APPELLATE CIVIL.

Before Jai Lal and Abdul Rashid JJ.

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May 15.

JIWAN KHAN AND OTHERS (PLAINTIFFS) Appellants

versus

HABIB AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 495 of 1928.

Muhammadan Law—Public mosque—right of all Mussalmans to use for purposes of worship—reservation for particular sect—whether valid—anticipated breach of peace—whether a ground for refusing declaration.

In a suit by certain *Shias* for a declaration that they and all *Shias* are entitled to worship in the Khajurwali mosque of Pind Dadan Khan and also for a permanent injunction restraining the defendants from obstructing the plaintiffs in performing worship in this mosque according to the tenets of their sect, the defendants pleaded that the plaintiffs were heretics, and could not be regarded as true Muslims, that there were two separate *Shia* mosques in the town, that the plaintiffs had never used this mosque for worship, that there was a danger of the breach of the peace if the plaintiffs were allowed to worship in the *Sunni mosque;* and that the plaintiffs had indulged in abusive language towards the *Ashabs*, *Hazrat* Abubakar, *Hazrat* Umar and *Hazrat* Usman. The trial Judge decreed the suit subject to certain provisos to the effect that the plaintiffs in the exercise of their right of worship should not interrupt or disturb the worship of others. The defendants' appeal, however, was accepted on the grounds *inter alia*, that the theory that every Mussalman has a right to say prayers in a mosque had never been practised in this mosque; and that, if a decree were passed in favour of the plaintiffs it would lead to periodical fights between the two sects. It was not, in fact, established that there was any imminent danger of fights between the *Shias* and the *Sunnis* if the plaintiffs' suit were decreed.

Held, that it is a well recognised principle that if a person has an undoubted legal right to say his prayers in a

mosque the Courts cannot refuse to recognise that legal right merely because an anticipated breach of peace is to be committed by the other side.

Held also, that a mosque does not belong to any particular sect; for once it is built and consecrated, any reservation for people of a particular locality or sect is void, and persons not belonging to that locality or sect are entitled to worship in it, whether or not any particular sect had contributed towards the site or the building of the mosque and had been saying their prayers in it.

Maula Bakhsh v. *Amir-ud-Din* (1), followed.

Jangu v. *Ahmad Ullah* (2), relied on.

Held further, that every person who believes in the unity of God and the mission of Muhammad as a prophet is a Mussalman, to whatever sect he may belong, and that the *Shias* satisfy this test; and that there is no such thing as a *Sunni* or a *Shia* mosque though the majority of the worshippers at any particular mosque may belong to one or the other sect either generally or at various times.

Mussammat Iqbal Begum v. *Mst. Syed Begum* (3), followed.

And, that the trial Judge had rightly exercised his discretion in granting the declaration sought subject to the provisos mentioned.

Khazan Chand v. *Crown* (4), *Thakur Singh* v. *Crown* (5) and *Abdus Subhan* v. *Korban Ali* (6), relied on.

Game Shah v. *Maulu Shah* (7), *Ma Htay* v. *U Tha Hline* (8), and *Jaipal Kunwar* v. *Indar Bahadur Singh* (9), distinguished.

Second appeal from the decree of Mian *Ahsan-ul-Haq, District Judge, Jhelum, dated the 3rd December 1927, reversing that of* Diwan *Sita Ram, Senior*

(1) (1920) I. L. R. 1 Lah. 317.
(2) (1891) I. L. R. 13 All. 419 (F.B.).
(3) (1933) 34 P. L. R. 24.
(4) (1926) I. L. R. 7 Lah. 482.
(5) (1927) I. L. R. 8 Lah. 98.
(6) (1908) I. L. R. 35 Cal. 294.
(7) 1930 A. I. R. (Lah.) 728.
(8) (1924) I. L. R. 2 Rang. 649.
(9) (1904) I. L. R. 26 All. 238 (P.C.).

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Subordinate Judge, Jhelum, dated the 23rd February 1927, and dismissing the plaintiffs' suit in toto.

BARKAT ALI, ASLAM KHAN and S. R. SAWHNEY, for Appellants.

GHULAM MOHY-UD-DIN and MUHARRAM ALI CHISHTI, for Respondents.

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ABDUL RASHID J.—This second appeal has arisen out of a suit instituted by 18 *Shias* of Pind Dadan Khan to obtain a declaration that the plaintiffs and all other *Shias* are entitled to worship in the Khajurwali mosque and also a permanent injunction restraining the defendants from obstructing the plaintiffs in performing worship in this mosque according to the tenets of their sect. The defendants pleaded *inter alia* that the plaintiffs were *Sahih Shias* and as they indulged in abusive language towards the *Ashabs*, *Hazrat* Abubakar, *Hazrat* Umar, and *Hazrat* Usman, they were heretics and could not be regarded as true Muslims, that there were two separate *Shia* mosques in the town, that the plaintiffs had never used this mosque for worship, that there was a danger of the breach of the peace if the plaintiffs were allowed to worship in this *Sunni* mosque, that the granting of a declaratory decree was entirely within the discretion of the Court and that in the peculiar circumstances of this case the Court should not exercise this discretion in favour of the plaintiffs.

The trial Court passed a decree in favour of the plaintiffs in the following terms:—"It is ordered that the declaratory decree is hereby passed in favour of the plaintiffs against the defendants to the effect that they have a right to worship and say their prayers in the mosque known as Khajurwali and the defen-

dants have no right to stop them from doing so and an injunction is passed in their favour that the defendants have no right to stop the plaintiffs from doing so. The plaintiffs' right will be exercised in such a manner as not to disturb the rightful exercise by the defendants of their right of prayer and worship in the mosque according to their rituals and if the plaintiffs commit such act they can be turned out by the *Mutwali* of the mosque. The rest of the plaintiffs' suit about a declaration in favour of the whole community of *Shias* is dismissed."

The defendants appealed to the District Judge who held that the Khajurwali mosque was a public mosque, that once a building had been dedicated as a public mosque every Mohammadan had a right to enter it for the purpose of worship and to join in the congregational prayer in any manner sanctioned by the Muslim Ecclesiastical Law. In spite of these findings, however, he accepted the appeal of the defendants on two grounds, (1) that all the rulings cited by the learned counsel for the *Shias* in support of their right to say prayers in this mosque related to disputes between the different sects of *Sunnis inter se* and did not deal with disputes between *Shias* and *Sunnis*, and (2) that the theory that every Mussalman has a right to say prayers in a mosque has never been practised in the Khajurwali mosque of Pind Dadan Khan and that if a decree is passed in favour of the plaintiffs it will lead to periodical fights between the two sects. Against this decision the plaintiffs have come up in appeal to this Court.

It is a well recognised principle of Mohammadan Law that a mosque does not belong to any particular sect. The *Sunnis* are divided into four main sects,

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the *Hanafis*, the *Shafais*, the *Malakis* and the *Hambalis* and some of the differences between these sects of *Sunnis* are as great as between the *Shias* and the *Sunnis*. The authorities cited before the learned District Judge, therefore, did not become inapplicable to the present case simply because they related to disputes between the different sects of *Sunnis inter se* and not to dispute between *Sunnis* and *Shias*. In the Full Bench ruling of the Allahabad High Court *Jangu* v. *Ahmad Ullah* (1) Mahmud J. remarked "that it is a fundamental principle of the Mohammandan Law of *wakf*, too well known to require the citation of authorities, that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God (To use the language of the *Hedaya*) in such a manner as subjects it to the rules of Divine property, the appropriator's right in it is extinguished, and it becomes the property of God by the advantage of it resulting to his creatures." A mosque once so consecrated cannot in any case revert to the founder and every Mohammadan has the legal right to enter it and perform devotions according to his own tenets, so long as the form of worship is in accord with the recognised rules of Mohammadan Ecclesiastical Law."

Further it seems clear that when a mosque is consecrated and it is purported to be reserved for the people of a particular locality or sect the reservation is void and persons not belonging to that locality or sect are entitled to worship in it. It was held in *Maula Bakhsh* v. *Amir-ud-Din* (2), that where a *wakf* had been validly made exclusively for the use of a

(1) (1891) I. L. R. 13 All. 419 (F. B.). (2) (1920) I. L. R. 1 Lah. 317.

particular sect the *wakf* is good and the condition attached to it is void. It was contended on behalf of the respondents that the appellants came into Court alleging that the Khajurwali mosque had been built on land belonging to *Raja* Muhammad Afzal Khan who was a *Shia*, that *Shias* had contributed to the building of the mosque and that they had been saying their prayers in it and that as the learned District Judge had found that the above allegations of the plaintiffs had not been established he acted rightly in dismissing their suit.

In my view this contention cannot prevail for if it be conceded that the mosque has not been built on land belonging to *Shias*, that the *Shias* have not contributed anything towards the cost of the building nor have they ever said prayers in this mosque in the past, even then the *Shias* have a right to say prayers in this mosque so long as they are to be regarded as Mussalmans. Realising this difficulty it was contended half-heartedly by counsel for the respondents that *Shias* were not Mohammadans. This argument has merely to be mentioned to be rejected. It has been laid down in numerous authorities that every person who believes in the unity of God and the mission of Muhammad as a prophet is a Mussalman to whatever sect he may belong. The *Shias* undoubtedly satisfy this test and that is why even the learned District Judge did not regard the *Shias* as non-Muslims. In *Mussammat Iqbal Begum* v. *Mst. Syed Begum* (1), it has been held by a Division Bench of this Court that all mosques are open to all sects of Islam and there is no such thing as a *Sunni* or a *Shia* mosque though the majority of the worshippers at any particular mosque may belong

(1) (1933) 34 P. L. R. 24.

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to one or the other sect either generally or at various times.

It was vehemently urged on behalf of the respondents that a declaratory decree should not be passed in this case as it would lead to periodical fights between the *Shias* and the *Sunnis*. In 1924 the *Shias* presented a petition under section 145, Criminal Procedure Code, with respect to this mosque. *Malik* Allah Bakhsh, Magistrate, 1st Class, dismissed their petition on the 28th November, 1924, holding that as there was no danger of the breach of the peace they should seek their remedy in a civil Court. It does not, therefore, seem to be established on the present record that there is any imminent danger of fights between the *Shias* and the *Sunnis* if the plaintiffs' suit is decreed. Be that as it may, it is a well-recognised principle that if a person has an undoubted legal right to say his prayers in a mosque the Courts cannot refuse to recognise that legal right merely because an anticipated breach of the peace is to be committed by the other side. Under such circumstances those Mohammadans would bring themselves within the grasp of the Criminal Law who for the purposes of disturbing others engaged in their prayers make any demonstration in a mosque and thereby create a disturbance. Reference may be made in this connection to *Khazan Chand* v. *Crown* (1), *Thakur Singh* v. *Crown* (2) and *Abdus Subhan* v. *Korban Ali* (3).

Reliance was placed on behalf of the respondents on *Game Shah* v. *Maula Shah* (4), *Ma Htay* v. *U. Tha Hline* (5) and *Jaipal Kunwar* v. *Indar Bahadur Singh* (6). These cases, however, are distinguishable

(1) (1926) I. L. R. 7 Lah. 482.
(2) (1927) I. L. R. 8 Lah. 98.
(3) (1908) I. L. R. 35 Cal. 294.
(4) 1930 A. I. R. (Lah.) 728.
(5) (1924) I. L. R. 2 Rang. 649.
(6) (1904) I. L. R. 26 All. 238 (P.C.).

as they merely lay down that the granting of a declaratory decree is discretionary with the Court and that this discretion should not be exercised in favour of a plaintiff whose conduct has been fraudulent. In the present case the trial Court exercised a wise discretion in giving the plaintiffs a decree subject to certain provisos to the effect that the plaintiffs in the exercise of their right of worship should not interrupt or disturb the worship of others. I am of the opinion that the judgment of the learned District Judge reversing the decree of the trial Court is unsustainable.

I would, therefore, accept the appeal with costs, set aside the decree of the learned District Judge and restore the decree of the trial Court in favour of the plaintiffs.

JAI LAL J.—I agree. JAI LAL J.

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Appeal accepted.