PRIVY COUNCIL.

ABDUR RAHIM (PLAINTIFF)

v.

NARAYAN DAS AURORA (SINCE DECEASED), AND OTHERS (DEFENDANTS).

P. C.*
1922
Dec. 20.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Mortgage—Wakf property—Severable family interest—Absence of necessity—Effect of mortgage—Limitation.

A deed of wakf contained severable provisions for substantial religious purposes and for the benefit of the settlor's family. In 1899 the mutawalli mortgaged the property for a purpose unconnected with the wakf, and in 1906 a final decree for foreclosure and possession was obtained. In 1913 the appellant, as successor in the office of mutawalli, sued to recover the property. It was found that the late mutawalli was in possession within twelve years of the suit being brought :—

Held, following *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1), that Art. 134 of Sch. I of the Indian Limitation Act (IX. of 1908) did not apply, and that the suit was not barred by limitation ; and that the appellant was entitled to recover the property free of any charge upon the interest of the settlor's family under the deed of wakf.

APPEAL (No. 122 of 1921) from a judgment and decree of the High Court (March 26, 1920) reversing a decree of the Subordinate Judge of Howrah.

In 1894 Sheik Abdur Rahim, deceased, dedicated certain property to wakf, the trusts being for the settlor for life, and after his decease to apply the income, after discharging rent and other outgoings, one-half to the worship at a certain mosque, and the other half to the heirs of the settlor of each degree,

* *Present* : LORD SUMNER, LORD CARSON and MR. AMEER ALI.

(1) (1921) I. L. R. 44 Mad. 831 ; L. R. 48 I. A. 302.

1922

ABDUR RAHIM v. NARAYAN DAS AURORA.

according to their shares by Mahomedan law. The settlor on his death was succeeded as mutawalli by his sister Nazir-un-nissa. On February 7, 1899, she and her surviving brother mortgaged the property by way of conditional sale to one Kedar Nath for purposes unconnected with the wakf. On the death of the mortgagee, which took place soon afterwards, litigation arose as to who was entitled to his property. Ultimately Sheo Prasad was found to be entitled, and in 1904 he brought a suit on the mortgage. On January 3, 1905, he obtained a preliminary decree for foreclosure and possession, and a final decree was passed in January 1906. Meanwhile, on February 4, 1905, Sheo Prasad executed an assignment of the mortgage to the father of Narayan Das, the present first respondent, to whom formal possession was delivered by the Court in March, 1906. The first respondent then endeavoured to collect rents from the tenants on the land, and was met by opposition. Soon afterwards persons interested in the wakf, having procured the sanction of the Advocate-General, brought a suit under the Civil Procedure Code, s. 92 in the Court of the District Judge of Hooghly, for the removal of Nazir-un-nissa from her office and for the appointment of a new mutawalli. That suit resulted in a decree appointing the present appellant as mutawalli in her place.

The appellant commenced the present suit on May 2, 1913, to recover possession of the properties. The suit was defended by the first respondent who, in addition to other pleas no longer material, pleaded that the suit was barred by limitation.

The trial Judge made a decree for possession. In the course of his judgment he found that Nazir-un-nissa had been in possession within twelve years of the suit being brought.

Upon appeal to the High Court the suit was dismissed as barred by limitation. Richardson J. held that Art. 134 of Sch. I of the Indian Limitation Act, 1908, applied, and that the twelve years' period thereunder was to be computed from the date of the mortgage; he however expressly concurred with the finding of the Subordinate Judge as to the time at which possession was obtained. Syed Shamsul Huda J. differed on the last question, being of opinion that the burden of proof was upon the plaintiff to negative the prescriptive title set up, and that he had failed to do so.

De Gruyther K. C. and *Kenworthy Brown*, for the appellant. The High Court was wrong in applying Art. 134: *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1); the decision of the Board in that case was given after the judgment now appealed from. The concurrent findings of Richardson J. and the Subordinate Judge that the late mutawalli was in possession within twelve years of the date of the suit was supported by the evidence. The suit therefore was in time whether Art. 142 or Art. 144 applies. The onus under Art. 144 was upon the defendants: *Secretary of State for India* v. *Chelikani Rama Rao* (2), *Kuthali Moothavar* v. *Peringati Kunharankutty*. (3)

Dunne K. C. and *E. B. Raikes*, for the representatives of the first respondent, deceased. It is conceded that having regard to the recent decision of the Board Art. 134 does not apply. The suit was however barred. This was a suit in ejectment, and Art. 142 applies under that article the onus was upon the plaintiff to show possession within twelve years. Further, having regard to its provision, the wakf was invalid

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.

(2) (1916) I. L. R. 39 Mad. 617; L. R. 43 I. A. 192.

(3) (1921) I. L. R. 44 Mad. 883; L. R. 48 I. A. 395.

1922

ABDUR RAHIM v. NARAYAN DAS AURORA.

Mutu Ramanadan Chettiar v. *Vava Levvai Marakayar* (1). A deed by which a definite and substantial part of the property is reserved to the family without any gift over to charitable or religious purposes, is not valid under that decision, apart from Act VI of 1913: *Muhammad Munawar Ali* v. *Razia* (2), *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (3). Even if the wakf is valid so far as religious purposes are provided for, this respondent is entitled to have the secular interests, which were severable, charged in his favour.

De Gruyther, K.C., in reply. There was a substantial dedication of property to religious purposes; the authorities show that that is sufficient to establish the validity of the wakf. The secular interests cannot be severed; the whole property is made wakf, and the wakf, as a whole, is valid.

The judgment of their Lordships was delivered by

Dec. 20.

LORD SUMNER. This was a suit brought by the mutawalli of a mosque to recover possession of property, alleged to have been settled as a valid wakf, from the defendants, whose title arose under incumbrances created by his predecessors in that office.

The principal issue tried in India was whether or not the claim was statute-barred, and, relying on Art. 134 of Sch. I of Act No. IX of 1908, the High Court gave judgment in favour of the defendants. This was before the decision of their Lordships' Board in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (4), which held that Art. 134 does not apply to a wakf, and accordingly their conclusion is admitted to be no longer sustainable. There has further been much

(1) (1916) L. R. 44 I. A. 21.

(2) (1895) I. L. R. 27 All. 320; L. R. 32 I. A. 86.

(3) (1889) L. R. 17 I. A. 28.

(4) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.

discussion on the present appeal whether the case is governed by Art. 142 or by Art. 144, since Art. 134 is inapplicable; but again it is common ground that, if the plaintiff's evidence established that his predecessor in office remained in possession of the property in question until after the year 1901, then his claim is not statute-barred. As to this, oral evidence, relating to the receipt of the rents and profits, was called on both sides. The learned trial Judge, after criticising adversely the evidence given on this point by the defendants' witnesses, accepted the plaintiff's case, and held that the mortgagors had remained in possession until less than twelve years before the present suit was begun. With this finding of fact one of the learned Judges in the High Court, Richardson J., agreed. His colleague, Syed Shamsul Huda J., dissenting, drew attention to the burden of proof, which he said rested on the plaintiff and had not been discharged, the probabilities being in favour of the defendants. If the learned Judge meant, as his reference to the onus of proof seems to indicate, that the plaintiff had given no evidence, that the mortgagee had not received possession at the time when the mortgage was executed and in accordance with its terms, he overlooked the fact that several of his witnesses gave positive and precise evidence on the subject, and so far as the burden of proof goes, there was enough to call for an answer. If, on the other hand, as his allusion to the probabilities of the case seems to show, he only meant that, weighing the plaintiff's evidence against that of the defendants', he rejected the former and accepted the latter, his opinion is not fortified by any detailed examination or comparison of the evidence, which the respective witnesses gave. Their Lordships do not think that under these circumstances the opinion of Syed

1922

ABDUR RAHIM v. NARAYAN DAS AURORA.

Shamsul Huda J. ought to prevail against the concurrent opinions of Richardson J. and of the learned trial Judge; nor does their own examination of the evidence, which need not be set out in detail, lead them to discredit the plaintiff's case in this respect.

The affirmation of the finding that the mortgagors retained possession down to a date, which defeats the plea of the Limitation Act, would dispose of this appeal, but for the following point. The original settlement was undoubtedly a valid creation of a wakf, for the provision intended to benefit the family of the settlor was not the preponderating feature of the settlement, nor was the provision made for the perpetuation of religious ceremonies and charitable gifts by any means illusory or unsubstantial; but, equally undoubtedly, the two provisions—that for the upkeep of the mosque and celebration of worship there on the one hand, and that for the benefit of the settlor's family on the other—are, as a matter of drafting, separate and severable dispositions. Indeed, it could not have been otherwise. The new contention for the respondents was that a mortgagee, who had parted with his money to the persons, members of the plaintiff's and of the settlor's family, who were then in the position of mutawalli, ought not to lose his money altogether, and that too at the plaintiff's instance, but was at least entitled to have a charge declared in his favour over the portion of the property which was settled for the benefit of the settlor's family.

This point was not taken below, or even in the respondents' case, unless it can be brought within the third reason, "because the trusts created were not those of a valid wakf—at any rate as to the half of the property settled on the founder's heirs." Their Lordships would not in any event have declared

that the respondents were entitled to the suggested charge, for they are by no means sure that all necessary parties are before them or that all necessary matters have been proved, and the case would have to be remitted to India, even if the contention be sound.

In the present case there is a dedication, which has already taken effect, and it is so substantial that one-half of the net income has to be devoted to specified pious purposes. It is impossible to say that this gift is only a veil to cover arrangements for the aggrandisement of the settlor's family and a device to make the property inalienable. There is nothing illusory about it. The most that can be said is that the provision for the settlor's family is considerable, for the mere provision itself is clearly permissible, as is the provision that the settlor's heirs shall be the mutawallis of the wakf in their order. In delivering the judgment of their Lordships' Board in *Mujibunnissa* v. *Abdul Rohim* (1), Lord Robertson says: "It will be so" (that is, it will be a valid deed of wakf) "if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family." In view of the fact that this deed has been taken as creating a valid wakf in both Courts in India, and that effect has been given to it as creating a valid wakf in separate proceedings by the decree appointing the appellant to be mutawalli, their Lordships think it needless to discuss further the genuine character of the wakf. Its dominating purpose is to make adequate provision for the pious uses mentioned.

In *Vidya Varuthi Tirtha* v. *Balusami Ayyar* (2) it was explained that the idea conveyed by the word

(1) (1900) I. L. R. 23 All. 233, 242; L. R. 28 I. A. 15, 23.

(2) (1921) I. L. R. 44 Mad. 831, 840; L. R. 48 I. A. 302, 312.

1922

ABDUR RAHIM v. NARAYAN DAS AURORA.

"trust" is foreign to the religious conception involved in the word "wakf": "'When once it is declared that a particular property is wakf or any such expression is used as implies wakf. . . . the right of the wakf is extinguished and the ownership is transferred to the Almighty,' says Mr. Ameer Ali in delivering judgment. 'The manager of the wakf is the mutawalli, the governor, superintendent, or curator.' In the case of khankhas the head is called a sajjadanishin. 'But neither the sajjadanishin nor the mutawalli has any right in the property belonging to the wakf; the property is not vested in him, and he is not a trustee in the technical sense. . . . . The wakfnama does not transfer property to trustees. . . . . Under the Mahomedan law the moment a wakf is created all rights of property pass out of the wakf and vest in God Almighty. 'The curator, whether called mutawalli or sajjadanishin, or by any other name, is merely a manager.'"

The principle of the respondents' contention, accordingly, appears to their Lordships to be fallacious. 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 property as is held in wakf is inalienable, except for the purposes of the wakf. A similar view forms the basis of the inalienability of a Hindu math and, if the settlor declares himself, as he is entitled to do, to be the first mutawalli or the first shebait, that does not affect the fundamental principle, that the whole property is considered as having passed from him for the purposes which he has declared, and not merely such portion of it as will suffice to produce the

1922

ABDUR RAHIM v. NARAYAN DAS AURORA.

part of the income which he has expressly dedicated to pious and charitable uses.

From this it follows that where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the wakf, which is therefore as such unsustainable, the whole mortgage fails. It cannot, for purposes of enforcement, be severed into two distinct charges, one declared for pious uses on one part of the property, and another and separate charge declared on another part for the uses of the mortgagor only. The property itself is not to be regarded as severable and chargeable according to the measure of the interest, which the settlor's family may have in the rents and profits of the whole. The contention now advanced is inconsistent with the character of a wakf, as fully explained in the abovementioned and many other decisions of their Lordships' Board.

Their Lordships are of opinion that, for an advance of money, otherwise than to satisfy the legitimate needs and purposes of the wakf, no part of the property held in wakf is chargeable either by the settlor or by the Court. In such a case any claim by the person who advances the money must be in the nature of a claim *in personam*, and cannot be secured by holding liable the wakf property itself.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and the judgment of the High Court set aside and that of the trial Judge restored with costs here and below.

Solicitors for the appellant: *Pugh & Co.*

Solicitors for the respondents: *Watkins & Hunter.*

A. M. T.