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March 14.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

ABDUL RAHMAN AND OTHERS (DEFENDANTS) *v.* YAR MUHAMMAD AND OTHERS (PLAINTIFFS).*

Arbitration—Remission of award—Refusal of arbitrators to reconsider it—Appeal impugning propriety of order of remission—Act X of 1877 *(Civil Procedure Code), ss.* 520, 521—*Mosque—Right to sue—Worshipper.*

An award was remitted under s. 520 of Act X of 1877. The arbitrators refused to reconsider it, and the Court thereupon proceeded with the suit, and gave the plaintiffs a decree. The defendants appealed from such decree on the ground, amongst others, that the award had been improperly remitted under s 520. *Held* that the question whether the award had been properly remitted under s. 520 or not could be entertained in such appeal.

The worshippers at a public mosque can maintain a suit to restrain the superintendents of such mosque from using it or its appurtenant rooms for purposes other than those for which they were intended to be used, and from doing acts which are likely to obstruct worshippers in entering or leaving such mosque.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the respondents.

The following judgments were delivered by the Court :—

SPANKIE, J.—Yar Muhammad and others, plaintiffs, residents of mohalla Madanpura in the town of Benares, aver that there is a "*Jahángírí masjid*" in the mohalla to which are attached a "*hujra*" or small room, and a "*saiban*" or hall. These appertain to the mosque and were from ancient times used by travellers, and also by the "*mutwali*" or superintendent ; the furniture of the mosque was kept in the apartments. On the 5th June, 1879, the defendant Abdul Rahman and two others wrongfully took possession of both apartments, turned out Mahmud Bakhsh, the "*mutwali*" referred to above, from the small room, and have occupied the rooms ever

* Second Appeal, No. 1092 of 1880, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 15th September, 1880, reversing a decree of Babu Mirtonjoy Mukarji, Munsif of Benares, dated the 8th April, 1880.

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since as shops. The plaintiffs, as residents of the mohalla and worshippers at the mosque, pray that the defendants may be ejected from both rooms; that the materials and stock of the shops may be removed; and that the defendants may be restrained from using the rooms in future as shops. The material part of the contention made by the defendants was that plaintiffs had no connection with the mosque to which the rooms are said to be attached; they have never had any possession of these rooms, nor was Mahmud Bakhsh the *mutwali*, nor had he ever any possession of the rooms, whereas defendants have always from ancient times been in possession of the rooms, and have used them as shops; the mosque was built by their ancestors, and is within the enclosure in which their house stands; the rooms were built long after the mosque, in the vicinity of the house and mosque, but they never belonged to the mosque, or were used as a store-room for the furniture of the mosque; no *mutwalis* ever lived in them except defendants and their ancestors who have been and are superintendents of the mosque, but even if these rooms appertained to the mosque, there would be no impropriety in occupying them as shops. The Munsif found that the defendants and their ancestors from the earliest times within the memory of living persons had been in possession of the mosque, and in the absence of reliable evidence to the contrary, it might be inferred that the mosque was the private property of the defendants; the rooms had been rebuilt thirty years prior to the suit by the ancestors of the defendants. The Munsif also held, upon the evidence of learned Muhammadans and authorities cited, that, though the rooms might be by position appurtenances to the mosque, still they were not indispensable; the mosque would be nevertheless a mosque, if the rooms had no existence; the indispensable appurtenance (*ferai masjid*) to a mosque was its court-yard (*sahan*); but these rooms were not appurtenances proper to the mosque, and what it would not be right to do in the mosque and its court-yard would be allowable in other appurtenances; under any circumstances the suit was barred by the adverse possession of the defendants for more than twelve years. The Munsif dismissed the suit. In appeal, on the agreement of the parties, the Judge referred the case to arbitration. The record was returned by the lower appellate Court under the provisions of s. 526 of Act X of

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1877 to be reconsidered by the arbitrators. Two of the arbitrators were in favour of the defendants and one in favour of the plaintiffs. But both parties objected to the award of the majority. On this account and for other reasons the case was sent back to the arbitrators, who, however, refused to reconsider their award. Upon this the Judge determined the case on the merits. He held that the suit was not barred by limitation; that the mosque was a public place of worship; that the defendants were simply superintendents and managers of the mosque; that the plaintiffs were competent to maintain the suit; that the rooms were built in the same style as the mosque, and were attached to it, and access to them could only be had over the pavement in front of the mosque; and that, looking to all the circumstances of the case, there could be no doubt that all Muhammadans, who have strict opinions on the subject of their religion, would regard the appropriation of the rooms in suit for purposes of trade, or lay work, as highly improper. He therefore decreed the appeal and the claim of plaintiffs in full, and reversed the decree of the Munsif with costs.

It is contended in second appeal by the defendants (i) that the decree was bad because the award of the majority was good, and not open to objection on any of the grounds which permit a remission for reconsideration; (ii) that the decree was bad because the plaintiffs not being recognised representatives of the public were not competent to bring the suit; (iii) that the Judge had not considered the plea that the mosque appertained to the private dwelling house of the defendants, and the rooms were built and occupied by the defendants and their predecessors; and (iv) that the decree was bad, because the rooms were no part of the mosque, and there was nothing objectionable in their use for trade.

There is no doubt that the parties agreed to abide by the opinion of a majority of the arbitrators. All three arbitrators were agreed that the suit was not barred by limitation; that the building was a public mosque; that the small room and hall were appurtenances of the mosque; and that the defendants and their ancestors had no higher possession than that of managers and superintendents. But the majority of the arbitrators hold that trade might be carried on in the rooms in dispute, and there was

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no reason for removing the defendants from their office in the mosque; but they added that the trade was not unjustifiable "provided it does not become necessary to open a passage to and from the mosque; as the court-yard of the mosque is used as a passage to and from the building in suit, it is not proper that purchasers, who consist of persons of all descriptions, should use the pavement of the mosque as their passage, which should therefore be totally stopped." Their order maintained the possession of defendants as superintendents of the mosque, and directed "them to put a total stop to the pavement of the mosque being used as a passage by purchasers." Both parties objected to this award, and the defendants in whose favour it was made urged that the order regarding purchasers not being permitted to use the pavement of the mosque as a passage was opposed to the claim and relief sought, and they prayed that that portion of the award might be amended under s. 518 of the Civil Procedure Code. The Judge considered that, as the award of the majority held trade to be lawful in the rooms in dispute, which were appurtenances of the public mosque, that part of their decision which forbade purchasers from having access to the rooms over the pavement of the mosque, the only means of entrance to those buildings, was inconsistent, indefinite, and incapable of execution, being likely also to promote a breach of the peace, and he accordingly remitted the award under cl. (*b*), s. 520 of the Code. It is hardly consistent with the objections taken below by the defendants that they should now complain of the award being remitted for reconsideration on the very point which was the subject of their dissatisfaction. True, they prayed that action might be taken under s. 518 of the Code, and had this been done there would have been an appeal under s. 588 (26) of the Code. But the Court in the exercise of its discretion remitted the award under cl. (*b*) of s. 520. The order remitting the award is not appealable as an order. It is open to doubt whether, when a decree has been made, we are competent to consider in second appeal whether or not the Judge has rightly exercised his discretion. The opening words of s. 522—"If the Court sees no cause to remit the award on any of the matters referred to arbitration for reconsideration in manner aforesaid"—seem to indicate that the

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Court is not fettered in the exercise of its discretion. The appeal now before us is under s. 584 of the Code, and is from the decree on the merits of the case, the award having become null and void under s. 521, in consequence of the refusal of the arbitrators to reconsider it. If one can look behind the decree and consider the propriety of the order remitting the award for reconsideration, one can only do so under cl. (*c*), s. 584 of the Code, and I think this very questionable. It would be difficult to say in this particular case, certainly in which both parties objected to the award, and the defendants on the very point which led to its remission to the arbitrators, that the exercise by the Judge of the discretion allowed to him had "possibly produced error or defect in the decision of the case on the merits." But I do not care to press this point, for this Court has in Full Bench allowed the propriety of an order under this section to be considered—*Nanak Chand* v. *Ram Narayan* (1)—and I was myself a party to the decision. There was, however, no discussion in the case as to whether we could or could not look at the order; that we could do so appears to have been unquestioned. As far as the first plea is concerned, I see no reason to doubt that the lower appellate Court acted within its powers in remitting the award. The Judge has pointed out the difficulty likely to arise when the award is acted upon, and he appears to have exercised his discretion aright in bringing the case within cl. (*b*), s. 520. As to the second plea, I have no doubt that the plaintiffs were competent to sue. I expressed a similar opinion in S. A. No. 860, decided on the 8th January, 1877 (2), that a heretofore worshipper at a shrine in the town in which he resides would have a right to call in question the conduct of the manager; and suits of a similar nature have been entertained in this and other Courts. It was held recently that worshippers or devotees of an idol are entitled to bring a suit complaining of a breach of trust with reference to the funds or property belonging to the idol or appendant to its temple.—*Radha Bai Kom Chimuji Sali* v. *Chimmaji* (3) It is sufficient to be a worshipper. The mosque in suit is a public one, and used by the residents of the mohalla: the plaintiffs, who use it for the purpose of worship, are

(1) I. L. R., 2 All., 181. (2) Unreported.

(3) I. L. R., 3 Bom. 27.

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at liberty to restrain the defendants, being persons in charge of the mosque, from acts which they believe to be contrary to the intention or purpose for which the mosque and its rooms were built, or which are likely to obstruct or impede worshippers in their entrance to or exit from the mosque. The third and fourth pleas require no particular notice; the finding of the Judge is quite clear and one of fact, and the record bears full testimony that he comprehended and understood all the points of the case. I would dismiss the appeal, and so far affirm the decree with costs as to direct that the room be cleared of all stores or articles of trade, and the defendants be restrained in future from using the rooms as shops.

OLDFIELD, J.—The first question for decision is whether the Judge's order setting aside the award is fit to be maintained. The claim is to eject the defendants from two buildings appertaining to a mosque, which they had used as a shop, and to restrain them from so using the rooms. The suit was dismissed by the Court of first instance, and in appeal to the Judge, by consent of parties, the questions at issue were referred to arbitration, and the award of the majority of the arbitrators was that the rooms appertained to the mosque, that the defendants were the *mutwalis* or superintendents, that there was no objection to their using the rooms for purposes of trade, and while maintaining the defendants' possession the award directed them to put a total stop to the pavement of the mosque, that is, the court-yard, being used as a passage by purchasers between the mosque and the rooms. The Judge held that the decision in respect of the injunction as to the use of the platform was indefinite and incapable of execution: he also held the award to be contrary to public policy and calculated to provoke a breach of the peace, and he remitted the award for reconsideration, and as the arbitrators refused to reconsider it, he set it aside and disposed of the case on the merits. The defendants have now appealed. I consider we are competent to entertain this appeal, as it is only where a decree has been made in the terms of the award that no appeal lies; and in determining the appeal it is open to us to consider whether the award did become legally void by the refusal of the arbitrators to reconsider their award when directed to do so by the Judge;

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and this will depend on whether the Judge's order remitting it was one which he could legally make. S. 520 empowers the Court to remit an award for reconsideration upon certain grounds specified in the section, but upon no others; and by s. 521 an award remitted under s. 520 becomes void on refusal of the arbitrators to reconsider it. S. 520 gives no unreserved discretion to a Court in the matter of remitting awards for reconsideration; and the refusal of the arbitrators to reconsider the award will render it void only when the order remitting it was one which could be properly made under s. 520. It is therefore the duty of this Court on appeal to see if the order of the Judge was one which he could legally make under s. 520 so as to render the award void by refusal to comply with it. I am not prepared to hold that the Judge exceeded his powers in remitting the award for reconsideration, as the award does seem to disclose a ground under cl. (*b*), s. 520, and to be so indefinite as to be incapable of execution. It permitted the defendants to use the rooms attached to the mosque for the sale of goods, but at the same time put a duty on them indefinite in its nature and which they could not fulfil. As the court-yard of the mosque is the only means of access to the rooms, the restriction would virtually prohibit the use of the rooms by purchasers, and as the platform is used by all the frequenters of the mosque, it would be quite impossible to determine who amongst them were using it as purchasers; the injunction is thus indefinite; it is not clear what precise object the arbitrators had in view in making it, and it would either remain a dead letter or be an interference with the legitimate use of the platform. So far then the first objection in appeal fails. The second objection has no force. With regard to the third and fourth objections, there is no reason to interfere in second appeal with the findings of fact of the Judge as to the rooms being part of the mosque and the defendants having no right to use them for trade purposes. The plaintiffs have not established any right to eject the defendants who are *mutwalis*, but they have a right to have the rooms cleared of all stock and articles of trade, and to restrict the defendants from using them in future. I therefore concur in the proposed order of my honorable colleague.

Appeal dismissed.