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being a religious institution within the meaning of section 24 of Act VI of 1871, and therefore governed by the Muhammadan law. Mr. Ameer Ali in his work on Muhammadan law (Volume I, 3rd edition) at page 455, referring to the case *Jawahra* v. *Akbar Husain*, observes as follows:—"The judgement of the Allahabad High Court seems to be in conformity with the provisions of the Muhammadan law. As has been already pointed out from *Radd-ul-Mukhtar* and the *Fatwai Kazi Khan*, every Muhammadan who derives any benefit from a waqf or trust is entitled to maintain an action against the *mutawalli* to establish his right thereto, or against a trespasser to recover any portion of the waqf property which has been misappropriated, joining any other person who may participate with him in the benefit." At page 449 of the same volume the learned author comments on and expresses approval of the decision of this Court in *Zafaryab Ali* v. *Bakhtawar Singh* above cited. Now the plaintiffs have a right to frequent and use the mosque for devotion and the land adjoining is appurtenant to the mosque and according to the above rulings they can maintain their suit.

The lower appellate court has found that the land adjoining the *idgah* is endowed property and this finding of fact is binding upon us in second appeal. In view of the findings we are of opinion that the decision of the court below is correct. We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

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June 1.

Before Mr. Justice Chamier

EMPEROR *v.* BISHESHAR BHATTACHARYA.*

Criminal Procedure Code, section 556—*Magistrate ordering prosecution as president of octroi sub-committee—Jurisdiction—"Personally interested."*

A Magistrate as the president of the octroi sub-committee of a Municipal Board, ordered the prosecution of the accused, and with the consent of the accused tried the case himself. *Held* that the Magistrate must be deemed to have been personally interested within the meaning of section 556 of the Code of Criminal Procedure and was not qualified to try the case of the applicant, whose consent

* Criminal Revision No. 239 of 1910 against the order of A. P. Collett, Joint Magistrate of Benares, dated the 5th of April, 1910.

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could not confer jurisdiction upon him, *Emperor* v. *Mohan Lal* (1) distinguished. *In the matter of the petition of Inayat Husain* (2) referred to.

THE facts of this case are fully stated in the judgement of the Court.

Babu *Satya Chandra Mukerji* (with him Babu *Surendra Nath Sen*), for the applicant.

The Assistant Government Advocate, (Mr. *R. Malcomson*) for the Crown.

CHAMIER, J.—This is an application for revision of an order of the Joint Magistrate of Benares, convicting the applicant of evading the payment of octroi, an offence punishable under section 69 of the United Provinces Municipalities Act, and sentencing him to pay a fine of Rs. 20. It has been contended before me that the articles in respect of which the applicant has been convicted are not subject to octroi. In view of the order which I am about to pass, I express no opinion upon this point. The question which I have to decide is whether the Magistrate had jurisdiction to try the case. In his order he says:—"I would note that at the first hearing I asked counsel for the defence to apply for the transfer of the case, as the prosecution had been initiated by me *ex officio* as the president of the octroi sub-committee. He elected to let the case remain in this court." It is quite clear that if the case falls within section 556 of the Code of Criminal Procedure as is now contended by the applicant, the Magistrate was debarred from trying the case, and the consent of the applicant could not confer jurisdiction upon him. The only facts which need be stated are that some correspondence passed between the applicant and the Octroi Superintendent ending with a letter from the applicant, dated the 2nd of March, 1910, in which he declined to give any further information. The whole correspondence was then laid before Mr. A. P. Collett, who was president of the octroi sub-committee of the Municipal Board. The file does not show that the papers were laid before him as president of that sub-committee; but the fact is admitted and there can be no doubt about it. On the file he wrote as follows:—"Whether the goods are dutiable or not, it seems that the importer's correct procedure was to pay and then appeal

(1) (1904) I. L. R., 27 All., 25. (2) Weekly Notes, 1899, p. 74.

the Board. If the importer still persists that the goods are not dutiable, it is a question best decided by a court, and he should be prosecuted in order to have it finally settled."

On that the Secretary of the Board noted at once "prosecute," and sent the papers to the Octroi Inspector who made them over to a mukhtar in order that a complaint might be drawn up. The complaint was ultimately presented to Mr. Collett. It is quite clear to me that Mr. Collett's order was intended to be and was understood to be an order for the prosecution of the applicant. It is not a case like that of *Emperor* v. *Mohan Lal* (1), in which the Magistrate concerned was merely one of a body of members of the Municipal Board, who did not direct the prosecution but merely handed in a recommendation, upon which the Chairman of the Board took action. In that case, KNOX J., referred to and distinguished the case of *Emperor* v. *Ahmad Husain*, decided by the present learned Chief Justice. He observed that in *Ahmad Husain's* case it was alleged that the Joint Magistrate who tried the case was the Chairman of a special meeting of the committee which ordered the prosecution of the accused. The present case is stronger than that of *Ahmad Husain*, for Mr. Collett does not seem to have acted with the sub-committee, but alone and on his own responsibility. It was contended that the case fell rather within the explanation to section 556 than within the illustration to that section. The difference between the two clases of cases was pointed out by STRACHEY, C. J., in *Inayat Husain* (2). In the course of his judgement he says:—"It has, however, been contended that he is disqualified on the ground of the principle embodied in the new illustration to section 556. That illustration is as follows:—'A, as Collector upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws. A is disqualified from trying this case as a Magistrate.' The illustration simply embodies the principle that a man cannot be both prosecutor and judge in the same case. What the section shows is that if a magistrate or a judge is merely connected with a case by reason of his discharging some other public functions, or is concerned with it in some public

(1) (1904) I. L. R. 27 All., 25. (2) Weekly Notes, 1899, p. 74.

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capacity he is not on that ground alone to be deemed personally interested in the case. But if, in addition to a connection of that sort, he, in some capacity outside his magisterial or judicial functions, orders or directs the prosecution of a person for an offence, then he is deemed to be personally interested in the case and he cannot try it as magistrate or judge. The distinction is between having merely some public official connection with a case and ordering or directing the prosecution in some extra-judicial or extra-magisterial capacity." In the present case, as I have said, the magistrate ordered the prosecution of the applicant. I cannot accept the suggestion that the prosecution was directed by the secretary. He treated Mr. Collett's endorsement as an order to prosecute and merely set the machinery in motion. In accordance with the decisions which I have mentioned I hold that the Magistrate in this case must be deemed to have been personally interested within the meaning of section 556 of the Code of Criminal Procedure, and therefore was not qualified to try the case of the applicant. I set aside the conviction and direct that the case be retried by the District Magistrate or by some competent Magistrate nominated by him.

Conviction set aside—Retrial ordered.

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June, 1.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

UGAR SEN (DEFENDANT) *v.* LAKHMI CHAND AND ANOTHER (PLAINTIFFS).*

Partnership—Suit by surviving member to recover debt due to firm—Representatives of deceased members not necessary parties to suit—Act No. IX of 1872 (*Indian Contract Act*), *section* 45.

Held that the representatives of a deceased partner are not necessary parties to a suit for recovery of a debt which accrued due during the lifetime of the deceased partner. *Held* also that section 45 of the Indian Contract Act does not apply to a suit to recover a debt due to a partnership firm. *Gobind Prasad* v. *Chandar Sekhar* (1), *Motilal Bechardass* v. *Ghellabhai Hariram* (2) and *Debi Das* v. *Nirpat* (3) followed.

* Second Appeal No. 1095 of 1909, from a decree of Udit Narayan Sinha, Subordinate Judge of Jhansi, dated the 12th of July, 1909, confirming a decree of P. K. Ray, Munsif of Jhansi, dated the 23rd of March, 1909.

(1) Weekly Notes, 1887, p. 133. (2) (1892) I. L. R., 17 Bom., 6.
(3) (1898) I. L. R., 20 All., 365.