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order against which this application is made, the learned Civil Judge declined to exercise jurisdiction vested in him by law. We accordingly set aside the order and direct that the file be sent back to the lower court to dispose of the application according to law. The applicants will get their costs of this application.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice R. L. Yorke

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MUSAHEB KHAN AND OTHERS (PLAINTIFFS-APPLICANTS) v. PUNDIT RAJ KUMAR BAKHSHI AND ANOTHER (DEFENDANTS-OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), section 109(c)—Appeal to His Majesty-in-Council—Leave to appeal under section 109(c), when to be granted.

Ordinarily none but the parties to a litigation are concerned with the result of a case. In every such case, where the valuation is less than the prescribed limit, there is no right of appeal to His Majesty in Council. It is only when a case is of larger importance and the principle, when finally decided by their Lordships of the Privy Council, will be of benefit, not only to the people who are directly involved in the litigation, but to a considerable body of other people, that leave to appeal should be granted. *Raghunath Prasad Singh and another* v. *Deputy Commissioner of Partabgarh and others* (1), distinguished. *Bhaiya Hari Saran Das* v. *Har Kishen Das,* (2), and *Ruchcha Saithwar and another* v. *Hansrani and others* (3), relied on. *Musaheb Khan and others* v. *Raj Kumar Bakhshi, Pt., and another* (4), *Sheopujan Upadhiya and others* v. *Bhagwat Prasad Singh and others* (5), and *Subhan and another* v. *Baburam Singh and others* (6), referred to.

Mr. *M. Wasim,* for the appellants.

Mr. *L. S. Misra,* for the respondents.

THOMAS, C.J., and YORKE, J.:—This is an application under the provisions of order XLV, rules 2 and 3

*Privy Council Appeal No. 13 of 1938, for leave to appeal to His Majesty-in-Council.

(1) (1927) I.L.R., 2 Luck., 93.
(2) (1939) I.L.R., 14 Luck., 675.
(3) (1928) I.L.R., 50 All., 640.
(4) (1938) O.W.N., 937.
(5) (1931) I.L.R., 54 All., 459.
(6) (1929) I.L.R., 52 All., 329.

of the Civil Procedure Code for the grant of a certificate said to be under clauses (*a*) and (*c*) of section 109 of the Code of Civil Procedure that the case is a fit one for appeal to His Majesty-in-Council.

The application relates to the case of *Musaheb Khan and others* v. *Pandit Raj Kumar Bakshi* and *Mst. Dhan Raj Patti Bakshi* which came before us in second appeal and was decided by us on the 6th September, 1938, the judgment being reported as *Musaheb Khan and others* v. *Raj Kumar Bakshi, Pt. and another* (1). The case related to a mosque or rather a building having the appearances of a mosque in mohalla Alamnagar in the Saadatganj Ward of Lucknow city. The building was situated in private property which had come to the ancestors of the defendants by a court auction in 1868. The plaintiffs instituted the suit as a representative suit claiming (*a*) a declaration that the mosque, with the land and *pucca* well in front of it, is a place of worship for the Musalmans, (*b*) that a perpetual injunction be issued to the defendants not to demolish the building or to interfere with the land in front of the mosque or the *pucca* well, (*c*) that the defendants be ordered to demolish the building which had been constructed on the old route to the mosque and to re-open the way "(M. N.)" as it used to be (*d*) that the defendants be made to repair the damage done to the mosque by its being pulled down.

The suit was dismissed by the trial court which held that there was no evidence of dedication, and implied that the mosque, since the building had all the appearance of a mosque, must be regarded as being a private mosque. It further held against the plea of the plaintiffs that the Musalman public had been praying in the mosque for a long time before the 18th July, 1936, and accordingly rejected the plea that the mosque had become a public mosque by user. It went on to hold that the defendants' right to hold the building in suit as their private property was proved. On the question as to the acquisition by prescription of a right of way

(1) (1938) O.W.N., 937.

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through the old gate marked "M. N." it held that in the absence of satisfactory evidence to prove that a right of access to the mosque had been acquired by continuous use of the right of way for 20 years (ending not more than two years before the date of suit), the issue must be answered against the plaintiffs.

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In first appeal the learned District Judge similarly rejected the case of the plaintiffs based on dedication and their furher case that dedication should be inferred from user, and in consequence he arrived at the same conclusion that the building in suit was not a public mosque. It followed that it must be no more than a private mosque, the title in which rested with the defendants who had the title to the whole of the property in which this building was situated. He went on to consider the question of adverse possession on the assumption that the building might be held to be a public mosque, and on this question he held it proved that the defendants had been in exclusive possession of the mosque for much more than 12 years and that the defendants had established their right to the building by adverse possession quite apart from the other findings in the case.

On the matter coming up before us more or less the same points were argued and dealt with in our judgment reported as mentioned. The first question considered was whether the building is a public mosque or a private place of worship. The findings in regard to the absence of proof of dedication, separation, or delivery and the absence of proof of dedication by user were findings of fact. We examined the other evidence and came to the conclusion that the entries in public records etc. only proved that the building in question was a place of worship and did not establish that it was a mosque in the sense of a public mosque. In this connection we held that the documents on which reliance was placed by the plaintiffs were not instruments of title but only pieces of evidence. On the finding that the building in suit is not a public mosque but

only a private place of worship it would follow that it passed along with the property to the defendants' predecessors under the court sale of 1868 just like the rest of the property did, and the plaintiffs must necessarily fail.

We proceeded to take up the question of adverse possession which was argued before us with some care. The case of adverse possession necessarily proceeded on the assumption that the building in suit was a public mosque. Learned counsel who argued the case conceded in the opening of his argument that there could be adverse possession over a mosque and he argued the case with the object of showing that adverse possession was not established. Our decision on this question was a decision on a point of law based on the consideration of the cumulative effect of a number of facts relating to this particular building.

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In the present application we are asked to grant a certificate under the provisions really of section 109(*c*) only. The valuation of the suit was below Rs.10,000 and by our decision we have affirmed the decision of the two courts below. Learned counsel on both sides have drawn our attention to a number of decisions in which rules have been laid down as to the nature of cases in which a certificate may be granted under clause (*c*) of section 109. For the applicants reliance was placed on *Radhakrishna Ayyar and another* v. *Swaminatha Ayyar* (1), where after dealing with general principles governing the granting of certificates in cases where the subject-matter of the suit is Rs.10,000 their Lordships go on to say, "This does not cover the whole grounds of appeal, because it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which

(1) (1920) L.R., 48 I.A., 31 at p. 33.

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the subject-matter in dispute cannot be reduced into actual terms of money. Sub-section (*c*) of section 109 of the Civil Procedure Code contemplates that such a state of things exists, and rule 3 of order XLV regulates the procedure."

Learned counsel went on to refer to *Subhan and another* v. *Baburam Singh and others* (1), a case to which, as in the present case, sub-section (*c*) of section 109 alone applied, and the certificate was granted on the view that this was a matter of general importance to both communities and therefore a fit case for appeal. The foundation for the grant of certificate was that the judgment of the High Court in second appeal amounted to an assertion (or more properly led to the inference) that it is incompetent for members of the Muhammadan community to take out any new religious procession at all. It is clear that the matter was one of great general importance.

Another case to which our attention was drawn was *Sheopujan Upadhiya and others* v. *Bhagwat Prasad Singh and others* (2). That again was a case in which certificate was granted on the view that the questions sought to be agitated in the appeal to the Privy Council are substantial questions of law involving matters of principle which not only affect the parties to the litigation but are likely to concern a large class of persons who are or may be in the same situation as the plaintiffs and in whose case the decision of the Privy Council is sure to be a guiding precedent.

Learned counsel also referred to *Raghunath Prasad Singh and another* v. *Deputy Commissioner of Partabgarh and others* (3), but that was not a case which fell under the provisions of section 109(*c*) only. The valuation was over Rs.10,000 but this Court had affirmed in appeal the decision of the court below and what was required was that the appeal should involve "some substantial question of law" and it was held that the condition was satisfied if there was a substantial ques-

(1) (1929) I.L.R., 52 All., 529. (2) (1931) I.L.R., 54 All., 459.
(3) (1927) I.L.R., 2 Luck., 93.

tion of law between the parties. The case has no applicability to the present case.

On the other hand reference has also been made to *Bhaiya Hari Saran Das* v. *Har Kishen Das* (1), in which it was held that a case should be certified to be a fit one for appeal to His Majesty-in-Council under clause (*c*) of section 109 only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who were directly involved in the litigation but also to the public at large.

The same view has been taken in *Ruchcha Saithwar and another* v. *Hansrani and others* (2) in which the headnote runs:

> "Ordinarily none but the parties to a litigation are concerned with the result of a case. In every such case where the valuation is less than the prescribed limit, there is no right of appeal to His Majesty-in-Council. It is only when a case is of larger importance and the principle, when finally decided by their Lordships of the Privy Council, will be of benefit, not only to the people who are directly involved in the litigation, but to a considerable body of other people, that leave to appeal should be granted."

This principle has been so frequently stated that there is no room for doubt that it must be treated as a matter of settled law, and it is in the light of the law as so settled that we have to consider the present application.

A large number of grounds have been taken but substantially they relate to the same two questions which came for decision before us. First whether the building in dispute is a public mosque or a private place of worship, and secondly, whether assuming it to be a public mosque the defendants have established adverse possession over the mosque.

Ground (*a*) is to the effect that we should have held that under the Muhammadan law there cannot be a private mosque and that every mosque must be held to be a public mosque. The ground is really founded on

(1) (1939) I.L.R., 14 Luck., 675. (2) (1928) I.L.R., 50 All., 640.

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what might be described as a play upon words. If the word "mosque" is to be understood as meaning a public place of worship, there obviously cannot be a private public place of worship. As to the possibility of there being a private place of worship for Muhammadans, just as there may be for the followers of other religions, no question was raised in the arguments before us. We suppose this ground to mean that there cannot be a private place of worship having the appearances of a mosque. No such argument was ever addressed to us nor could be addressed to us in the light of the commentaries, which were put before us, which make it clear that by merely constructing a building in the shape of a mosque the builder does not create a mosque, that is a public mosque or public place of worship which only becomes so by dedication, delivery, permission or user.

Grounds (*b*) and (*c*) relate to the inferences to be drawn from the documents on the record, and we are clear that these grounds do not raise any substantial question of law or question of great public importance.

Ground (*d*) is that first there can be no adverse possession of a mosque and second that this Court has erred in holding that the defendants have established their adverse possession in the mosque. As regards the first question it will be sufficient to say that we could not regard as a substantial question of law a question on which learned counsel arguing the appeal before us, one of the acknowledged leaders of the bar in Lucknow, conceded that there could be such adverse possession. On the second point the decision which we have arrived at is a decision in regard to adverse possession over a particular building in suit in the present case. Our decision was unquestionably not in regard to any matter of wider public importance, and in so far it could not furnish a ground for the grant of certificate under section 109(*c*).

Grounds (*e*), (*f*), (*g*) and (*h*) all relate to subsidiary question in connection with adverse possession, while

ground (*i*) merely puts forward an excuse for the plaintiffs failing to institute a suit for the recovery of possession. In our opinion the statement in ground no. (*j*) that the proposed appeal to His Majesty-in-Council involves a substantial question of law and is one of great public importance to the Musalman community cannot be sustained. We have no doubt in our minds that this is not a case which can be brought within the scope of the principles laid down in regard to the grant of a certificate that the case is a fit one for appeal to His Majesty-in-Council.

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We accordingly refuse to grant a certificate and dismiss this application with costs.

Before leaving the case we should perhaps note that there is a slip of the pen on page 954 of the decision as reported in the Oudh Weekly Notes. The last word on the page should be "permission" instead of "precariousness".

Application dismissed.

REVISIONAL CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice Radha Krishna Srivastava

SHRI MAHARANI LAKSHMI PAT MAHADEVI GARU. DOWAGER MAHARANI OF JAYPORE (APPLICANT) *v.* THE COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES (OPPOSITE-PARTY)*

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Income-tax Act (XI of 1922), sections 23(4), 30, 31 and 66(2)(3) —Assessment under section 23(4)—Appeal against assessment rejected as not lying—Order of rejection of appeal, whether under proviso to section 30 or section 31—Provisions of section 66(2), if apply to such order—Commissioner refusing to state case on ground that question arising for decision is settled question of law—High Court, if can require Commissioner under section 66(3) to state and refer case.

Where income-tax assessment is made on the assessee under section 23(4) and an appeal against the assessment is rejected on

*Applications Nos. 1, 2 and 3 of 1939, under section 66 of the Indian Income-tax Act, for revision of the order of Mr. A. G. Ansari, Commissioner of Income-tax, Central and United Provinces, at Lucknow, dated the 21st October, 1938.