

of marriage or for divorce. If it is not so, then it cannot be pleaded in defence by the appellant to a petition for restitution of conjugal rights made by the respondent in this case. The grounds for judicial separation, nullity of marriage and divorce are given in sections 10, 11 and 13 of the Act respectively. The contravention of section 5 (iii) of the Act does not admittedly find any mention in any of these three sections. That being so, it cannot be pleaded as a ground in answer to a petition for restitution of conjugal rights. The decree passed by the trial Judge and affirmed by the learned Single Judge is, therefore, in conformity with law.

(8) The result is that this appeal fails is dismissed with costs.

GOPAL SINGH, J.—I agree.

B.S.G.

CIVIL MISCELLANEOUS

*Before Bal Raj Tuli, J.*

MANDIR MAUSUMA GITA BHAWAN, Etc.—*Petitioners.*

*versus*

THE TAXING OFFICER (REGISTRAR) PUNJAB AND HARYANA  
HIGH COURT, CHANDIGARH, Etc.—*Respondents.*

**Civil Writ No. 3962 of 1970.**

July 29, 1971.

*Court Fees Act (VII of 1970)—Section 7(v) and Article 17(iv) of Schedule II—Suit for possession of a mosque or temple—Court fee payable thereon—Whether under Article 17(vi) of Schedule II—Value of extra-commercium property fixed in the plaint for purposes of jurisdiction—whether means market value of such property.*

*Held*, that a mosque cannot be sold because no person has the right to sell it nor can any person pass title of ownership to a purchaser. It is generally described as a house of God and is primarily used for saying prayers by the Muslim community. According to Mohamedan Law, a mosque is *extra commercium* and its ownership vests in God. The mere fact that a mosque can be adversely possessed does not mean that it is

Mandir Masuma Gita Bhawan, etc. v. The Taxing Officer  
(Registrar) Punjab and Haryana High Court, Chandigarh, etc.  
(Tuli, J.)

saleable. The person getting into adverse possession does so on his own force and not because some person passes on the title to him. Since a mosque cannot be sold, it has no market value and, therefore, on a suit for possession of a mosque, the Court-fee payable is under Article 17(vi) of Schedule II of the Court fees Act, 1870. Section 7(v) of the Act does not apply to such a case. Similarly on suit for possession of a temple, whether public or private, the Court-fee payable is under Article 17(vi) of Schedule II of the Act, as a temple falls within the category of *res-extra-commercium* and has no market value. (Para 4)

*Held*, that the value of the property fixed for purposes of jurisdiction in the plaint does not mean the market value of the property if the property is *res-extra-commercium* and has no market value. (Para 5).

*Write petition under Articles 226 and 227 of the Constitution of India praying that a writ in the nature of Certiorari, or any other appropriate writ, order or direction be issued quashing the order dated 16th September, 1970 passed by respondent No. 1 (Annexure 'A') and further praying that the dispossession of the petitioner be stayed till the decision of the writ petition.*

R. L. AGGARWAL, ADVOCATE, for the petitioners.

R. S. MITAL AND I. S. BALHARA, ADVOCATES, for respondent No. 2.

M. S. JAIN, ADVOCATE FOR ADVOCATE-GENERAL, HARYANA.

M. S. SANDHU, DEPUTY ADVOCATE-GENERAL, PUNJAB, for the respondents.

### JUDGMENT

TULI, J.—(1) This writ petition is directed against the order of the Registrar of this Court as Taxing Officer under section 5 of the Court Fees Act, 1870 (hereinafter referred to as the Act), with regard to the amount of Court fee payable on a Regular First Appeal filed by the petitioner against respondent No. 2. Since the matter related to the payment of Court fee on appeals arising out of the suits relating the Waqf properties, I issued notice to the Advocate-General of Punjab and Haryana and counsel have appeared on their behalf.

(2) The facts are that the Punjab Waqf Board, Ambala Cantonment, respondent 2, filed a suit for the possession of a mosque against the petitioner, Mandir Mausuma Gita Bhawan, through its President and Secretary, and stated the value of the property as Rs. 15,000.00 in the plaint, but paid a fixed Court fee of Rs. 15.00 in

accordance with the notification dated October 3, issued by the Punjab Government. It was stated in the plaint that the defendant (petitioner in this case) had taken forcible possession of the mosque in 1953. The suit was decreed by the learned trial Court and an appeal against that decree has been filed in this Court. An objection was raised by the office that proper Court fee had not been paid. The learned counsel for the appellant stated that the proper Court fee payable was Rs. 19.50 under Schedule II, Article 17(vi) of the Act on the ground that it was not possible to determine the market value of the mosque or the temple even if it is considered to be a house under section 7(v) of the Act. The matter was placed before the Taxing Officer who has expressed the view that a mosque is a property and the appellant must pay *ad valorem* Court fee on its value. That value was stated in the plaint to be Rs. 15,000.00, which had been accepted by the appellant, that is, the petitioner in the present case. The petitioner has challenged that order of the Taxing Officer.

(3) The learned counsel for the petitioner has argued that even if the property in suit is to be considered a house, the Court fee is payable on its market value as is provided in section 7(v) of the Act. The mosque cannot be sold because no person has the right to sell it nor can any person pass title of ownership to a purchaser. Mosque has been generally described as house of God or abode of God and is primarily used for saying prayers by the Muslim community. A mosque which is a Waqf property is dedicated to God and is, therefore, inalienable. There is no doubt that a mosque can be adversely possessed as has been held in *Mosque known as Masjid, Shahid Ganj and others v. Shromani Gurdwara Parbandhak Committee, Amritsar* (1), and *Mosque known as Masjid Shahid Ganj and others v. Shiromani Gurdwara Parbandhak Committee, Amritsar, and another* (2), but the mere fact that a mosque can be adversely possessed does not mean that it is saleable. The person getting into adverse possession does so on his own force and not because some person passes on the title to him. Any property which is Waqf, whether it is a mosque or something else, is, according to the Mohamedan Law, "*extra commercium*" and its ownership vests in God, as was held by Bhide, J., in *Mosque known as Masjid Shahid Ganj and others v. Shiromani Gurdwara Parbandhak Committee, Amritsar* (1). Since a mosque

(1) A.I.R. 1938 Lah. 369 (F.B.).

(2) A.I.R. 1940 P.C. 116.

Mandir Masuma Gita Bhawan, etc. v. The Taxing Officer  
(Registrar) Punjab and Haryana High Court, Chandigarh, etc.  
(Tuli, J.)

cannot be sold, it has no market value and, therefore, the Court fee payable is under Article 17(vi) of Schedule II to the Act, according to which the petitioner has paid the Court fee on the memorandum of appeal. Section 7(v) of the Act does not apply.

(4) There is another aspect of the matter, that is, the property has to be seen on the date of the suit for the purposes of Court fee because it is that property which becomes the subject-matter of the suit. At the time the suit was filed, the property was a temple and a temple has also no market value. It was so held in *Rajagopala Naidu v. Ramasubramania Aiyar and another* (3). That judgment was followed by a Full Bench of the Rangoon High Court in *U Pyinnnya and another v. U Dipa* (4). A learned Single Judge of the Nagpur High Court in *Motilal Shioji Ram v. Shambhoolal Ganpatlal* (5), also held that the temple falls within the category of "*res-extra-commercium*," and after referring to the Madras and Rangoon cases (supra) and *Parsottamanand Giri v. Mayanand Giri* (6), observed as under:—

"It is further contended that the temple in dispute is not a public but a private temple. I do not see what difference it makes to the marketability of the temple whether it is private or public. The temple, so long as it stands as a temple dedicated to a deity installed in it, remains as a property of the deity and consequently where it is private in the sense that it is meant mainly or exclusively for the worship of the persons who founded it does not make it any more marketable than it is when the public at large are allowed to enter and worship there. In either case the property belongs primarily to the deity and, therefore, it must fall within the category of "*res extra commercium*".

So that even if the property in suit is considered to be a temple, it has no market value and, therefore, Court fee has been correctly paid under Article 17(vi) of Schedule II to the Act.

- (3) A.I.R. 1924 Mad. 19 (F.B.).  
(4) A.I.R. 1929 Rangoon 134.  
(5) A.I.R. 1938 Nagpur 481.  
(6) A.I.R. 1932 All. 593.

(5) The learned counsel for the Punjab Waqf Board supports the learned counsel for the petitioner in his argument that the mosque has no market value, but he submits that the value of the property in suit having been stated in the plaint and having been accepted by the petitioner as defendant to that suit, in appeal it cannot be urged on its behalf that the property has no market value. What was stated in the plaint was the value of the property for the purposes of jurisdiction since a fixed Court fee of Rs. 15.00 was payable under the notification of the Punjab Government. The petitioner admitted the value of the property as Rs. 15,000.00, which did not mean the market value. The plaintiff nowhere stated its market value nor did the defendant, the present petitioner, admit it as such. The petitioner is, therefore, not bound by the value of Rs. 15,000.00 as it never accepted it as the market value of the property in suit and, therefore, cannot be required to pay the Court fee on that value. Similar arguments were advanced by the learned counsel appearing for the Advocates-General for the two States. I, however, find no merit in their submission. The result is that this petition is accepted and the order of the Taxing Officer is set aside. It is further held that the memorandum of appeal requires Court fee under Article 17(vi) of Schedule II to the Act and if the Court fee, as prescribed therein, has been paid, the memorandum of appeal is to be considered as properly stamped. In the circumstances of the case, I leave the parties to bear their own costs.

B.S.G.

CIVIL MISCELLANEOUS

Before A. D. Koshal, J.

RAMPURA GUJRAN CO-OPERATIVE AGRICULTURAL SERVICE SOCIETY  
LTD., RAMPURA ETC.,—*Petitioners.*

*versus*

THE STATE OF PUNJAB ETC.,—*Respondents.*

Civil Writ No. 1701 of 1970.

July 29, 1971.

*Punjab Co-operative Societies Rules (1963) —Rule 28—Primary Co-operative Service Societies Employees Service Rules (1970)—Rules 2.3 and 2.11—Whether ultra vires Rules 28.*