

FOR NECESSARY ACTION

Speeches & Judgments of

SIR DOUGLAS YOUNG

VOL. II

1941

For Necessary Action

Speeches & Judgments of
Sir DOUGLAS YOUNG,

CHIEF JUSTICE, HIGH COURT OF JUDICATURE AT LAHORE

VOLUME II

EDITED BY

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AND

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SHAHID GANJ CASE

The Mosque known as Masjid Shahid Ganj, through its next friend Maulana Maulvi Abul Hasnot Syed Mohammad Ahmad, Preacher of Masjid Wazir Khan, Lahore and others,

Plaintiffs — Appellants

versus

Shiromani Gurdwara Parbandhak Committee, Amritsar, through its President, and Committee for the Notified Sikh Gurdwaras within the municipal limits of Lahore,

Defendants — Respondents.

Civil Regular First Appeal No. 244 of 1936,
decided on 26th January 1938 by

SIR DOUGLAS YOUNG, CHIEF JUSTICE,

MR. JUSTICE BHIDE,

AND

MR. JUSTICE DIN MOHAMMAD.

For Appellants —

Dr. Mohammad Alam, Advocate, for all Appellants except Nos. 1, 2, 6, 9, 12 and 17 ;

Mr. Barkat Ali, Advocate, for all Appellants ;

Messrs. Ghulam Rasul Khan and Taj-ud-Din, Advocates for Nos. 1, 6, 9, 12, and 17 ;

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Mr. M. Aslam Khan, Advocate, for Appellant
No. 2 only ; and

Mr. Coltman, Advocate, for all Appellants on 10th
and 11th January 1938.

For Respondents —

Messrs. Badri Das, Charan Singh, Harnam Singh
and Narindar Singh, Advocates.

JUDGMENT

Young, C. J.

This is an appeal from the Court of the learned
District Judge of Lahore.

The plaintiffs brought a suit in the lower Court^t
praying for a declaration that a certain parcel of land
known in this case as Shahid Ganj was and is the site
of a *wakf* mosque, dedicated to God ; that the mosque
could not be used for any purpose which, according
to Mohammadan Law, was opposed to the purposes of
a mosque, and that plaintiffs Nos. 2 to 18, and also all
other followers of Islam, had a right to use the
mosque for purposes of worship without let or hind-
rance by anyone. Consequential relief was claimed
in the form of a mandatory injunction to the follow-
ing effect :

That the defendants —

- (a) should not use plaintiff No. 1 (i. e. the mosque
itself) for any purpose which may be contrary
to its sanctity and use according to Mohamma-
dan Law ;
- (b) should not in any way interfere in the plaintiffs
Nos. 2 to 18's rights of worship relating to the
said mosque; and
- (c) should re-construct the portion of the mosque
which was demolished by them on the night
between the 7th and 8th July 1935, in the

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same shape and form as it was before demolition. In the alternative, the plaintiffs claimed damages for the demolition so that they might re-build it in its former shape.

It is to be noted that the plaintiffs did not sue for possession.

By their defence the defendants, that is the Shiromani Gurdwara Parbandhak Committee and another, who are in possession of the site, denied that the building was a mosque, claimed that the suit was barred by (a) the principle of *res judicata*, (b) by the provisions of the Sikh Gurdwaras Act, (c) by decision of the Sikh Gurdwaras Tribunal, dated the 20th of January 1930, and that the suit was not within the time prescribed by the Limitation Act.

The learned District Judge found that the building was in its origin *wakf*, that is originally dedicated for prayers in 1722, but that it had not been used as a mosque for prayers since 1762. He decided that the claim was not within limitation, and was barred by the decision of the Sikh Gurdwaras Tribunal and the provisions of the Sikh Gurdwaras Act, but not by the decisions of the Courts between 1850 and 1883. He held that the defendants had acquired a title by adverse possession and that plaintiff No. 1, that is the mosque itself, was a juristic person capable of suing through its next friend.

The facts which are proved, and accepted by the parties, are that in the year 1722 the mosque was erected, dedicated to God, and used as a mosque until the establishment of Sikh rule in the year 1762; that from the year 1762 till the institution of the suit the building had not been used as a mosque or place of worship; that two actions had been brought by a descendant of the original *Mutwalli* of the mosque in

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1854 and 1855, but both these actions had failed on the ground of limitation; that in 1925 the Sikh Gurdwaras Act was passed and the question was litigated under that Act as to whom this property belonged; the Anjuman Islamia of Lahore filed a petition on behalf of the Muslims under section 5 of the Act praying that the mosque should be excluded from the consolidated list, and an issue was framed as to what right, title or interest the Anjuman had in the property claimed; the Tribunal decided that the Anjuman had no right, title or interest in the property; that on the night of the 7th of July 1935 the Sikhs demolished the mosque.

From the date of their possession in 1762 the Sikhs have used this building as their own. In one of the domes they kept the Guru Granth Sahib until about the year 1883 when the dilapidation of the building made it dangerous for the Granth Sahib still to be kept there. The Sikhs have also for many years let the building on rent to tenants, and for the use of the tenants they placed a latrine upon the roof. These facts have not been challenged here in appeal. Mr. Badri Das on behalf of the respondents accepts the findings that the mosque as an institution is a juristic person, and also that the building was originally dedicated to sacred uses as a mosque. It is not contested by the appellants that the building has not been used as a mosque, that is for the purpose of prayers, since 1762. In fact the findings of fact by the lower Court throughout are not contested here. There has been continuous adverse possession by the Sikhs for no less than 173 years, and during that time there has been a complete denial to the Muslims of all their rights. The facts being as they are it is obvious that no appellants ever were faced with a more difficult task than the appellants in this appeal. The fact

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that the plaintiffs did not sue for possession shows that they recognised the difficulties of their position.

The main point argued in this Court concerns the Indian Limitation Act, and the finding of the Court below that the suit was not brought within time. It has been somewhat difficult to follow the arguments of learned counsel appearing for the appellants, but the points appear to be these:—

- (1) That Mohammadan Law governs *wakfs* and that Mohammadan Law does not recognise any rule of limitation.
- (2) That a mosque as a juristic person, and because of its sanctity, has a perpetual existence and cannot be subject to adverse possession.
- (3) That property in a mosque vests in God and nothing divests God of His property except, perhaps, an Act of the Legislature.
- (4) That a mosque is not immoveable property and, therefore, Article 144 of the Limitation Act does not apply.
- (5) That if the Limitation Act is held to apply, a new period of limitation commenced to run from the date of the demolition of the mosque on the ground that when property is dedicated to sacred uses there is a duty cast on an owner of such property, whether his title is acquired by adverse possession or in any other manner, to maintain the sacred character of the land or building so dedicated, and to maintain the sacred building.

We have been referred to a mass of authority, little of which is of assistance in dealing with the points in issue. All these points can be dealt with together. In my opinion it is clear that if the

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Limitation Act applies to the suit there is no force in any of them.

The first point to be considered is the effect of the Punjab Laws Act (Act IV of 1872) upon the personal law of the Muslims. Section 5 of the Act is very much in point. It is as follows :—

“5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be :—

- (a) Any custom applicable to the parties concerned, which is not contrary to justice, equity, or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority ;
- (b) The Mohammadan Law in cases where the parties are Mohammadans and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.”

It is clear therefore from this Act that Mohammadan Law does not necessarily govern cases in which even Mohammadans only are interested. This Act allows for modification of Mohammadan Law by legislative enactment and makes it clear that Mohammadan Law only applies in cases where the parties are Mohammadans and there has been no legislative interference with the personal law.

The next point to consider is the Indian Limitation Act, 1908 (Act IX of 1908). Section 3 is as follows :—

“3. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.”

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This section applies to *every suit instituted*. It provides no exception for suits concerning *wakfs*, religious institutions, or land and buildings dedicated to sacred uses. Article 144 of the Limitation Act provides a period of 12 years within which an action for possession of immoveable property must be brought, the time to run from the date when the possession of the defendant became adverse. Articles 134 (a), 134 (b) and 134 (c) which prescribe the period of limitation in actions concerning Hindu, Mohammadan or Buddhist religious or charitable endowments show conclusively that the contention of the appellants that *wakfs*—or property dedicated to God—are outside the law of limitation is not maintainable. That the Act is concerned with the personal law of Mohammadans is shown by reference to Articles 103, 104 and 125. The Limitation Act, therefore, beyond any argument, applies to this suit, and the original Mohammadan Law has been accordingly modified by legislative enactment. It is not possible therefore for it to be argued now that Mohammadan Law *simpliciter* can be applied by the Courts of British India.

While dealing with the Limitation Act it is important to note Section 28 which reads as follows:

“At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.”

It has been frequently held, and now cannot be disputed, that the operation of Section 28 perfects a title to the property in favour of the person in adverse possession after the period prescribed for recovery of possession has run. Twelve years continuous possession by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner of land, but confers a good title upon the

wrong-doer. See I. L. R. 3 Calcutta 224 and I. L. R. 3 Allahabad 435.

It was conceded by counsel for the appellants that there is no direct authority in favour of his proposition that a suit concerning *wakf* property was not subject to the Limitation Act. Having regard to the quotations herein from the Act itself it is quite clear that there could be no such authority. The cases to which we have been referred, which were alleged by counsel indirectly to apply to this point, were cases in which only Muslims were involved, or the Limitation Act did not apply, or adverse possession had not been established. I. L. R. 35 Mad. 681 was strongly relied upon by the appellants. All that that case decided, however, was that, according to Mohamadan Law, when a *wakf* was created all proprietary rights of men were extinguished in the property so dedicated. No question of adverse possession or limitation arose. This proposition of law, however, clearly applies only as between Muslims themselves, and then only when no statutory modification of Mohamadan Law exists. We have not been referred to any authority for the proposition that as between Muslims and non-Muslims dedicated property was inalienable or not subject to adverse possession. We have also been referred by counsel for the appellants to cases both civil and criminal concerning grave-yards. In none of these, however, was the question of limitation or adverse possession raised or decided. The Mohamadan Law relating to *wakfs* was laid down, namely that once land was dedicated to the purpose of a grave-yard it was inalienable. I deal later with the offence under Section 297, Indian Penal Code; it can have no bearing upon the civil aspect of this question. The principal authority on civil law relied upon by the appellants is that of *Ballabh Das and another v. Nur*

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Mohammad and another (38 P. L. R. 182 P. C.). This was a decision of their Lordships of the Privy Council. This case, however, by no means covers the proposition argued by the appellants. In this case in the year 1928 Ballabh Das, according to the findings in the lower Courts, obtained by deed a transfer of the land in suit from one *Musammât* Musaheb Khanam, who was the descendant of the original *manager* of the *qabristan* or grave-yard. Their Lordships held that the land was a grave-yard and that the ancestor of the vendor was not the owner of the land but only the manager; that the land was a cemetery in the ordinary Mohammadan sense and was no longer the subject of private ownership. It followed that the vendor had no title to the land and that, therefore, Ballabh Das could not get a better title than his vendor had. It is to be noted in this case that the question of adverse possession did not arise, the land was alienated in 1928 and the suit brought well within time. This case is, therefore, no authority for the proposition that land dedicated to sacred uses is not alienable to strangers, or that adverse possession would not confer a good title upon a vendee who was in possession of the land for 12 years even after wrongful alienation to him by the manager. It would appear to be obvious that anything which admits of possession also admits of adverse possession. A mosque can clearly be "possessed." On the other hand the cases reported in A. I. R. 1935 Oudh 425 and A. I. R. 1936 Oudh 207 are authorities showing that suits concerning Muslim grave-yards are subject to limitation and adverse possession.

It is conceded by the respondents that a mosque as an *institution* (but not as a building consisting of stones, bricks and mortar) is a juristic person. According to Mohammadan Law its sacred character is perpetual. Counsel for plaintiff No. 1, that is the

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mosque, could not refer us to any authority of the Indian Courts or of the Privy Council for his proposition that property dedicated to sacred uses retains its sacred character under all circumstances and for all time. He relied upon two decisions of the Courts in England reported in 16 Q. B. D. 379 and (1869) 4 Q. B. 407. Those cases decided that if land was dedicated to sacred uses, only an Act of Parliament could divest such land of its sacred character. In fact the position in England — as indicated by these authorities — would appear to be much the same as the position under Mohammadan Law where that law has not been modified by statute. In these cases no question of limitation or adverse possession arose, and they do not decide that the sacred character of such property in England would prevent the title passing by adverse possession to a third party. In any event, they recognize that an Act of Parliament may alter the character of such land. The Limitation Act in India is equivalent to an Act of Parliament, and it clearly deals with property dedicated to God.

It was impossible to follow or understand the argument that a mosque as a “juristic person” had a perpetual existence and was not “property,” and therefore could not be subject to adverse possession. It appeared to be based on the false analogy of the position in law of a Hindu deity. It is true that “God” as a deity has a perpetual existence and cannot be subject to possession of any kind and there are many authorities to this effect; indeed no authorities are needed for such an obvious proposition. On the other hand there are authorities to the effect that the wood or stone idol of a Hindu deity is property and therefore subject to adverse possession. See Gour’s Hindu Code section 199 paragraph 2072, I. L. R. 4 Mad. 315 and I. L. R. 51 All. 621. In any event there is no analogy between a Hindu—or any other—deity

and a mosque. A mosque is the house of God but is not the deity. A mosque as a building is also clearly "property" in every sense of the word even if it be the "property of God." There is a clear distinction between a mosque as an institution, or as a juristic person which can own property, and a mosque as a building; the mosque as a building may be owned by the institution (juristic person) or by anyone else who may acquire adverse possession over it. A mosque as a building has every attribute of "property," it is—for example—subject to trespass, and it has been held that a mosque is "immoveable property" and that the juristic person—that is the institution—as owner of such immoveable property has a right of pre-emption under section 13 of the Punjab Pre-emption Act, 1905. An eminent Muslim Judge (Shah Din J.) was a party to this view in 59 P. R. 1914; and see also 153 P. R. 1884. It was also argued that the mosque as a juristic person was divorced from the mosque building, and, as a juristic person, could not be subject to the Limitation Act whatever might happen to the mosque or to the Muslim worshippers. I cannot understand this argument. A "juristic person" cannot exist apart from property or right. All property in the mosque and all rights having been lost to the Muslims and to the juristic person by 12 years' adverse possession, the juristic person—a legal fiction—ceases also to exist. It owns nothing and represents nothing.

Another argument of a similar character which has been addressed to us is as follows: That if the Limitation Act does apply, and by virtue of section 28 of that Act a title to the land in suit is acquired by the respondents, the mosque being sacred in character, it is the duty of the present proprietors not only to maintain that sacred character but the building itself; in fact that there is some form of

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onerous covenant running with such land which cannot be got rid of, and, apparently, that no matter if the owner of the land be atheist, or infidel of any kind, this duty is paramount and must be carried out. This argument is based upon the case of *Ballabh Das v. Nur Mohammad*, already referred to, and in particular upon the use of the words "*extra commercium*" by their Lordships in that judgment, and perhaps also upon section 297 of the Indian Penal Code. It is said that such land is not governed by any human law and that the sacred character must, therefore, be maintained. As I have pointed out above, the decision of their Lordships in *Ballabh Das v. Nur Mohammad* cannot possibly be used as an authority for this purpose.

Dedicated property is "*extra commercium*" as regards Muslims themselves but not as regards Muslims and third parties, or if there is statutory modification of Mohamman Law. Indeed if there was anything in this point at all the appellants would not have had to go to the length of contending that the Limitation Act did not apply to this suit.

The criminal liability cast upon persons under section 297, Indian Penal Code, for deliberately destroying sacred edifices with the intention of offending religious sentiment cannot have any bearing upon the point under consideration. There may be complete ownership of property by adverse possession or otherwise, but for good cause the legislature may enact that the owner, in the interest of the public, cannot do what he likes with his own. A cow may be owned and, similarly, it is an offence to slaughter a cow publicly; but it cannot therefore be said that there is, by reason of this salutary provision, a duty cast upon a Muslim owner of a cow to maintain its sacred character and therefore to keep it alive and

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not have it slaughtered at all. We have nothing to do in this appeal with the demolition of the mosque in relation to any possible liability under the Indian Penal Code. We have not been referred to any authority for this proposition, and I would be very slow, without authority, to lay down that a building once dedicated to God retains its sacred character for all time and under all circumstances, or that it was the duty of any owner of such property to maintain the original sacred character of the building. This proposition, if accepted, must apply to all forms of property dedicated to God. It would apply equally to a Hindu temple. We would then get the curious and dangerous position that where Muslims have taken possession of Hindu temples dedicated to God, demolished them, and erected mosques on the sacred sites, it would be the duty of the Muslims to maintain the sacred character of the land as understood by the Hindus. If this contention were correct, the position, if such a mosque eventually came into the possession of a third religious community, apparently might be that three forms of rites might have to be performed in the same building at the same time. One thing is clear that if the general proposition was established — greatly to the detriment of the maintenance of law and order — that there could be no adverse possession of land dedicated to God and the Limitation Act did not apply, there is no mosque in this country built on the site of a Hindu temple which could not now be recovered by the Hindus. There have been many decisions of their Lordships of the Privy Council which make it clear that the doctrine of adverse possession does apply to property dedicated to God. See I. L. R. 36 Bom. 135; I. L. R. 27 Bom. 363; I. L. R. 27 Bom. 500; I. L. R. 23 Cal. 536; I. L. R. 37 Cal. 885 P. C.; I. L. R. 51 All. 621; I. L. R. 41 Mad. 124 and I. L. R. 23 Mad. 271 P. C. The law as laid

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down by these authorities cannot now be disputed. There can be no distinction in law, in my opinion, between different forms of land dedicated to God; for instance there is no distinction between a mosque and its site dedicated to God and land dedicated to God for the use of that mosque. The same would apply to Hindu temples and the land dedicated thereto.

On the last point that, assuming the Limitation Act applied, a new period of limitation commenced to run from the date of the demolition of the mosque, it was argued that although all rights may have been lost to the Muslims and to the mosque—as a building—by virtue of the Limitation Act, there was a right remaining in the mosque—as a juristic person—to be maintained in its original form and that, therefore on its demolition a right of action arose. This argument was difficult to understand but it appears to have been based upon the argument already considered that it was the duty of any owner to maintain the sacred character of a building in his possession and, in addition, that there was a duty to maintain the building itself. We have not been referred to any authority on this point and indeed it appears to me that it is without any force whatever. When the Sikhs took possession of the mosque in 1762 limitation clearly began to run, and all rights being lost to the mosque and its worshippers at the expiry of the prescribed period of 12 years, no new act by those in possession could give a fresh cause of action. It was argued that the demolition of the mosque amounted to desecration and that this was a new act of desecration giving rise to a cause of action. From the history, however, of this building it is clear that, from the Muslim point of view, there was complete desecration of the mosque many years ago, and the demolition of the building was no more desecration than the original acts. In addition, the injury to the Muslims was

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complete when they were dispossessed, and there cannot be after the expiry of the limitation period — all rights being lost — any further right accruing to the mosque itself, as a building or as a juristic person, or to the Muslims.

The final argument which shows that there is nothing in the contentions of the appellants is that if they thought they were right that the Limitation Act did not apply, and that adverse possession could not be obtained by the respondents, there was nothing to prevent them from suing for possession. They have not done so and the reason is obvious; they knew the Limitation Act did apply and that, therefore, they could not get possession. They have tried, therefore, by the exercise of considerable ingenuity to attain their end by this suit for a declaration and injunction.

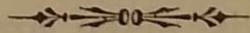
To sum up therefore :

The personal law of the Mohammadans has been modified by the Punjab Laws Act and the Limitation Act. Mohammadan Law regarding *wakfs*, and the lack of any rule of limitation within that law, cannot apply to this suit. The Limitation Act and article 144 of the Act apply. A mosque is immoveable property. Every suit is subject to the Limitation Act, and the Act applies without distinction to suits concerning both sacred and secular property; nor does it make any difference if the plaintiffs in such suits are divine or human. It therefore follows that the Muslims and the mosque at the end of 12 years' adverse possession by the Sikhs lost all rights in the land and building, including the right of worship. The Sikhs on the other hand by virtue of section 28 of the Limitation Act obtained a good title to the land and building thereon and have full rights therein as owners. The building under the

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circumstances cannot be held to have maintained its sacred character as a mosque, nor is there any duty cast upon the present proprietors to maintain its original sacred character or to maintain it as a building. Property dedicated to God can be alienated if adverse possession of the property is obtained and kept for twelve years. Finally there was no subsisting right in the plaintiffs at the date of suit and therefore no action lay.

On these grounds therefore this appeal must be dismissed with costs and it is unnecessary for me to discuss the other points raised. I have had the advantage of reading the judgment of my learned brother Bhide upon the other points. I agree with him on all his conclusions and have nothing to add.



PRIVY COUNCIL.

*Present : Lord Thankerton, Lord Russell of Killowen,
Sir George Rankin, Lord Justice Goddard and
Mr. M. R. Jayakar.*

THE MOSQUE, MASJID SHAHID GANJ
AND OTHERS—Appellants,

versus

SHIROMANI GURDWARA PARBANDHAK
COMMITTEE, AMRITSAR, AND ANOTHER—
Respondents.

Privy Council Appeal No. 91 of 1938.

On Appeal from the High Court at Lahore.

1940
May 2.

*Muhammadan law — Punjab Laws Act (VIII of 1872) —
Application of Limitation Acts to suits by Muhammadan insti-
tutions — Indian Limitation Act (IX of 1908), S. 144 —
Mosque (the building itself), whether juristic person — Res
judicata — Sikh Gurdwara Act (Punjab Act, VIII of 1925),
S. 37.*

In 1722 a mosque built in Lahore was dedicated by a deed in which provision was also made for the appointment of mutawalis.

From the commencement of the Sikh power in 1762, the building with its appurtenances was in the occupation of Sikhs and it was in the occupation of Sikh Mahants at the time of the annexation of the Punjab by the British in 1849. One Nur Ahmad, claiming as mutawali, tried to recover the property in a criminal proceeding in 1850, a suit in the Settlement Department in the same year, a civil suit in 1853 and another civil suit in 1855 but was unsuccessful in all these cases.

In 1927, by a notification by the Government under the Sikh Gurdwaras Act of 1925, the mosque and its adjacent land were included in a Sikh Gurdwara as belonging to it and, in 1930, the Sikh Gurdwara Tribunal established by the Act dismissed a claim to the property by the Anjuman Islamia "on

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MASJID SHAHID
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v.
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GURDWARA
PARBANDHAK
COMMITTEE,
AMRITSAR.

behalf of the Mohamedans," and the judgment of the Tribunal was affirmed by the High Court in 1934.

The building was demolished by the Sikhs in July, 1935.

The present suit was instituted in October, 1935, by "The Mosque" as plaintiff No.1 and a number of Mohamedans, including women and children, for a declaration that the building was a mosque in which the plaintiffs and all followers of Islam were entitled to worship and for other reliefs.

Held, that a mosque, (in the sense of the building itself), is not a juristic person by, or against, whom a suit may be brought.

Jafri Begum v. Amir Muhammad Khan (1) *Jagadindra Nath Roy v. Rani Hemanta Kumari Debi* (2), *Bhupati Nath v. Ram Lal* (3), Gopalchandra Sarkar Sastri's Hindu Law (7th ed.), p. 865, *Shankar Das v. Said Ahmad* (4), *Jinda Ram v. Husain Baksh* (5), *Maula Bukhsh v. Hafiz-ud-din* (6), Tyabji's Principles of Muhammadan Law (2nd ed.), p. 401, and Abdur Rahim's Muhammadan Jurisprudence, p. 218, referred to.

There is a presumption that a change of sovereignty does not affect private rights, but the plaintiffs, on whom the onus lay, had failed to show what law was in force immediately prior to the British annexation.

West Rand, etc., Ltd. v. The King (7), referred to.

Muslim law is applied by Courts in British India under legislative enactments to certain classes of cases and in such cases it is to be interpreted by the Courts themselves as a part of the law of the land and it is not to be ascertained by evidence.

Collector of Madura v. Mootoo Ramalinga Sathupathy (8) referred to.

Dictum of Sulaiman J. in *Aziz Bano v. Muhammad Ibrahim Hussain* (9), approved.

By the Punjab Laws Act, 1872, Muhammadan law is made applicable to the religious institutions of Muslims, but only in so far as it has not been modified by legislation.

(1) I. L. R. (1885) 7 All. 822, 841 (F.B.).

(5) 59 P. R. 1914.

(2) L. R. (1905) 31 I. A. 203 :

(6) 1926 A. I. R. (Lah.) 372.

I. L. R. 32 Cal. 129.

(7) L. R. (1905) 2 K. B. 391.

(3) I. L. R. (1910) 37 Cal. 128, 153 (F.B.).

(8) (1868) 12 Moo. I. A. 397, 436—9.

(4) 153 P. R. 1884.

(9) I. L. R. (1925) 47 All. 823, 835.

In British India the Courts do not follow the Muhammadan law in matters of procedure. Limitation is a matter of procedure and the Limitation Act of 1908 applies to immovables made wakf under Muhammadan law.

Abdur Rahim v. Narayan Das Aurora (1), *Damodar Das v. Lakhan Das* (2) and *Sri Sri Iswari Bhubenshwari Thakurani v. Brojo Nath Dey* (3), referred to.

The right of an individual Muslim worshipper to use a mosque for the purposes of devotion is not a sort of easement in gross, but an element in the general right of a beneficiary to have the wakf property recovered by its proper custodians and applied to its proper purpose. But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a person possessing adversely to the wakf and every interest thereunder, the rights of all beneficiaries are gone: the land cannot be recovered by or for the mutawali and the terms of the endowment can no longer be enforced.

Jawahra v. Akbar Husain (4) and *Chidambaranatha Thambiran v. Nallasiva Mudaliar* (5), referred to.

Held, on the facts, that the suit was barred not only under Article 144 of the Limitation Act of 1908, but also by the rule of *res judicata* by the decisions in the earlier suits and under section 37 of the Sikh Gurdwara Act by the decision under that Act.

Appeal (No.91 of 1938) from a decree of the High Court (January 26, 1938), which affirmed a decree of the District Judge of Lahore (May 25, 1936).

The material facts are stated in the judgment of the Judicial Committee.

1940, April 4, 5, 8, 9. L. E. PUGH, K. C. and J. M. PRINGLE for the appellants. A mosque under Muhammadan law is the property of God. There can be no human ownership of it. It is a juristic entity

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THE MOSQUE,
MASJID SHAHID
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v.

SHIROMANI
GURDWARA
PARBANDHAK
COMMITTEE,
AMRITSAR.

(1) L. R. (1922) 50 I.A. 84 :

I. L. R. 50 Cal. 329.

(2) L. R. (1910) 37 I. A. 147 :

I. L. R. 37 Cal. 885.

(3) L. R. (1937) 64 I. A. 203 :

I. L. R. [1937] 2 Cal. 447.

(4) I. L. R. (1885) 7 All. 178.

(5) I. L. R. (1917) 41 Mad. 124, 135.

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and, in that respect, it is on the same footing as a Hindu idol which can sue or be sued: *Vidya Varuthi Thirtha v. Balusami Ayyar* (1) and *Pramatha Nath Mullick v. Pradyumna Mullick* (2).

Once it is dedicated, it is always a mosque like other property that is dedicated as wakf: *Court of Wards v. Ilahi Baksh* (3) and *Ballabh Das v. Nur Mohammad* (4).

On the question of limitation, though I do not contend that Muhammadan law is entirely unaffected by the statutes of limitation, I submit that they do not apply to a mosque. They are inapplicable in the case of religious trusts: *Vidya Varuthi Thirta's case* (1). But even if the mosque, the 1st plaintiff, is hit by limitation, the right of the worshippers is not, in this suit, for they are not suing for possession but are only claiming the right to worship. Section 28 of the Limitation Act has, therefore, no application and it is not necessary for me to attack, and I am not attacking the finding of the Tribunal that the Gurdwara has been in possession many years and is now the owner. A change in ownership would not affect the right claimed here and Article 144 of the Limitation Act is not applicable; nor is Article 134.

Even if the building is used for improper purposes, the right of the individual worshippers to worship there would not be affected.

This is not a suit to recover immoveable property and so it does not come within the Gurdwara Act. If it does, I submit, it would fall within the exception to section 30 (ii) Proviso.

(1) L. R. (1921) 48 I. A. 302, 310-12. I. L. R. 44 Mad. 831.

(2) L. R. (1925) 52 I. A. 245-50 : I. L. R. 52 Cal. 809.

(3) L. R. (1912) 40 I. A. 18 I. L. R. 40 Cal. 297.

(4) (1935) 40 Cal. W. N. 449.

The suit is not barred as *res judicata* by the previous decisions. The parties here were not represented in the previous cases.

J. M. PRINGLE followed: I submit that the mosque was in existence as such till demolished in 1935. The description of its appearance in 1882 shows it was desecrated. There are findings in the earlier suits of non-user but there is no finding of exclusion. Persons who do not appear before the Tribunal though they can do so are not affected by the Gurdwara Act. The only persons affected are those who appear and those in possession. Section 30 of the Act shuts out a person who could have petitioned under the Act, but did not do so. It would not shut out a Muhammadan claiming merely a right to worship. The suit of 1855 was decided on the ground that the claim was *res judicata* by the judgments in the Settlement Courts. It was a decision against three persons. The mosque was not represented and the decisions is not binding on the parties here.

1940, May 2. The judgment of the Judicial Committee was delivered by—

SIR GEORGE RANKIN.—Before 1935 there had stood for many years to the south of what is now called the Naulakha Bazaar, in the city of Lahore, a structure having three domes and five arches, which had been built as a mosque (*masjid*) and which retained, notwithstanding considerable disrepair, sufficient of its original character to suggest, or even to proclaim, its original purpose. It had a projecting niche (*mehrab*) in the centre of the west wall such as is used in mosques as the place from which the imam leads the prayers. Its dedication is no longer in dispute, having been established as of the year 1134

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A. H. or 1722 A. D. by the production and proof of a deed of dedication executed by one Falak Beg Khan. By this deed, Sheikh Din Mohammad and his descendants were appointed mutawalis.

The deed speaks of a school, a well and an orchard as being among the appurtenances of the mosque and gives the total area of the dedicated property as three kanals and fifteen marlas; but it is not now necessary to ascertain with precision the limits of the original curtilage.

No less well established than the dedication is the fact that from about 1762 A. D. the building, together with the courtyard, well and adjacent land, has been in the occupation and possession of Sikhs. The occupation of Lahore by the "Bhangi Sardars" in 1762 was the commencement of Sikh power in this part of India. Sikh rule continued under Ranjit Singh, who in 1799 established himself by force of arms as the local ruler. It ended only in 1849, ten years after the death of Ranjit Singh, when the Punjab as a result of the second Sikh war, became part of British India by annexation. At some time during the Sikh domination, land adjacent to the mosque building (but to the north of what is now the Naulakha Bazaar) became the site of a Sikh shrine (*gurdwara*) and the tomb of a Sikh leader named Bhai Taru Singh situated thereon was held in reverence. The land, which in 1722 had been dedicated to the purposes of a mosque, came to be held and occupied by the managers and custodians of the Sikh institution and the mosque building was used by them. Until about 50 years ago, part of the building was used for the worship of the Granth Sahib or holy book of the Sikhs. Other parts have been used for

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secular purposes being let out to tenants, or used for storing chaff (*bhusa*) or holding rubbish. By a tradition which cannot be ignored (though their Lordships are thankful to be free of any duty to investigate its truth) the land adjacent to the building was regarded by the Sikhs as a place of martyrs (*shahid ganj*), it being commonly held among them that Bhai Taru Singh had on this spot suffered for his religion at the hands of Muslim rulers and that many others including women and children had been executed here. Thus communal feelings have long been in a state of tension as between Muslims and Sikhs with respect to this *masjid shahid ganj*. Its history after 1760 is summarised in the trial Judge's finding that "this mosque has not been used as a place of worship by Muslims since it came into Sikh possession and control"; in the Chief Justice's statement that "there has been a complete denial to the Muslims of all their rights"; and in the language of Bhide J. that "it is scarcely likely that the Muhammadans would have been allowed to have access to the building for any purpose whatever during this period (1760 to 1853)". These findings are not in any way blunted by the consideration that a pious mutawali might properly have let parts of the waqf property to tenants appropriating the rents to the purposes of the waqf. The possession of the Sikhs has been hostile not merely to the claim of other persons to the office of mutawali of his mosque, but hostile to the *waqf* itself and all interests thereunder. On the other hand it is true that the building has been frequently and indeed has been generally referred to as a mosque by those who have had its custody as well as by others and that it retained to the end the outward appearance of a mosque.

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In 1849, at the time of the British annexation, the mosque building and the property which had been dedicated therewith were in the possession of certain Sikhs mahants of the *gurdwara*. It is unnecessary to decide whether they held it under a revenue-free grant made to them by the Sikh authorities as it is certain that they held it and used it for their own purposes and for the purposes of the *gurdwara* as already described. The facts are made plain by the action taken to recover the property for the purposes of Islam soon after Sikh authority had given place to British. A criminal case brought in 1850 by one Nur Ahmad claiming to be mutawali and proceedings in the Settlement Department, brought by him in 1853, came to nothing as he had been long out of possession. A civil suit with a like object was brought and dismissed in 1853. On the 25th June, 1855, yet another suit by Nur Ahmad was brought in the Court of the Deputy Commissioner, Lahore, against the Sikhs in possession of the property : it was dismissed by that officer on the 14th November, 1855, by the Commissioner on the 9th April, 1856, and on further appeal by the Judicial Commissioner on 17th June, 1856.

In 1925 the Sikh Gurdwaras Act (Punjab Act VIII of 1925) was passed for the purpose of ascertaining what Sikh shrines were in existence and what property they owned; and of vesting the management of such shrines in certain committees (and other bodies). This step had become necessary to bring to an end disturbances which had been caused by disagreement between different schools or sects among the Sikhs. On 22nd December, 1927, by a Government notification the old mosque building and land adjacent thereto was included as belonging to the Sikh *gurdwara* "Shahid Ganj Bhai Taru Singh." Seventeen

claims were made by various petitioners to have rights therein. One dated 8th March, 1928, was by Mahant Harnam Singh and others to the effect that the property belonged to them personally and not to the institution of which they were the head. Another dated 16th March, 1928, was by the Anjuman Islamia of the Punjab "on behalf of the Mohammedans" claiming that the land and property were dedicated for a mosque and did not belong to the *gurdwara*. Both sets of claimants failed before the Sikh Gurdwaras Tribunal which decided on the 20th January, 1930, that the mahants' possession had been held on account of the *gurdwara* and that the Anjuman's case failed by reason of adverse possession and previous decisions. No appeal was brought by the Anjuman from the latter decision but against the former an appeal brought by the mahants was dismissed by the High Court on 19th October, 1934. In the result the property and building were given into the custody of the defendants and on the night of 7th July, 1935, the building was suddenly demolished by or with the connivance of its Sikh custodians under the influence of communal ill-feeling. Riots and disorder ensued and much resentment was felt and expressed by the Muslims.

The plaint in the present suit was filed on 30th October, 1935, in the Court of the District Judge, Lahore, against the Shiromani Gurdwara Parbandhak Committee, and the Committee of Management for the notified Sikh gurdwaras at Lahore—the authorities who were in possession of the disputed property as being property belonging to the *gurdwara*.

It contained no claim for possession of the property or ejectment of the defendants or that the property be handed over to the hereditary mutawali.

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The relief claimed was a declaration that the building was a mosque in which the plaintiffs and all followers of Islam had a right to worship, an injunction restraining any improper use of the building and any interference with the plaintiffs' right of worship: and a mandatory injunction to reconstruct the building. The learned District Judge dismissed the suit by decree, dated 25th May, 1936, and an appeal to the High Court was dismissed on 26th January, 1938, by Young C. J. and Bhide J., Din Mohammad J. dissenting.

By the Punjab Laws Act, 1872, the Mahomedan law is made applicable to the religious institutions of the Muslims but only in so far as it has not been modified by legislation. Thus the Indian Limitation Act, 1908, applies though limitation is not an original principle of Mahomedan law. The length of time which had elapsed since the property claimed had been lost to Muslims and the repeated failure of the attempts previously made to recover it for their use and benefit, were manifest objections to the grant of the relief sought. To assist in surmounting these difficulties, the suit was brought by 18 plaintiffs of which the first was the mosque itself suing by a next friend—not the waqf or institution or charity in some abstract sense but the mosque in the sense of the site and building. The declaration sought was “that plaintiff No.1 was and is the site of a waqf mosque,” the injunction sought was that the defendants “should not use plaintiff No.1 for any purpose which may be contrary to its sanctity”, and the mandatory injunction asked for was “to reconstruct that portion of plaintiff No.1—i.e., the mosque which they demolished.” The choice of this curious form of suit

was motivated apparently by a notion that if the mosque could be made out to be a "juristic person" this would assist to establish that a mosque remains a mosque for ever, that limitation cannot be applied to it, that it is not property but an owner of property. A second feature of the suit as framed is that a number of the plaintiffs were minors or women. This was thought to be of some assistance to the plaintiffs in meeting objections taken under the Sikh Gurdwaras Act, 1925, to the competence of the suit, but it was also relied upon before the Board in argument as relevant to the general question of limitation.

A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mahomedan law is by taking evidence. The authority of Sulaiman J. to the contrary [*Aziz Bano v. Muhammad Ibrahim Husain* (1)] was cited to him but he wrongly considered that section 49 of the Evidence Act was applicable to the ascertainment of the law. He seems also to have relied on the old practice of obtaining the opinions of *pandits* on questions of Hindu law and the reference made thereto in *Collector of Madura v. Moottoo Ramalinga Sathupathy* (2). No great harm, as it happened, was done by the admission of this class of evidence as the witnesses made reference to authoritative texts in a short and sensible manner. But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the Courts if decisions

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(1) I. L. R. (1925) 47 All. 823, 835. (2) (1868) 12 Moo. I. A., 397, 436—39.

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upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses and so forth. The Muslim law is not the common law of India : British India has no common law in the sense of law applicable *prima facie* to everyone unless it be in the statutory Codes, e.g., Contract Act, Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian Courts to certain classes of matters and to certain classes of people as part of the law of the land which the Courts administer as being within their own knowledge and competence. The system of "expert advisers" (*muftis*, *maulvis* or in the case of Hindu law *pandits*) had its day but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence but not the law itself. Their Lordships desire to adopt the observations of Sulaiman J. in the case referred to :—

"It is the duty of the Courts themselves to interpret the law of the land and to apply it and not to depend on the opinion of witnesses however learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are therefore allowed to be admitted."

It has been made clear by learned counsel for the appellants that the plaintiffs do not now claim any relief extending beyond the actual site of the mosque building. The first question to be asked with reference to this immoveable property is the question : In

whom was the title at the date when the sovereignty of this part of India passed to the British in 1849? It may have been open to the British on the ground of conquest or otherwise to annul rights of private property at the time of annexation as indeed they did in Oudh after 1857. But nothing of the sort was done so far as regards the property now in dispute. There is nothing in the Punjab Laws Act or in any other Act authorising the British Indian Courts to uproot titles acquired prior to the annexation by applying to them a law which did not then obtain as the law of the land. There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property [cf. *West Rand, etc., Ltd. v. The King* (1)]. Who then immediately prior to the British annexation was the local sovereign of Lahore? What law was applicable in that State to the present case? Who was recognised by the local sovereign or other authority as owner of the property now in dispute? These matters do not appear to their Lordships to have received sufficient attention in the present case. The plaintiffs would seem to have ignored them. It is idle to call upon the Courts to apply Mahomedan law to events taking place between 1762 and 1849 without first establishing that this law was at that time the law of the land recognised and enforced as such. If it be assumed, for example, that the property in dispute was by general law or by special decree or by revenue-free (*muafi*) grant vested in the Sikh *gurdwara* according to the law prevailing under the Sikh rulers, the case made by the plaintiffs becomes irrelevant. It is not necessary to say whether it has been shown that

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Ranjit Singh took great interest in the *gurdwara* and continued endowments made to it by the Bhangi Sardars as was held by Hilton J. (20th January, 1930) presiding over the Sikh Gurdwaras Tribunal. Nor is it necessary that it should now be decided whether the Sikh mahants held this property for the Sikh *gurdwara* under a *muafi* grant from the Sikh rulers. It was for the plaintiffs to establish the true position at the date of annexation. Since the Sikh mahants had held possession for a very long time under the Sikh state there is a heavy burden on the plaintiffs to displace the presumption that the mahants' possession was in accordance with the law of the time and place. There is an obvious lack of reality in any statement of the legal position which would arise assuming that from 1760 down to 1935 the ownership of this property was governed by the Mahommedan law as modified by the Indian Limitation Act, 1908.

The rules of limitation which apply to a suit are the rules in force at the date of institution of the suit, limitation being a matter of procedure. It cannot be doubted that the Indian Limitation Act of 1908 applies to immoveables made waqf notwithstanding that the ownership in such property is said in accordance with the doctrine of the two disciples to be in God. Thus in *Abdur Rahim v. Narayan Das Aurora* (1), it was expressly stated by Lord Sumner delivering the judgment of the Board:—

“ The property in respect of which a wakf is created by the settlor is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in very deed ‘ God’s acre ’ and this is the basis of the settled rule that such

(1) L. R. (1922) 50 I. A. 84.

property as is held in wakf is inalienable except for the purposes of the wakf.”

Yet in that very case it was taken as plain that if article 134 of the Limitation Act did not apply to a waqf the claim to recover possession of waqf property was governed either by article 142 or article 144. The rule of Hanafi law that waqf property is taken to have ceased to be held in human ownership is applied to all such property even if the waqf be a *waqf-alal-aulad* or waqf for the benefit of descendants.

The result of the rule is not that the property cannot in any circumstances be alienated but that it can only be alienated for proper purposes and save as provided by the terms of the endowment with the leave of the Court. In some circumstances it can even be taken in execution. In the particular case of a mosque, like that of a graveyard, the waqf property is intended to be used in specie for a certain purpose—not to be let or cultivated so that the income may be applied to the purposes of the *waqf*. This and other facts make some case for a contention that such property cannot be alienated on any conditions or with any sanction, though their Lordships are by no means satisfied to affirm so wide a proposition. But the Limitation Act is not dealing with the competence of alienations at Mahomedan law. It provides a rule of procedure whereby British Indian Courts do not enforce rights after a certain time, with the result that certain rights come to an end. It is impossible to read into the modern Limitation Acts any exception for property made waqf for the purposes of a mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a

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site and building for the purpose. While their Lordships have every sympathy with a religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the waqf, or that it is not so possessed so long as it is referred to as "mosque," or unless the building is rased to the ground or loses the appearance which reveals its original purpose.

The argument that the land and buildings of a mosque are not property at all because they are a "juristic person" involves a number of misconceptions. It is wholly inconsistent with many decisions whereby a worshipper or the mutawali has been permitted to maintain a suit to recover the land and buildings for the purposes of the waqf by ejectment of a trespasser. Such suits had previously been entertained by Indian Courts in the case of this very building. The learned District Judge in the course of his able and careful judgment noted that the defendants were not pressing any objection to the constitution of the suit on the ground that the mosque could not sue by a next friend. He went on to say:

"It is proved beyond doubt that mosques can and do hold property. There is ample authority for the proposition that a Hindu idol is a juristic person and it seems proper to hold that on the same principle a mosque as an institution should be considered as a juristic person. It was actually so held in *Jinda Ram v. Husain Bakhsh* (1), and later in *Maula Bakhsh v. Hafiz-ud-Din* (2)."

(1) 59 P. R. 1914 p. 200.

(2) 1926 A. I. R. (Lah.) 372.

That there should be any supposed analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion is a matter of some surprise to their Lordships. The question whether a British Indian Court will recognise a mosque as having a *locus standi in judicio* is a question of procedure. In British India the Courts do not follow the Mahomedan law in matters of procedure [cf. *Jafri Begum v. Amir Muhammad Khan* (1), per Mahmood J.] any more than they apply the Mahomedan criminal law or the ancient Mahomedan rules of evidence. At the same time the procedure of the Courts in applying Hindu or Mahomedan law has to be appropriate to the laws which they apply. Thus the procedure in India takes account, necessarily, of the polytheistic and other features of the Hindu religion and recognises certain doctrines of Hindu law as essential thereto, e.g., that an idol may be the owner of property. The procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the *sebait* (*Jagadindranath v. Hemanta Kumari* (2)). Very considerable difficulties attend these doctrines—in particular as regards the distinction, if any, proper to be made between the deity and the image [cf. *Bhupati Nath v. Ram Lal* (3), Gopalchandra Sarkar Sastri's "Hindu Law," 7th ed., pp. 865 *et seq.*]. But there has never been any doubt that the property of a Hindu religious endowment—including a *thakurbari*—is subject to the law of limitation [*Damodar Das v. Lakhan Das* (4); *Sri Sri Iswari Bhuvaneshwari Thakurani v. Brojo*

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(1) I. L. R. (1885) 7 All. 822, 841-2 (F.B.). (3) I. L. R. (1910) 37 Cal. 128, 153 (F.B.).

(2) L. R. (1905) 31 I. A. 203.

(4) L. R. (1910) 37 I. A. 147.

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Nath Dey (1)]. From these considerations special to Hindu law no general licence can be derived for the invention of fictitious persons. It is as true in law as in other spheres "*entia non sunt multiplicanda praeter necessitatem*." The decisions recognising a mosque as a "juristic person" appear to be confined to the Punjab: *Shankar Das v. Said Ahmad* (2), *Jinda Ram v. Husain Bakhsh* (3), *Maula Bakhsh v. Hafiz-ud-din* (4). In none of these cases was a mosque party to the suit and in none except perhaps the last is the fictitious personality attributed to the mosque as a matter of decision. But so far as they go these cases support the recognition as a fictitious person of a mosque as an institution—apparently hypostatizing an abstraction. This, as the learned Chief Justice in the present case has pointed out, is very different from conferring personality upon a building so as to deprive it of its character as immoveable property.

It is not necessary in the present case to decide whether in any circumstances or for any purpose a Muslim institution can be regarded in law as a "juristic person." The recognition of an artificial person is not to be justified merely as a ready means of making enactments—well or ill expressed—work conveniently. It does not seem to be required merely to give an extended meaning to the word "person" as it appears in the Punjab Pre-emption Act, 1905, or in the definition of gift contained in section 122 of the Transfer of Property Act. It is far from clear that it is required in order that property may be devoted effectively to charitable purposes without the

(1) L. R. (1937) 64 I. A. 203.

(2) 153 P. R. 1884.

(3) 59 P. R. 1914.

(4) 1926 A. I. R. (Lah.) 372.

appointment of a trustee in the sense of the English law. It would seem more reasonable to uphold a gift, if made directly to a mosque and not by way of waqf, as having been made to the mutawali than to do so by inventing an artificial person in addition to the mutawali (and to God in whom the ownership of the mosque is placed by the theory of the law). Their Lordships do not understand that in this respect a mosque is thought to be in any unique position according to the authorities on Mahomedan law. "A gift may be made to a mosque or other institution" (Tyabji Principles of Muhammadan Law, 2nd ed., 1919, p. 401, cf. Abdur Rahim's Muhammadan Jurisprudence, p. 218). A gift can be made to a *madrasah* in like manner as to a *masjid*. The right of suit by the mutawali or other manager or by any person entitled to a benefit (whether individually or as a member of the public or merely in common with certain other persons) seems hitherto to have been found sufficient for the purpose of maintaining Mahomedan endowments. At best the institution is but a *caput mortuum*, and some human agency is always required to take delivery of property and to apply it to the intended purposes. Their Lordships, with all respect to the High Court of Lahore, must not be taken as deciding that a "juristic personality" may be extended for any purpose to Muslim institutions generally or to mosques in particular. On this general question they reserve their opinion; but they think it right to decide the specific question which arises in the present case and hold that suits cannot competently be brought by or against such institutions as artificial persons in the British Indian Courts.

The property now in question having been possessed by Sikhs adversely to the waqf and to all

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interests thereunder for more than 12 years, the right of the mutawali to possession for the purposes of the waqf came to an end under article 144 of the Limitation Act and the title derived under the dedication from the settlor or wakif became extinct under section 28. The property was no longer, for any of the purposes of British Indian Courts, "a property of God by the advantage of it resulting to his creatures." The main contention on the part of the appellants is that the right of any Moslem to use a mosque for purposes of devotion is an individual right like the right to use a private road [*Jawahra v. Akbar Husain* (1)]; that the infant plaintiffs, though born a hundred years after the building had been possessed by Sikhs, had a right to resort to it for purposes of prayer; that they were not really obstructed in the exercise of their rights till 1935 when the building was demolished; and that in any case in view of their infancy the Limitation Act does not prevent their suing to enforce their individual right to go upon the property. This argument must be rejected. The right of a Muslim worshipper may be regarded as an individual right, but what is the nature of the right? It is not a sort of easement in gross, but an element in the general right of a beneficiary to have the waqf property recovered by its proper custodians and applied to its proper purpose. Such an individual may, if he sues in time, procure the ejectment of a trespasser and have the property delivered into the possession of the mutawali or of some other person for the purposes of the waqf. As a beneficiary of the religious endowment such a plaintiff can enforce its conditions and obtain the benefits thereunder to which he may be

(1) I. L. R. (1885) 7 All. 178.

entitled. But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a person possessing adversely to the waqf and every interest thereunder the rights of all beneficiaries have gone: the land cannot be recovered by or for the mutawali and the terms of the endowment can no longer be enforced [cf. *Chidambaranatha Thambiran v. Nallasiva Mudaliar* (1)]. The individual character of the right to go to a mosque for worship matters nothing when the land is no longer waqf and is no ground for holding that a person born long after the property has become irrecoverable can enforce partly or wholly the ancient dedication.

This seems to their Lordships a sufficient answer to the argument that the only article of the Limitation Act which affects the right of the plaintiffs (other than the first plaintiff) is article 120. Under that article any plaintiff who had been of age for more than six years before the date of the suit would be barred as he has clearly been excluded from resort to the building for purposes of prayer. But the true answer to these plaintiffs and to the minor plaintiffs is that the rights of the worshippers stand or fall with the waqf character of the property and do not continue apart from their right to have the property recovered for the waqf and applied to its purposes. As the law stands, notice of the rights of individual beneficiaries does not modify the effect under the Limitation Act of possession adverse to the waqf. Were the law otherwise the effect of limitation upon charitable endowments would be either negligible or absurd. The plaintiffs may, if they choose, refrain

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 ——— but they do not alter the character of their right by
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It remains to say that in the opinion of their Lordships the present suit is concluded on the general principle of *res judicata*, by the decision in the suit of 1855 and also under section 37 of the Sikh Gurdwaras Act, 1925, by the decision of the Tribunal (20th January, 1930) rejecting the petition of the Anjuman Islamia. The mere circumstance that the plaintiffs have chosen not to seek recovery of the land in dispute but ask for relief in the forms of declaration and injunction does not avail to enable them to litigate again the claim made by Nur Ahmad as mutawali to recover the property for the purposes of the waqf. The ground of the decision of 1855 does not affect the question of *res judicata*.

Section 37 of the Act of 1925 is as follows :

“ Except as provided in this Act no Court shall pass any order or grant any decree or execute wholly or partly, any order or decree, if the effect of such order, decree or execution would be inconsistent with any decision of a tribunal, or any order passed on appeal therefrom, under the provisions of this Part.”

It is sufficiently plain that if the present suit were to succeed the effect of the decree would necessarily be inconsistent with the decision of the Tribunal rejecting the petition of the Anjuman Islamia. Unless therefore the case can be brought within the opening words of section 37—“ except as provided in this Act ”—that section is fatal to the claim. Their Lordships are of opinion that the words of exception have no reference to the provisions of clause (ii) of

section 30 which states the circumstances under which a suit shall be tried notwithstanding that the claim was not put forward before the Tribunal. Section 37 assumes that a civil court has before it a competent suit in which one party or another would but for the section be entitled to a certain order or decree, and it provides that such order or decree shall not be made if the effect of it would be inconsistent with any decision of a Tribunal. The words of exception with which section 37 opens are doubtless accounted for by the provisions of section 34 authorising appeals to the High Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the respondents' costs.

C. S. S.

Solicitors for the appellants: *Peake & Co.*

Solicitors for the respondents: *Charles Russell & Co.*

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