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in default of payment of the arrears and penalty. He, therefore, referred the case to the High Court. His reasons were as follow:—
[401] "I do not think that it was intended by the Legislature to render a municipal defaulter liable to imprisonment in a criminal jail. I think that a distinction exists between an offender sentenced to a fine and a municipal defaulter, though also legally an offender, ordered to pay, in addition to his dues, a penalty, and that the order of imprisonment on default is *ultra vires*."

The reference was heard by a Division Bench (CANDY and FULTON, JJ.)

There was no appearance for the Crown or for the accused.

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Before Mr. Justice Farran.

ADVOCATE-GENERAL OF BOMBAY (*Plaintiff*) v. MOULVI ABDUL KADIR JITAKER AND OTHERS (*Defendants*).* [12th, 13th, 15th and 20th February and 6th, 8th, 9th, 10th, 12th and 20th March, 1894.]

Mahomedan law—Mosque—Charity—Suit against directors or Mushavirs of a mosque—Liability of directors—Board of directors not properly constituted under the rules of the mosque—Liability of directors for acts done by Board not properly constituted—Appointment of officers—Management of property—Liability of provisional committee assuming authority to act—Trustees—Limitation—Kazi—Act II of 1864 and Bombay Act IV of 1864—Nazir of mosque, liability of—Parties to suit against trustees of mosque—Practice.

A certain Mahomedan mosque in Bombay, known as the Juma Masjid, was possessed of considerable property. The administration of the mosque and its property was [402] carried on under rules which had been drawn and approved in the year 1834 at a special general meeting of the jamat convened for the purpose in the course of a suit which had been filed in the Supreme Court against the then mushavirs of the mosque. That suit was referred to the Master to make certain enquiries, and in his report these rules were set out in full. His report was confirmed by the Court. The rules provided that the mosque and its property should be managed by the Kazi of Bombay and ten mushavirs, and that a nazir should be appointed by them, and be subject to their control. The rules also prescribed the various duties of the kazi, mushavirs and nazir, and declared that the power of filling up vacancies should be exercised by the kazi and mushavirs collectively or by the kazi and an absolute majority of the mushavirs.

In 1834 and for many years subsequently there was, as there had always been, a "Kazi of Bombay" appointed under a sanad from Government. He held the appointment for life, and the office was not hereditary. In 1866 the then Kazi of Bombay died, but in consequence of the provisions of Act II of 1864 and Bombay Act IV of 1864 the Government made no new appointment, and the office lapsed. One Mahomed Husain Murgay, however, assumed the office and was generally accepted by the community as Kazi of Bombay. He died in 1878, and upon his death, rival claimants sought the office of Kazi of Bombay.

The mushavirs were then advised that they could not select one of the rival kazis to fill the office of Kazi of Bombay under the rules, and they, therefore, continued to manage the mosque without a kazi in violation of the rules of 1834. Two of the mushavirs (now relators) were of opinion that one of the rival applicants for the position should be appointed kazi, and as their wishes were not acceded to, they ceased to attend the board, and as far as possible, while retaining their offices, they thwarted the action of the other mushavirs. Subsequently in 1878 other vacancies occurred in the board. In 1888, the number of mushavirs was reduced to six,

* Suit No. 656 of 1891.

and two of them (the relators) as above stated took no part in the administration, so that the management was left in the hands of the first four defendants. In 1891 four new mushavirs (defendants Nos. 6 to 9) were elected, and in that year the Advocate-General at the relation of the two dissatisfied mushavirs filed this suit against the mushavirs. The former nazir of the masjid was also made a defendant (No. 5). He had held the office of nazir from 1879 to 1891 when he resigned. The plaint set forth the irregularities which had taken place in the management in 1878, and prayed for the removal of the defendants (other than defendant No. 5) from the position of directors or mushavirs and for an account against all the defendants, and for a scheme, &c. The following were the principal charges made against the defendants in the plaint and at the hearing:—

(1) The neglect to take steps to supply the place of the kazi and the failure to keep up the proper number of the mushavirs.

Held, as to this, that subsequently to 1878 the mushavirs had no authority under the rules of 1834 to fill up vacancies as they occurred or to carry on the government of the masjid. Since that year the mushavirs were a provisional committee of management kept up from time to time by co-optation tacitly permitted by the jamat to manage the affairs of the masjid until the original constitution could be restored or legally changed, that original constitution being for the time in abeyance.

[403] 2. The improper appointment, in 1879, of one Mahomed Cassum Curtay (defendant No. 5) as nazir.

Held, that the mushavirs incurred no liability and deserved no censure for so doing.

3. The neglect to call for an annual account of the income and expenditure of the mosque under Rule 6.

Held, that this charge was not proved.

4. The neglect to purchase properties with the surplus income of the mosque as required by Rule 4.

Upon this point it was contended that the defendants should be charged with interest on the uninvested funds, so as to make up for the loss of rents which would have been recovered if properties had been purchased. In answer to this claim it was argued (1st) that, under the circumstances, the mushavirs had no power to expend the funds of the mosque in purchasing property, and (2) that the claim was barred by limitation.

Held, that the claim fell within art. 120 of the schedule to the Limitation Act (XV of 1877), and was barred except as to six years prior to the filing of the suit, but even as to this period the Court refused to order accounts to be taken against the defendants. There had been no dishonesty or improper dealing with the funds of the mosque. The highest at which the case could be put was that there had been error of judgment. In this the community had acquiesced. Moreover, the position of the parties had changed. Some of the mushavirs were dead, others had resigned and were not defendants to the suit, and it would be difficult to enforce contribution against them. The Court was further of opinion that, in any case, it was very doubtful whether a provisional committee like the mushavirs would have been justified in assuming the power of purchasing property. Had the property fallen in value, the purchase might perhaps have been repudiated.

5. Their neglect in not detecting sums appropriated by the bill-collectors of the mosque and getting in the same.

Held, that as a provisional committee who had assumed the management of the masjid, the defendants were bound to protect its interests. Of the money which they actually received, or which was paid into their account, they were actual trustees, but in addition to this they were officers of the masjid charged with the specific duty of superintending the nazir and his accounts, and if the masjid had suffered loss by their neglect of duty, they were answerable for it. They neglected to examine the books, a cursory audit of which would have detected the defalcations of the bill-collectors. The Court, therefore, directed an account against them of the rents actually received, or which, but for their wilful default or neglect they might have received from the bill-collectors.

6. Their neglect in allowing arrears of rent to accumulate and to be lost to the masjid.

Held, that it was not the duty of the mushavirs to look into the account of each individual tenant. Under the rules the nazir, and not the mushavirs, was

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entrusted with the collection of rents, and it was his duty to see that the rents were not allowed to fall unduly into arrear. It was not shown that, except at an exceptional time when [404] the nazir was ill, the rents were so much in arrear as to call for the active interference of the mushavirs, or that the masjid had suffered undue loss under this head. The Court, therefore, refused relief on this charge.

7. The non-payment into the Bank of sums in the hands of the nazir when they exceeded Rs. 500.

Held, that the spirit of the rules had been complied with, and no loss had been shown.

Defendant No. 5, as above stated, had acted as nazir of the masjid from 1879 to July, 1891, when he resigned. Under the rules (see Rules 2 and 7) he was appointed by the directors and was under their orders and was removable at their pleasure. It was contended at the hearing that he was not a proper party to the suit, being merely the agent or servant of the directors and not a trustee.

Held, that he was properly made a defendant. Both under Mahomedan law and under the rules the nazir was a public officer in charge of the mosque, and as such liable to account to the community.

SUIT to remove the defendants from the position of directors of the Mahomedan mosque in Bombay known as the Juma Masjid and of the charitable property connected therewith, and for an account against them; for a scheme and the appointment of new officials; for the administration of the mosque, &c.

OPINION.

PER CURIAM.—As non-payment of municipal taxes entails liability to a penalty, it appears to be an offence as defined by s. 40 of the Indian Penal Code. We are unable to draw a distinction between the word "penalty" in the Bombay District Municipal Act and the word "fine" in s. 64 of the Indian Penal Code. The word "penalty" is used in many places in the Municipal Act as equivalent to a fine or pecuniary punishment for an offence (*vide* ss. 64 and 74). In *Reg. v. Gulalchand* (1), it was held that imprisonment could be awarded in default of fines imposed under this Act.

The order of the Third Class Magistrate is, therefore, correct.

The suit was filed in December, 1891, by the Advocate-General at the relation of five persons, two of whom, *viz.*, Mahomed Husain Churgay and Haji Sheriff, were then and had been for many years directors of the masjid.

The plaint stated that in the year 1834 A.D. certain rules for the management of the Juma Masjid and of the charitable properties connected with it had been framed and adopted, and had received the sanction of the then Supreme Court of Bombay. These rules were the result of certain litigation which had been instituted in the Supreme Court. The rules referred to were as follows :—

"Whereas at a general meeting of the Kazi Chougla and the members of the Jamat or Mahomedan community of Bombay held at the Juma Masjid on the twenty-eighth day of October, 1834, two certain decrees of His Majesty's Supreme Court of Judicature at Bombay have been read, bearing date respectively the 8th day of March, 1833, and the 8th day of September, 1834, which said decrees were made in a certain suit on the Equity Side of the said Court wherein Kazi Kutbudin Sabeh bin Shaik Abdula Mahimker, the Kazi of Bombay, Haji Ebrahim Jitaker, Mahomed Ally Rogay, Mahomed Ebrahim Muckba, Shumsudin Kisay, and

Mahomed Syed Palloba were the complainants and Nur Mahomed bin Ebrahim Patell was the defendant.

[405] "And whereas in and by the first of the said decrees it was declared that the said complainant Kutbudin Saheb bin Shaik Abdula Mahimker, the Kazi of Bombay, Haji Ebrahim Jitaker, the Chougla of the Mahomedans residing in Bombay, Mahomed Ally Rogay, Mahomed Ebrahim Muckba, Shumsudin Kisay, and Mahomed Syed Palloba, the principal members of the jamat of the Mahomedans of Bombay on behalf of themselves and the rest of the Mahomedans of Bombay, were entitled to an account from the said defendant Nur Mahomed bin Ebrahim Patell as executor of his said father Ebrahim Ismail Patell, of all sums of moneys received by him either for donations, bequests, or otherwise for or on account of the Juma Masjid in the pleadings mentioned, and for the rents and profits of the ground in the pleadings also mentioned and of the chawls and buildings thereon erected from the time of the death of Nathu Patell in the pleadings mentioned until the tenth day of May, 1814, and also of all sums received by the said defendant in his own right since the said tenth day of May, 1814, on the same account; and whereas by the other decree it was decreed that the said defendant should be forthwith removed from his situation as manager or superintendent of the said Juma Masjid and chawls, now thereupon the following rules and regulations for the future management of the affairs and concerns of the said Juma Masjid and the chawls above mentioned, having been taken into consideration by the said meeting, the same are hereby and in and by the said meeting unanimously confirmed and agreed to.

Rule 1st.

"The late superintendent having been removed by the last mentioned decree of the Supreme Court from his said situation as manager of the Juma Masjid and the chawls belonging thereto, the said Juma Masjid and chawls shall henceforth (subject to any order or decree of the Supreme Court to the contrary in the suit pending therein in which the above-mentioned decrees were made) be placed under the Government and control of the Kazi of Bombay for the time being, and ten directors to be appointed in the manner hereinafter mentioned.

Rule 2nd.

"Subject as aforesaid, a superintendent of the said masjid and chawls shall be appointed in the manner hereinafter proposed, such superintendent to be at all times subject to the control of the kazi and directors, and in all respects to obey their orders; the duties of such superintendent to consist in the collection of the rents of the aforesaid chawls and of any other property dedicated to the mosque, and that such superintendent shall thereout defray all expenses incurred on account of the masjid and the ceremonies performed therein or of its appropriated property in necessary repairs or otherwise.

Rule 3rd.

"The superintendent shall not expend any sum exceeding rupees one hundred in amount in the repairs of the masjid or chawls, or any sum exceeding rupees fifty beyond the ordinary monthly expenses of the mosque or chawls without an order in writing signed by the kazi, and the directors or by the kazi and a majority of the directors for that purpose first had and obtained to sanction such payment, and such superintendent

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shall not at any time retain in his hands funds belonging to [406] the said masjid exceeding in amount the sum of rupees five hundred, and all surplus funds arising from the rents of the chawls or otherwise belonging to the said masjid exceeding the aforesaid amount shall from time to time be paid by the superintendent as the same shall be received by him into the hands of the kazi, who shall forthwith deposit the same in the Bombay Treasury in the names of himself and the two senior directors for the time being.

Rule 4th.

"As often as the funds standing to the credit of the kazi and the two senior directors shall amount to the sum of rupees five thousand or upwards, then and so often the kazi and the directors or the kazi and a majority of them shall therewith purchase other property to be added to the then appropriated property belonging to the said masjid, and the deed of sale thereof shall be made out to and in the name of the kazi and ten directors for the time being and their successors and assigns in trust for the kazi and jamat of Bombay for and on behalf and for the sustentation and repairs and other expenses of the said Juma Masjid, and of its appropriated property.

Rule 5th.

"The superintendent shall on the 1st day of Rujab, on the 1st day of Shawal, on the 1st day of Mohurram, and on the 1st day of Rubussani in each year make a report in writing to the kazi and directors exhibiting what sums of money he has received on account of the rents of the chawls or otherwise and of his application thereof, and in such report such superintendent shall state the condition of the masjid and chawls and other property belonging to the said masjid, and what, if any, repairs are in his opinion required, and generally any matters connected with his duties as superintendent, and the said kazi and directors shall within fifteen days after the receipt of such report meet for the purpose of taking such report into consideration.

Rule 6th.

"The superintendent shall keep proper books of account, wherein he shall duly enter all sums received by him as rents of the chawls or otherwise on account of the masjid, and in like manner he shall enter all sums expended by him on account of the said mosque or chawls or other property; he shall make up, sign, and render to the kazi and directors annual accounts in duplicate of his receipts and disbursements, and such accounts shall not be allowed and considered as correct until they shall have been audited and signed by the kazi and the directors, or by the kazi and the directors, or by the kazi and a majority of the directors, and when so audited and signed one copy thereof shall be deposited and kept in the office of the kazi and another copy shall be lodged in the Juma Masjid.

Rule 7th.

"The superintendent shall hold his office at the will of the kazi and directors, and shall be removeable by them or by the kazi and the majority of the directors by notice signified in writing; such superintendent on being appointed by the Supreme Court and all future superintendents upon being appointed shall execute and deliver to the kazi and the directors for the time being a bond in a penalty [407] of ten thousand rupees.

conditioned to be void upon the due observance and performance by such superintendent of the rules thus made, or which shall hereafter be made by the kazi and the directors, or by any general meeting of the kazi, chougla, and jamat convened for the purpose, and nothing in these rules contained shall prevent any superintendent from resigning his situation as such, but in every such case he shall give to the kazi and directors two calendar months' previous notice of his intended resignation.

Rule 8th.

"Inasmuch as the Master in Equity of the said Supreme Court is directed by the aforesaid decree to inquire and state to the Court who should be a fit person for the future superintendent, the complainants in the said suit are requested to propose that Haji Mahomed Sued Sahab Rogay be appointed under and subject to the preceding rules as a fit and proper person to be appointed future superintendent.

Rule 9th.

"The persons following, that is to say:—Mahomed Ally Sahab Rogay, Mahomed Ebrahim Sahab Muckba, Haji Ebrahim Sahab Jitaker, Fucki Mahomed Mirasahab Arai, Shumsudin Sahab Kisay, Shabudin Sahab Ghuttay, Mahomed Sued Sahab Palloba, Mahomed Yusuf Sahab Murgay, Mahomed Shumsudin Sahab Palloker and Zeyawudin Sahab Narker are hereby appointed directors of the said Juma Masjid and chawls, and upon the death or resignation of any of the above-named directors the vacancy occasioned by such death or resignation shall be supplied by the election of another director or directors in the place of the director or directors dying or retiring, such election to be made by the kazi and the remaining or continuing directors, or by the kazi and the majority of the remaining or continuing directors.

Rule 10th.

"Every future director, superintendent, and every other officer connected with the said masjid, with the exception of the kazi, shall be elected by the kazi and directors, or by the kazi and the majority of the directors for the time being, who are hereby authorized to fix the scale of remuneration of the several officers, with the exception of the kazi, the directors, and superintendent, whose respective offices as connected with the said masjid shall be and are hereby declared to be honorary.

Rule 11th.

"The kazi and directors shall be empowered to frame and make from time to time rules and regulations for the management of the Juma Masjid and chawls and the general concerns thereof, provided such rules and regulations are not contrary to the Mahomedan law.

Rule 12th.

"The several powers and authorities conferred upon the kazi and the directors by the preceding rules shall be exercised by them collectively or by the kazi and a majority of the directors."

[408] The plaint stated that by the above rules the Juma Masjid and the properties appertaining to it were to be managed by the kazi of Bombay and ten directors, &c.; that by the said rules a superintendent should be appointed by the kazi and directors, &c. It also referred to various other provisions made by the above rules for the administration.

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of the funds of the mosque. It then set forth that at the beginning of the year 1878 the governing body of the mosque consisted of ten directors presided over by Kazi Mahomed Husain Murgay. The first two relators in the present suit (Mahomed Husain Churgay and Mahomed Husain Londay) were then directors, as also were the first three defendants, *viz.*, Moulvi Abdul Kadir Jitaker, Shaik Ahmad Saheb Muckba and Shaik Mahomed Curtay. In January, 1878, however, the kazi died, and from that time there had been no kazi as president, as contemplated by the rules. The community was divided as to the person to be appointed kazi, and the result was that no appointment was made.

Subsequently to the death of the kazi, but in the same year, one of the then directors (Gulam Mohidin Delvi) died, and the fourth defendant (Munshi Shaik Ahmed Delvi) took his place. The plaint stated that the validity of the new appointment was doubtful having regard to the rules, as there was then no kazi and no quorum of directors.

In 1888 another director (Munshi Mahomed Unday) died and no successor to him was appointed. Three others of the directors, who held office in 1878 subsequently resigned, and their places were not filled up. The result was that instead of having a governing body consisting of a kazi and ten directors as provided by the rules, there were only six directors, and the validity of the appointment of one of these six was doubtful. Of these six directors, two were relators and the others were the first four defendants. Munshi Shaik Ahmed Delvi, whose appointment was doubtful, was the fourth defendant.

In 1891 the first four defendants appointed four additional directors (defendants Nos. 6, 7, 8, 9) in spite of the remonstrance of the other two directors (the first two relators). The defendants also appointed the first defendant to be president.

[409] The fifth defendant to this suit had been nazir or superintendent of the mosque from 1879 until July, 1891, when he resigned. The plaint (at the relation of the said relators) complained that, having regard to the rules, there had been no validly appointed superintendent; that the fifth defendant, who was not a fit person for the office, had got himself appointed and had acted as superintendent; that the directors (defendants) had exercised no proper supervision over him, and the plaint charged that the properties and funds of the mosque had been greatly mismanaged and that the rules with regard thereto had been disregarded.

The plaint further complained that the provisions of rules 3 and 4 had been disregarded by the defendants to the great detriment of the masjid. With regard to rule 4, it alleged that for many years no property had been purchased for the masjid, and that the funds had been allowed to lie idle in the Bank, bringing in no income: that these funds at the date of suit amounted to two lakhs of rupees, and that, if the same had been duly invested as directed, the charity would have been much benefited.

The plaint also complained that rules 5 and 6 had been disregarded, and further alleged that all the moneys received from tenants of the charity were not credited to the masjid.

The plaint prayed for a declaration that the defendants were not entitled to carry on the management of the Juma Masjid and its property, or that if entitled, the defendants might be removed from their position as directors; that an account should be taken of moneys received by the defendants, and that defendants should make good such sums as but for their wilful default they might have received, &c.; that a kazi, directors

and superintendent be appointed to manage the charity and a scheme settled, &c., &c.

The first four defendants filed a written statement, stating that they had always been desirous of having the Kazi of Bombay as their president, but that there was not and had not been for years any such officer in existence; that each section of the Mahomedans recognised as kazi any person they pleased; they denied the [410] charges of mismanagement, neglect and misconduct, and alleged they had performed their duties to the best of their ability under the circumstances in which they were placed. They prayed that the rules should be amended and the affairs of the mosque put on a proper footing under the direction of the Court.

At the hearing, issues were raised as to the validity of the various appointments since the death of the kazi in 1878; as to the liability of the directors in respect of the alleged violation of the rules in administering the affairs of the mosque, &c. As above mentioned, two of the relators were directors of the mosque. At the hearing, Mahomed Husain Churgay, the survivor of them (the other was then dead), was made a defendant.

Lang (Advocate General) and *Jardine*, for the plaintiff.

Badrudin Tyebji, *Inverarity* and *Vicaji*, for defendants Nos. 1, 2, 3, 4; *Kirkpatrick* and *Slater*, for defendant No. 5.

Scott and *Lowndes*, for defendants Nos. 6, 7 and 8.

At the close of the examination of the first witness Mahomed Husain Churgay, the relator, counsel for the fifth defendant (the nazir or superintendent) raised an issue whether the fifth defendant was a proper party to the suit.

Kirkpatrick:—The superintendent or nazir is not a proper party, and the suit ought at once to be dismissed as against him. Under the rules, and from the evidence just given, it appears that he was merely the servant of the directors and was accountable to them only—*Attorney General v. Earl of Chesterfield* (1); *Tudor on Charities*, (3rd ed.), pp. 327, 310; *Indian Contract Act* (IX of 1872), s. 192; *Lewin on Trusts*, (9th ed.), pp. 201, 723. He ceased to be nazir before suit brought. Moreover, he cannot be charged with fraud or default, as the plaint contains no specific instances—*Ganga Narain Gupta v. Tilukram* (2); *Krishnaji v. Wamnaji* (3); *Lewin on Trusts* (9th Ed.), p. 1034.

Badrudin Tyebji, for first four defendants:—We object to the fifth defendant being dismissed from this suit. He is a [411] proper party. The nazir or superintendent of a masjid is the mutawali and is the real trustee and the person responsible for the administration of the property—*Tagore Law Lectures*, 1884, p. 264. The rules of this mosque recognise the general principles of Mahomedan law. Other defendants who are directors are the mushavirs or merely supervisors, and represent the general community.

Jardine, for plaintiff on the same side.

FARRAN, J.—I cannot dismiss the fifth defendant from the suit. He was the nazir of the mosque, or, as he is called in the rules, the superintendent. I think that both under the Mahomedan law and under the rules, the nazir of this mosque was a public officer in charge of the mosque and of its property, and as such liable to account to the community in this Court.

The hearing of the suit then proceeded.

(1) 18 Beav. 596.

(2) 15 C. 533.

(3) 18 B. 144.

1894 *Jardine* (with *Lang*, Advocate General).—The directors were bound by the rules. The kazi died in 1878 and there has been no attempt to fill his place. The board of management has never since been legally constituted. Only three of the present directors have been legally appointed. The others have been appointed by an imperfectly constituted board, and their appointment is invalid and illegal. But they are all equally liable for their acts—*Rackham v. Siddal*(1); *Pearce v. Pearce*(2). Their acts since 1878 have caused heavy loss to the masjid, and the relators were right in causing this suit to be instituted. Even without a kazi the directors might have properly collected and invested the funds of the mosque. They should have superintended the nazir. There has been much rent lost through negligence and fraud. He referred to *In re Cape Breton Co.*(3); *Seton*, s. 3, ch. 41, p. 982 (5th Ed.), *Lewin on Trusts*, (9th Ed.) p. 1017-1035; *In re Symons* (4); *Sculthorpe v. Tipper* (5); *Devaynes v. Robinson* (6).

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Badrudin Tyabji with *Inverarity* and *Vicaji*, for defendants Nos. 1, 2, 3, 4.—The plaint states that the directors have violated the rules by acting without a kazi. But the kazi mentioned in [412] the rules of 1834 was the Kazi of Bombay. There was then an official who bore this title, which was conferred by Government. But Government ceased to appoint: see Act II of 1864; Bombay Act IV of 1864: *Muhammad Yussub v. Sayad Ahmed* (7). See also Regulation XXVI of 1827, which related to the mofussil. The directors had no power to appoint a kazi and are not responsible for acting as best they could without one. In 1888 the number of directors was reduced to six. When their numbers were further reduced, they could do nothing, as there was not a majority, the full number under the rules being ten. Reference was made to *Attorney General v. Corporation of Exeter*(8); *Wyatt v. Wallis*(9); *Tagore Law Lectures*, 1884, p. 248; *Saroda Pershad v. Brojo Nath* (10); *Kathiawar Trading Company v. Virchand*(11).

Kirkpatrick and *Slater*, for defendant No. 5.—The fifth defendant acted as nazir or superintendent from 1879 to July, 1891, without remuneration. He was entirely subordinate to the directors who might have dismissed him at any time. He continued the system of management which existed previously, and for which he was not responsible. The bill-collectors under him were not appointed by him or removeable by him. They were his fellow servants. Not receiving any remuneration, he was obliged to earn his living, and in doing so was frequently absent from Bombay with the knowledge and sanction of his masters the directors. The director (*Churgay*), who as relator has caused this suit to be instituted, has wholly neglected his duties as director for twelve years. He refused to attend meetings or sign papers. He instigated the tenants not to pay the rents. He is more responsible for any loss than the other directors—*Lewin on Trusts* (9th Ed.), 217, 777, 994; *Attorney General v. Stamford* (12). This suit is a vindictive suit and unnecessary. It has not been sanctioned by the community. All the defendants desire a new scheme. The nazir is willing to account. He is only responsible for money come to his hands.—*Williams on Executors*, p. 1674. No account for wilful default

(1) 16 Sim. 297 (305); 1 Mac. and G. 607. (3) 22 Beav. 248.
(2) 26 Ch. D. 221. (4) 21 Ch. D. 757. (5) L R. 13 Eq. 232.
(6) 24 Beav. 86. (7) 1 B.H.C.R. Ap. xviii.
(8) 2 Russell. 45. (9) 8 Jurist 117. (10) 5 C. 910.
(11) 18 B. 119. (12) 1 Phillips 737.

can be directed, as no particulars [413] were given in the pleadings—*Krishnaji v. Wamnaji* (1); *Lewin on Trusts*, (9th ed.), 1004.

Scott and Lowndes, for defendants Nos. 6, 7, 8.—Nothing has been alleged or proved against these defendants. If any liability has been incurred, it rests on the other defendants.

JUDGMENT.

20th March, 1894. FARRAN, J. —A short resume of the facts which preceded the filing of this suit is necessary to explain the present state of the governing body of the Juma Masjid and to enable me to make the conclusions at which I have arrived readily intelligible. The jurisdiction of the Court to intervene in its affairs at the instance of the Advocate General arises from the fact that the masjid and the properties belonging to it constitute a public charity.

On the 8th September, 1834, the late Supreme Court in a suit brought by certain members of the Mahomedan community against the then mushavirs of the Juma Masjid, referred it to the Master to enquire who were fit and proper persons, or a fit and proper person, to be appointed the future managers or manager, superintendents or superintendent, mutawalis or mutawali of the Juma Masjid, and to inquire whether such person or persons so to be appointed should be required to give any and what security to account for the moneys which they or he might receive. I take this recital from the plaint in suit No. 28 of 1871, as I cannot find the decree itself or the report of the Master amongst the proceedings.

The Master reported on the 31st November, 1834, that a special general meeting of the jamat had been convened for the purpose of framing rules for the future management of the affairs and concerns of the Juma Masjid, and that several rules were submitted for the consideration of the meeting and were unanimously approved and signed. These rules in English, or a translation of them, the Master set out in full in his report. The report of the Master was confirmed by the Court. I have not been able to ascertain, from the materials before me, whether the rules signed at the meeting were in Persian or English. In the [414] circumstances under which they were adopted, it appears to me that they derive their efficacy and force from the will of the community, and not from the decree of the Court; and that, therefore, the original rules passed at the meeting and signed, and not the copy or translation of them, which the Master set out in his report, are the rules which determine the constitution of the governing body of the masjid. It is not, however, very important, as the difference between them is merely a difference of phraseology.

In one instance, however, this difference of phraseology has a bearing upon a most important question in the suit. A print of the rules in Persian, Urdu and English has been put in evidence by the Advocate-General. It affords some internal evidence that the original rules were in Persian. The rules provide that the Juma Masjid and its chawls shall be placed under the Government and control of the Kazi of Bombay for the time being and ten mushavirs (I advisedly use the Persian expression), and that a nazir of the masjid and chawls should be appointed subject to the control of the kazi and mushavirs. The rules then specify the various duties assigned to the kazi, mushavirs and nazir respectively. At present it will be sufficient to note that the nazir

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had the general executive control of the masjid subject to the directions of the mushavirs, and that the several powers and authorities conferred upon the kazi and the mushavirs, including the power of filling up vacancies, were to be exercised by them collectively or by the kazi and an absolute majority of the mushavirs.

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At the time when the rules were framed there was, and had always been, a "Kazi of Bombay" holding office under a *sanad* from Government, a public local functionary who held the appointment for life and whose office was not hereditary. One Kutubudin Saheb Mahimker was then the Kazi of Bombay. He died in 1837 and Mahomed Yusuf Murgay was, on his death, appointed to the office. The latter died in 1866. In consequence of the passing of Act II of 1864 and Bombay Act IV of 1864 no appointment to the office of kazi was made upon his death by Government. The office lapsed.

The case of *Muhammad Yussub v. Sayad Ahmed* (1) establishes [415] that the appointment of kazi is by Mahomedan law vested in the chief officer of State and has never rested with the Mahomedan community at large. Kazi Mahomed Husain Murgay, however, assumed the office, and was generally accepted by the community as Kazi of Bombay. No difficulty occurred in his lifetime. He died in 1878. Upon his death, rival claimants to the office of kazi of Bombay sprang up. A minority of the Konkani Mussulmans, who appear to lead public Mahomedan opinion in Bombay, recognized his son Shaik Mahomed Murgay as kazi. A large majority were in favour of Kazi Abdul Latif Loday, and now recognize his son Mahomed Salay Loday as their kazi.

It is admitted on both sides that the Kazi of Bombay contemplated by the rules of 1834 was the official kazi appointed by *sanad*, and that consequently since 1866, or, at all events, since 1878, there has been no Kazi of Bombay within the meaning of the rules. My own view is in accord with that admission. This difficulty was felt in 1871, and in that year the Advocate General taking advantage of a suit, which he felt himself obliged to file against the then kazi and certain of the mushavirs to recover funds of the masjid in their hands and for the removal of the latter, urged upon the Court the necessity of amending the rules, and the Court by its decree declared that the system of management of the Juma Masjid was unsatisfactory and ought to be amended, and ordered that certain revised rules, which it approved, should be laid before the community for their consideration and adoption. The main object of the revised rules was to obviate the difficulty which had arisen from the lapse of the office of Kazi of Bombay. The revised rules were twice laid before the community for their adoption. They were explained and pressed upon the meeting by Mahomed Ally Rogay and others, but an anonymous handbill had been circulated misrepresenting their tenor. Certain persons opposed them, including the present relator Mahomed Husain Churgay, and they were rejected, and on the 28th February, 1876, the Court ordered the decree in the suit to be drawn up, stating that the revised rules mentioned in the decree had not been adopted. The Court was evidently of opinion either that it had no inherent power [416] itself to revise the rules, or that it could not do so on a plaint which did not specifically ask for such relief. The Advocate-General took no further steps, and left the Juma Masjid to be managed under a constitution which had become unworkable,

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When Kazi Mahomed Hussein Murgay died in 1878, the mushavirs of the masjid were Mahomed Ali Rogay, the defendants Moulvi Abdul Kadir Jitaker, Shaik Mahomed Curtay and Shaik Ahmed Muckba; relators Mahomed Hussein Churgay and Mahomed Hussein Loday, and some others (Gulam M. Delvi, Kutubudin Tomgekar, Mahomed I. Unday, Shaik H. Rogay), who have since died or resigned. Mahomed Ali Rogay, to whose ancestors' expenditure and exertions the present prosperity of the Juma Masjid may be traced, was the leading spirit amongst the majority of the mushavirs. On the death of Kazi Mahomed H. Murgay the difficulty which had been felt throughout the proceedings in suit No. 28 of 1871 at once arose. There was then certainly no Kazi of Bombay within the meaning of the rules. The constitution of the board thus became defective, and the powers and authorities which the mushavirs derived from having been elected under the rules of 1834, which could only be exercised in conjunction with the Kazi of Bombay, ceased to be exercisable. They had no longer any powers under the rules.

A meeting of the mushavirs was called on the 28th January, 1878, when it was resolved to take counsels' opinion—those of Mr. Mayhew and Mr. B. Tyebji. Mr. Mayhew was of opinion that the mushavirs could not select one of the rival kazis to fill the office of Kazi of Bombay under the rules, in which opinion he was, in my judgment, right, but that they could act without him under the rules, in which opinion he was, for the reasons which I have above assigned, in my judgment, wrong. Mr. B. Tyebji's opinion has not been put in evidence, being, it is said, lost. He appears to have advised that the constitution of the board became defective by the death of the Kazi of Bombay. These opinions were considered at a meeting held on the 1st March, 1878, when it was resolved that the opinion of Mr. Mayhew should be acted on, and that the mushavirs as before should only manage the affairs of the masjid as long as no kazi was [417] appointed, and that Mahomed Ali Rogay should be president. The relators M. H. Churgay and M. H. Loday did not, though summoned, attend that meeting. Their view was that the mushavirs should call upon Kazi Abdul Latif Loday to co-operate with them on the board. Consequently they would not attend, and they have ever since kept aloof from the board, and, as far as they could, thwarted their action. They did not, however, resign office, and have now put the Advocate-General in motion to put forward a new scheme for the government of the mosque, being at last convinced that the old scheme cannot be worked in the way which they have until lately advocated.

The rival kazis and their respective adherents from time to time put forward claims for a kazi to sit on the board of the Juma Masjid, but the majority of the mushavirs have never felt themselves in a position to allow either of them to occupy that position. In this course they were, as I have said, in my judgment, justified.

In 1879, Gulam M. Delvi died, and the majority of the mushavirs then appointed the defendant S. A. Delvi to fill his place.

In the same year, Kutubudin Tomgekar resigned and Mahomed Sayad Ranki was in like manner appointed to act. The latter and Mahomed Ismael Unday died before or in 1888. The majority of the mushavirs made efforts to fill the vacancies, but without success.

Mahomed Ali Rogay and Shaik Husain Rogay resigned in 1888, thus leaving the defendants Nos. 1, 2, 3 and 4 and the relators Nos. 1 and 2 the only remaining mushavirs. Though the defendants Nos. 1—4 made

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some attempts to fill the vacancies, they could not do so, and the mushavirs continued to be only six in number until the election of defendants Nos. 6, 7, 8 and 9, in 1891. The ninth defendant, however, did not agree to act. The board is at present thus constituted, except that the relator M. H. Londay has died since this suit.

From what I have already said it will be seen that I consider that the majority of the mushavirs have had since 1878 no authority, under the rules of 1834, to fill up vacancies as they occurred [418] or to carry on the government of the masjid. What, then, has been the legal position of the mushavirs generally since that time? They appear to me to have been a provisional committee of management kept up from time to time by co-operation, tacitly permitted by the jamat, to manage the affairs of the masjid until the original constitution could be restored or legally changed, that original constitution being for the time in abeyance. After the unsuccessful effort which was made from 1871 to 1876 to amend the constitution it was not, I think, incumbent on them to take further legal proceedings, which they could only have done at the risk of costs. It is not, therefore, I think, by their default that their provisional management has lasted unduly long. The election of the defendants Nos. 6, 7, 8 and 9 in 1891 shows, I think, that they have been acting with the tacit consent of the community, as many of its influential members took part in that election. It does not, I think, alter their position, that the relators Churgay and Londay individually objected to their proceedings, as they did not suggest any legal means for the mushavirs to adopt.

These persons, assuming then the position of mushavirs of the masjid, were, I think, bound to carry on the administration of its affairs according to its established rules so far as they could do so, and are liable for neglect or misconduct in their office to the same extent as if they had been validly appointed. I am unable to find any direct authority for that proposition, but it appears to me that it must be so. Mr. Jardine has referred me to Lewin on Trusts, chap. 30, s. 3, p. 1035; but that passage and the cases there referred to are not, I think, quite analogous to the present case. That of an executor *de son tort* is the nearest analogy which occurs to me.

Various charges are made in the plaint against the mushavirs since they began to act in 1878. The plaint itself is so vague and general in its terms that it is difficult to specify exactly what the Advocate-General complains of. I shall indicate the points which were mainly relied upon in counsel's reply:—

(1) The neglect to take steps to supply the place of the kazi, thereby depriving the charity of the assistance of the mushavir [419] relators and the failure to keep up the proper number of the mushavirs.

(2) The improper appointment of the defendant Mahomed Cassum Curtay as nazir of the masjid.

(3) The neglect to call for an annual account of the income and expenditure of the mosque and to audit the same as required by rule 6.

(4) The neglect to purchase immoveable properties with the surplus income of the mosque as required by rule 4.

(5) The neglect in not detecting sums appropriated by the bill-collectors, and getting in the same.

(6) The neglect in allowing arrears of rent to accumulate and to be lost to the masjid.

(7) The non-payment into the Bank of sums in the hands of the nazir when they exceeded Rs. 500.

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As to the first charge, I have already stated my opinion. There were several courses, which I could indicate, open to the mushavirs when the kazi died in 1878. They adopted the course which their senior counsel advised. I cannot say that they were wrong in this, though possibly some other course might have been more politic. It was the action of the present relators and their adherents with regard to the suit of 1871 which caused the principal difficulty.

(2) I do not think the mushavirs incurred any liability or laid themselves open to censure in appointing the defendant Mahomed Cassum Curtay to act as nazir in 1879. In considering this question it is important to bear in mind what the duties of the nazir then were. Whatever may have been the case in 1834, it was manifestly impossible, when the properties of the masjid had increased and were producing an income of about Rs. 3,000 per month, for the nazir personally to collect the rents or carry out the monthly repairs and keep the accounts. The kazi and the mushavirs had, therefore, established a nazir's office and employed in it two methas to keep the accounts, a munshi to do the Persian and Urdu writing, and two bill-collectors to collect the rents and see after the repairs. The quarterly and annual statements [420] of accounts were also prepared in this office. All these duties the rules 2, 5 and 6 impose upon the nazir. He would now perform them with the assistance of the office establishment. His duty, therefore, really was to superintend and check this office. This was carried out thus. Bill forms were kept for the collection of the rent. These (when filled up in the office) the nazir used to sign about the beginning of the month and send to the bill-collectors, taking their signatures for them. The amount received each day the collectors would bring to office and get the methas to credit them in the cash book to the different tenants. The nazir in the evening would see from the cash book what amount had been collected each day and would receive that amount and lock it up, initialling the cash book. So far the duties would be merely routine duties. To make the system and check complete, he should at the close of each month ascertain from the inspection of the bills and the bill book what bills had been paid and what remained unrecovered, and see that the cash received during the month corresponded with the amount of the bills recovered. He would also have to receive the reports of the bill-collectors as to the repairs required and give his sanction to them, or, when they exceeded Rs. 100, obtain the sanction of the mushavirs for them. A short time spent in the office each day and a few hours' labour each month would enable him to keep the whole system in exact working order. Intelligence rather than the expenditure of much time was what would be required for the nazir. *Prima facie*, a responsible clerk in a solicitor's office would be an excellent man for the post. Nazir Curtay was a clerk in the office of Messrs. Tyebji and Sayani. He was a man of good family and had interested himself in the affairs of the masjid. The mushavirs offered the post to the defendant Jitaker, but he declined it. They then selected Curtay to act. No one ever objected to the appointment, and I see no reason why the mushavirs should not have appointed him. It has transpired during the proceedings that he was in need of money, if not in debt, soon after his appointment, but there is nothing to show that the mushavirs knew of it. Until 1888 at all events he appears to have carried out the duties of his nazir-ship with seeming regularity.

[421] (3) The defendant Curtay says that quarterly statements of accounts as required by rule 5 were always made out and laid before the

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mushavirs, and I see no reason to doubt his statement. The accounts are forthcoming. He also says that the annual accounts were prepared down to 1888 and that notice was sent to the mushavirs when they were ready. I think this was probably done. Down to 1884 he says that the directors examined and passed them regularly, but that from 1884 to 1888 they did not do so, as there was no quorum or majority of mushavirs to act during the absence of Mahomed Ali Rogay in Europe. In 1888 the accounts down to that year were adjusted by the mushavirs and passed. They were also printed and circulated. No error has been pointed out in them. Mr. Jardine suggests that the defalcations of the bill-collectors, presently to be referred to, began before 1888, but he has not shown it. Even if some small defalcations did take place prior to 1888, and have not been detected, I could not upon the evidence hold the mushavirs responsible for them. The rules do not provide for a paid audit, and an audit by ten gentlemen like the mushavirs, none of whom are accountants, with the best intentions must necessarily be to a certain extent formal. Until an official auditor is appointed by Government to examine charity accounts, I do not see how there can ever be a really effective audit. I, therefore, consider that in respect of the accounts down to 1888 the rules have been substantially complied with. Since 1888 the annual accounts have not been audited or passed by the mushavirs. How far they are liable for not having done so, I shall consider when I deal with the appropriations of the bill collectors.

(4) This is the most important question in the case, so far as the mushavirs are concerned. No purchases have been made by the mushavirs since 1878. The balance in the Bank, when after the death of the kazi the account was transferred to the name of Mahomed Ali Rogay and Kutubudin Tomgekar, was Rs. 30,204-15-8. The balance at the end of 1888 was Rs. 1,83,592-11-10. These sums include the moneys belonging to some subordinate charities, the accounts of which were kept in the Juma Masjid books; and deductions have to be made for them on that account. They are sufficiently near the mark to [422] enable me to consider the question of principle. In 1888 they stood in the names of Mahomed Ali Rogay and the defendant Moulvi Abdul Kadir Jitaker in the books of the Bank of Bombay. The rule regarding the power or duty of the kazi and the mushavirs to purchase property is the fourth. In the English form it runs thus.—“As often as the funds standing to the credit of the kazi and the two senior directors shall amount to the sum of Rs. 5,000 or upwards, then and so often the kazi and the directors or the kazi and a majority of them shall therewith purchase other property, to be added to the then appropriated property belonging to the said masjid, and the deed of sale thereof shall be made out to and in the name of the kazi and ten directors for the time being and their successors and assigns in trust for the kazi and jamat of Bombay for and on behalf and for the sustentation and repairs and other expenses of the said Juma Masjid and of its appropriated property.” In the Persian and Urdu forms the expression “shall purchase” is rendered by a word which rather means “may purchase” than “shall purchase,” which confers an authority rather than indicates a command, and the addition of the “or upwards” in the English form rather points in the same direction. The plaintiff has not shown whether the vernacular or English form of the rule is authoritative. In either form, however, I apprehend that the rule imposed on the kazi and the mushavirs the duty of purchasing property with the surplus funds, but

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the vernacular form gave them a wider discretion as to the time when they shall purchase than did the English form. The rule certainly seems to have been throughout understood in that sense, for we find in the time of the kazi that the fund was allowed to reach the sum of over Rs. 30,000. I myself feel much doubt whether the power or duty of purchasing property for the masjid was one which the provisional committee like the mushavirs would have been justified in assuming. Had they purchased property with the masjid funds, and had property fallen in value, it appears to me that the Advocate-General, in the absence of special circumstances, acquiescence or the like, could have called upon them to restore the masjid funds and repudiated the purchase as made without authority. This power of purchasing property is a peculiar power requiring judgment to render the purchase a suitable addition to [423] the other appropriated property of the masjid, and is not like lending money on mortgage or investing it in stock. It is not a mere question of routine like most of the other duties of the mushavirs. A doubt, as to their powers, must have, I think, been the principal reason why the mushavirs did not purchase property. They made inquiries as to suitable purchases and employed brokers with the same object, but always stopped short of actual purchase. The property of Sonabai adjoining the mosque they seemed to be particularly anxious to acquire. This absence of power on the part of the mushavirs to make purchases, I think, must have been generally felt; for I do not find in the case any evidence even of a suggestion made by any one (except the relator Churgay) to Mahomed Ali Rogay and his colleagues that they should lay out the masjid funds. This, however, is not the case that the defendants Nos. 1—4 put forward. They have not themselves been examined, but the evidence afforded by the record of the masjid and that of the brokers which they have adduced, points rather to their defence being that the money was retained for the purpose of enlarging and improving the masjid and that it was not possible to find suitable investments at reasonable prices, than to their having entertained a well-founded doubt as to their power of purchase. Mr. Tyabji, however, did put forward this want of power in the mushavirs as an absolute defence.

The accounts which the mushavirs published prior to 1888 and those which they published in 1888 for the last preceding seven years show clearly that there were large uninvested funds of the masjid, and that no purchases had up to that date been made. These accounts were distributed amongst the leaders of the community, and no objection was taken to them. The Advocate-General, however, now seeks to re-open them by making the mushavirs, the defendants Nos. 1, 2, 3 and 4, liable for not purchasing property. He suggests that they should be charged interest on the uninvested funds, such as would have been received in the shape of rents had properties been from time to time purchased under the provisions of rule 4.

The first question which arises on that contention is whether the claim is within time. I think that it is clear that s. 10 of the Limitation Act (XV of 1877) has no application to this [424] case. This claim is not one to follow property which has become vested in the mushavirs for a specific purpose. They never had in their hands the interest with which it is sought to make them liable, nor did they use or misuse the principal moneys. It is really a claim against them as officers of the masjid for neglecting the duty to purchase landed estate. I cannot hold that they are agents so as to bring the case within art. 90, which applies to suits by principals against

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agents for neglect. The claim must, therefore, fall within art. 120 of the Limitation Act XV of 1877, and must be enforced within six years from the cause of action arising. The plea of limitation, therefore, only protects the defendants Nos. 1 to 4 in respect of neglect to invest arising before the 10th December, 1885. Ought I, however, to allow the Advocate-General to open the accounts adjusted and published in 1888 for the purpose of enforcing the liability of the defendants Nos. 1—4, which, to say the least, is extremely doubtful? I think not. The case is not, of course, so strong in point of time as that of the *Kathiawar Trading Company v. Virchand*(1), but the equities in the present case are far stronger. Dishonesty or improper dealing with the funds in this case there has been none. The highest at which the case can be put is that there has been an error of judgment. In this the community has acquiesced. The two Rogays are not defendants, and it would be difficult now for defendants, Nos. 1—4 to enforce any contribution against them. Other mushavirs are dead. The position of parties is changed. Moreover, my own opinion is that the mushavirs have never had since 1878 power or authority to invest these funds, though I prefer to trust my decision on the other grounds. Since 1888 the position is different. The number of acting mushavirs was then reduced to four. They tried to fill the vacancies, but without success. They had not even a working majority of six mushavirs, and the funds stood in the joint names of Mahomed Ali Rogay and the defendant Jitaker and could not be operated on by reason of the insanity of the former. It was then quite impossible for defendants Nos. 1—4 to make any purchase, even if the community would have permitted them to do so. I cannot hold them liable for not purchasing land during this period. The new directors were, as to the old funds, [425] under similar difficulties. As to the new, there was not time allowed for them to act. The filing of the suit and the nature of the relief sought therein precluded them from moving in this matter after its inception. I must, therefore, decline to make any reference to the Commissioner under this head of charge.

5. After the retirement of the Rogays in 1888 the affairs of the masjid appear to have been neglected. The nazir, to the knowledge of the defendants Nos. 1—4, had to leave Bombay on business, and after that, until he retired in July, 1891, only superintended the nazir's office from time to time in the most spasmodic manner. The annual accounts were not checked by the defendants Nos. 1—4 or audited. It does not appear that they were even made out. No meetings of mushavirs were called. Nothing was done. The reason of this apathy apparently was that the four remaining mushavirs did not consider that they could act for want of a quorum or majority of six. The unfortunate opinion which had been obtained in 1878, misled them. As a provisional committee who had assumed the management of the masjid they were bound to protect its interests. Of the money which they actually received, or which was paid into their account, they were, I think, actual trustees, as the kazi and two senior mushavirs had been, when the funds were received by the kazi and lodged in their names: but in addition to this they were officers of the masjid, charged with the specific duty of superintending the nazir and his accounts; and, if the masjid has suffered loss by their neglect of duty, I think they are answerable for it. It is practically admitted that the bill-collectors have collected since 1888 rents from tenants of the masjid which have not been credited in the books, and it is proved that

a cursory audit even, at the end of each year, would have detected these defalcations. If the mushavirs had examined and audited the accounts and failed to discover these defalcations. I do not say that they would have been liable; but that they have not done. They have neglected to examine them altogether. I think that a case is made out here for directing an account of the rents actually recovered which they have received since the date of the last account published, or which but for their wilful default or neglect they might have received.

[426] 6. The sixth head is not a very important one. The nazir and not the mushavirs is, under the rules, entrusted with the collection of the rents, and it is his duty to see that the rents are not allowed to fall unduly into arrear. It is not shown that, except at an exceptional time when the nazir was ill, the rents were so unduly in arrear as to call for the active interference of the mushavirs, or that the masjid has suffered undue loss under this head. The new mushavirs have put things to right on this score. As to the rents due by the servants of the masjid and the friends of the nazir, which have not been recovered, I do not think I should direct any special inquiry as to them. It was not the duty of the mushavirs to look into the account of each individual tenant and to stop his rent from his pay if he were a servant of the masjid. I consider that I have gone as far as it is possible to go in the direction I have already given.

7. As to the payment into the Bank of the moneys when they amounted to Rs. 500, I think that the spirit of the rules has been complied with, and no loss to the masjid has been suggested from its not having been observed to the letter.

I have lastly to consider the case of the nazir defendant. Although I am not altogether satisfied with his explanation of Exs. 1—4 with reference to his borrowing from the bill-collectors, and some other charges made against him; yet I think that on the whole, notwithstanding his embarrassed circumstances, it has not been proved that he has not kept his hands fairly clean. I do not think the statements of the bill-collectors made behind his back ought to have been entered upon my notes. Servants detected in defalcations are always ready to make their immediate superior a participator in the default. Their statements, though not evidence against him, the defendant No. 5, has met with an unqualified denial, which as the bill-collectors have not been called, I see no reason for not accepting. He ought, however, to have resigned his office in 1888, if not before. He is of course in a higher degree than defendants Nos. 1—4 answerable for his neglect in allowing the defalcations of the bill-collectors, and in not rendering his accounts since the adjusted accounts in 1888, and he must be charged with wilful default in the same respect and with not [427] having recovered his own rent. If pressed to do so, I might be induced to add the rents of the servants of the masjid whose rents have been lost, but it seems hardly worth while to have the last-mentioned special direction.

I have nothing but praise to assign to the conduct of the defendants Nos. 6, 7 and 8. The want of discrimination in the drafting of the plaint is much to be regretted.

Declare that the defendants, the mushavirs, are not authorized under the rules of 1834 to carry on the management of the masjid, and that they have not been validly appointed under these rules. Direct that they continue to carry on the management of the affairs of the masjid until the scheme hereafter provided for shall come into operation. Direct that

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a revised scheme for the future management of the affairs of the Juma Masjid and its appropriated properties be prepared by the Advocate-General and approved by the sitting Judge in Chambers and, when so approved, be laid before the jamat of the Juma Masjid for their approval and adoption. Direct that the defendants do bring in an account of the rents, profits and income of the Juma Masjid received by them respectively since the last adjusted and published accounts, and in taking such account let the defendants Nos. 1—4 account for the rents actually recovered and received by them, or which but for their wilful default or neglect they might have received, and let defendant No. 5 be similarly charged, and also with rent due by himself (if any) which he ought to have recovered, and pay such sum (if any) as upon the taking of such accounts may be found due from them respectively.

The Advocate-General and the defendants other than defendant No. 5 to have their costs taxed as between attorney and client out of the funds, including costs of rule. Two counsel allowed to defendants Nos. 1—4. Costs of defendant No. 5 reserved. Further directions and further costs reserved. Liberty to apply.

Attorneys for plaintiff: Messrs. *Ardesir, Hormasji and Dinsha.*

Attorneys for the defendants: Messrs. *Nanu and Hormasji*, and Mr. *K. D. Shroff.*

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[428] CRIMINAL REFERENCE.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* PIRIO KALIO * [17th July, 1893.]

Abkari Act (Bombay Act V of 1878), s. 3, cl. 11, and 43, cl. (f)—Drawing toddy is not manufacturing liquor.

Drawing toddy is not 'manufacturing liquor' as defined in cl. 11 (1) of s. 3 of the Bombay Abkari Act (V of 1878).

The mere possession of implements for the purpose of drawing toddy is not an offence punishable under cl. (f) of s. 43 (2) of the Act.

* Criminal Reference No. 54 of 1893.

(1) Bombay Act V of 1878, s. 3, cl. 11 :—

(1) "Manufacture" includes every process, whether natural or artificial, by which any spirituous, fermented or intoxicating liquor or intoxicating drug is prepared, and also every process for the rectification of liquor ; admixing is a process within the meaning of this definition.

(2) Section 43 :—

Whoever in contravention of this Act, or of any rule or order made under this Act, or of any license, permit or pass obtained under this Act,

- (a) imports or exports liquor or any intoxicating drug into or out of any part of the Presidency of Bombay, or
- (b) transports or removes liquor or any intoxicating drug from one place to another, or
- (c) manufactures liquor or any intoxicating drug, or
- (d) draws toddy from any tree, or
- (e) constructs or works any distillery or brewery, or
- (f) uses, keeps, or has in his possession any material, still, utensil, implement, or apparatus whatsoever for the purpose of manufacturing liquor or any intoxicating drug, or
- (g) sells liquor or any intoxicating drug,

shall be punished for each such offence with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to six months, or with both.