1910

RAM PARGAS UPADHIA v. SUBA UPADHIA.

from him had a like power. It is said that this view is in conflict with a ruling of this Court in *Harnandan Rai* v. *Nakchedi Rai* (1). The facts of that case are not similar to those now before us. In that case a simple money bond was executed before the passing of the Agra Tenancy Act, in which there was a provision that in default of payment of the debt the simple bond should be converted into a usufructuary mortgage. Default was made in payment but not till the 22nd of June, 1902, when the Agra Tenancy Act was in force, and it was held that the agreement of the parties to create a usufructuary mortgage could not be carried out in view of the provisions of section 20 of that Act. It is obvious that this case was governed by different considerations from those which present themselves in the present appeal.

We think that the lower appellate court was right and dismiss the appeal with costs.

Appeal dismissed.

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

1910
May 31.

MUHAMMAD ALAM AND ANOTHER (DEFENDANTS) *v.* AKBAR HUSAIN AND OTHERS (PLAINTIFFS).*

Act No. 1 of 1877 (Specific Relief Act), section 42—Muhammadan law—Waqf—Right of Muhammadans entitled to use such property to sue for a declaration that property is waqf.

The plaintiffs, Muhammadans resident in the city of Kanauj, sued for a declaration that a certain *idgah* and the land adjoining it situated in a village in pargana Kanauj was waqf property. *Held* that as Muhammadans who had a right to use the *idgah* they were entitled to sue and that no special permission was required to enable them to do so. *Zafaryab Ali* v. *Bakhtawar Singh* (2) and *Jawahra* v. *Akbar Husain* (3) followed. *Wajid Ali Shah* v. *Dianat-ullah Beg* (4) distinguished.

THE facts of this case were as follows:—

Certain Muhammadans, seven in number, residents of the city of Kanauj, brought a suit for a declaration that a certain idgah and lands joining it situate at Kandrauli, a village in

---

* Second Appeal No. 987 of 1909, from a decree of Muhammad Ishaq Khan, District Judge of Farrukhabad, dated the 8th of June 1909, modifying a decree of Daya Nath, Subordinate Judge of Fatehgarh, dated the 27th of September 1907.

(1) Weekly Notes, 1906, p. 302.
(2) (1883) I. L. R., 5 All., 497.
(3) (1884) I. L. R., 7 All., 178.
(4) (1885) I. L. R., 8 All., 31.

1910

MUHAMMAD ALAM v. AKBAR HUSAIN.

pargana Kanauj, were waqf property. The defendant was a purchaser of a portion of the property. The suit was resisted by him on the ground that the property was not waqf property. The court of first instance declared that the idgah was endowed property, but dismissed the suit as to the lands adjoining. The lower appellate court came to the conclusion that both the idgah and the lands adjoining were endowed property and decreed the suit in full. The defendant appealed.

Maulvi *Muhammad Ishaq*, for the appellant:—

Plaintiffs' suit came under the provisions of section 42 of the Specific Relief Act. The property having been found to be waqf property and no permission having been obtained from the Legal Remembrancer a suit of this nature was not maintainable under sections 92 and 93 of Act V of 1908. He cited *Wajid Ali Shah* v. *Dianat-ullah Beg* (1).

Babu *Balram Chandra Mukerji* (for Maulvi *Ghulam Mujtaba*), for the respondents:—

Any Muhammadan who has a right as such to use a mosque has a right to have it declared that the property appertaining to the mosque is waqf property. It is not necessary for him to show that he had any special interest in it. He had a right to prevent anyone from claiming property in the mosque and the adjoining lands. He relied on *Zafaryab Ali* v. *Bakhtawar Singh* (2), *Jawahra* v. *Akbar Husain* (3), *Raghubar Dial* v. *Kesho Ramanj Das* (4) and Ameer Ali's *Mohammedan Law*, Vol. I, p. 439. (3rd edition).

STANLEY, C. J. and GRIFFIN J.:—The plaintiffs, who are seven in number and all residents of the city of Kanauj, instituted the suit out of which this appeal has arisen to have it declared that certain land in the village of Kandrauli in the pargana of Kanauj is waqf property appertaining as such to an *idgah* or mosque which was built by the Moghal Emperors. It appears from the judgment of the lower appellate court that the land in question was recorded as *bagh idgah* at mauza Kandrauli, No. 463, at the time of the settlement made under Regulation IX of 1833, and No. 489 in the jamabandi of the settlement of 1872. The principal defendants are the purchasers of a part of

(1) (1885) I. L. R., 8 All., 31.
(2) (1883) I. L. R., 5 All., 497.
(3) (1884) I. L. R., 7 All., 178.
(4) (1888) I. L. R., 11 All., 18.

the zamindari of the village Kandrauli. The defendants set up a plea that neither the *idgah* nor the land adjoining it was waqf property, and upon this plea the main issue in the case was framed. The court of first instance gave the plaintiffs a declaration that the *idgah* was endowed property, but dismissed the suit as regards the land adjoining it. Upon appeal the learned District Judge came to the conclusion upon the evidence that the land adjoining the *idgah* was endowed property, and he decreed the plaintiffs' claim in full. From this decision the appeal which is now before us has been preferred, and the main contention of the learned vakil for the appellants is that the plaintiffs respondents have no right to maintain the suit. It is contended that apart from the provisions of section 42 of the Specific Relief Act and section 539 of the old Code of Civil Procedure, corresponding to sections 92 and 93 of Act V of 1908, a suit of the nature of the present suit cannot be maintained and that the plaintiffs who are Muhammadan residents of Kanauj, could not show that they had any special interest in the mosque in question and had no right to bring the suit. Reliance in support of this contention is based upon the ruling in *Wajid Ali Shah* v. *Dianat-ullah Beg* (1). In that case a Muhammadan not a resident of the district in which the alleged waqf property was situate, brought a suit against a person in possession of that property for a declaration that the property was waqf and in his plaint he did not allege that he himself was interested in the property further or otherwise than as being a Muhammadan. It was held by PETHERAM, C. J., and OLDFIELD, J., that unless it could be shown that the suit was maintainable under some statutory provision, it could not be maintained; that inasmuch as no permission had been given to the plaintiff to bring the suit, it was not maintainable under Act XX of 1863 or under section 539 of the Civil Procedure Code, and that the suit was not maintainable under the provisions of section 42 of Act I of 1877 (the Specific Relief Act). The learned Judges in their judgement observed, as regards section 42 of the Specific Relief Act that the only right asserted by the plaintiff was his right as a Muhammadan to have the property kept as waqf for the general body of

(1) (1885) I. L. R., 8 All., 31.

1910

MUHAMMAD ALAM *v.* AKBAR HUSAIN.

persons, who believe in the Muhammadan religion, and that section 42 of the Specific Relief Act applies to "any person entitled to any legal character or to any right as to any property," and, in certain circumstances, allows such a person to bring a suit for determination of his title to such character or right, and that the scope of the section is confined to the two classes which it specifies, and that the plaintiff could not sue as one of the first class, because he had no "legal character" which was denied by anyone, as he only asserted his character as a Muhammadan, and that had not been questioned, and further that the plaintiff did not for himself assert a right to any property, and by no act of the defendant had his right to any property been denied. This case is unlike the present in so far that in the present case the plaintiffs are Muhammadan residents of the city of Kanauj and, as such, are entitled to worship in any Muhammadan mosque in the city. If the decision to which we have just referred could be held to govern the case of the plaintiffs in the present suit, it appears to us to be inconsistent with the decision of a Full Bench of this court in the case of *Jawahra* v. *Akbar Husain* (1). In that case the Full Bench, consisting of Sir COMER PETHERAM C. J., and OLDFIELD, BRODHURST, MAHMOOD and DUTHOIT, JJ., held that "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 sections 30 and 539 of the Civil Procedure Code." In this case the Full Bench quoted with approval the case of *Zafaryab Ali* v. *Bakhtawar Singh* (2). In that case certain Muhammadans sued to set aside a mortgage of endowed property belonging to a mosque, a decree enforcing the mortgage, and a 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. It was held that the plaintiffs, as Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment, could maintain the suit, and that section 539 of the Civil Procedure Code had no application to the case, the endowment

(1) (1884) I. L. R., 7 All., 178. (2) (1881) I. L. R., 5 All., 497.

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.

1910

MUHAMMAD ALAM *v.* AKBAR HUSAIN.

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.

1910
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.