, was a good objection; and that this suit was properly dismissed by the District Judge." Now, with all due deference to the learned Judges who delivered that judgment, I dissent from the remarks which I have just read. I hold that it is an undoubted principle of Muhammadan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it. It is impossible to imagine whose interest in the mosque can be direct if theirs is not, and I should say, that even if this case fall under the purview of s. 539, they would have *locus standi* to maintain the suit. But, for the reasons which I have already given, I am of opinion that neither s. 30 nor s. 539 of the Civil Procedure Code applies to the present case, and that the plaintiff was competent to maintain the suit.

My answer to the reference is, therefore, in the affirmative.

OLDFIELD, BRODHURST, and DUTHOIT, JJ., concurred.

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

1884 November 29.

GANDHARP SINGH AND ANOTHER (DEFENDANTS) v. SAHIB SINGH AND ANOTHER (PLAINTIFFS).*

Pre-emption—Wajib ul arz—"Co sharer"—Joint Hindu family.

The members of a joint and undivided Hindu family, other than that member who is recorded in the Collector's book as a sharer in the mahal, are "co-sharers," for the purposes of pre-emption, in the sense of the *wajib-ul-arz*.

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* Second Appeal No. 1418 of 1883, from a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Mainpuri, dated the 4th August, 1883, affirming a decree of Pandit Kashi Narain, Munsif of Etawah, dated the 9th April, 1883.