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ERNMENT.

inchoate endowment only, which stopped short at the written and registered declarations of the defendants' father, from which he at once receded before he had put it out of his power to do so by divesting himself of the property. On behalf of the respondent we have heard the learned Government pleader who failed to show us any authority, either of Muhammadan law or of case-law, in support of his proposition, which is practically the law as laid down by Abu Yusuf. He referred us to Baillie on Muhammadan law, p. 552, from which he tried to show that all the essential conditions of a *waqf* are fulfilled in this case, and he also pointed to a judgment reported in 16 Weekly Reporter at p. 116 (*Doyal Chund Mullick v. Syud Keramat Ali*). We do not find in the 1st Chapter of the 9th book of Baillie on Muhammadan law any authority against the contention which we have stated above on behalf of the appellant, and the judgment in *Doyal Chund Mullick v. Syud Keramat Ali* was made with reference to *Shia* and not to *Sunni* Muhammadans. The learned Judge of Moradabad decreed the case against both the defendants. One confessed judgment, and the other, Muhammad Aziz-ud-din Ahmad Khan, alone appealed. We allow his appeal, and set aside the decree of the Court below so far as he is concerned, and decree his appeal with costs of both Courts.

*Appeal decreed.*

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May 9,

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Aikman.*

BALWANT RAO (PLAINTIFF) v. MUHAMMAD HUSAIN (DEFENDANT).\*

*Civil Procedure Code, s. 411—Sale of property for purpose of realizing Court fees erroneously supposed to be due to Government—Such order ultra vires and no necessity to bring a suit to set it aside—Jurisdiction.*

An order for sale and a sale under such order are *ultra vires* and nullities when in fact there was no jurisdiction in the Court to make the order. *Ram Lal Moitra v. Bama Sundari Dabia* (1) referred to.

\* Second appeal No. 82 of 1891 from a decree of A. B. Patterson, Esq., Commissioner of Jhānsi, dated the 11th October 1890, reversing a decree of Babu Baldeo Prasad, Deputy Commissioner of Jhānsi, dated the 18th April 1890.

(1) I. L. R. 12 Calc. 307.

The facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C. J. and AIKMAN, J.—This appeal has arisen in a suit brought by a usufructuary mortgagee for possession. The suit was brought against Narain Sakha Ram the mortgagor and Muhammad Husain. Narain Sakha Ram in 1883 presented an application to the Deputy Commissioner of Jhānsi for leave to sue as a pauper. He sought to get a decree for possession of property which included that in the present suit. Narain Sakha Ram's application to sue as a pauper was rejected. In 1884 Narain Sakha Ram brought a regular suit on the full Court fee to recover the property which he had sought to sue for as a pauper. That suit was brought in the Court of the Deputy Commissioner. The Deputy Commissioner dismissed the suit. Narain Sakha Ram appealed to the Commissioner of Jhānsi *in formā pauperis*. The Commissioner set aside the decree of the Deputy Commissioner, and remanded the suit under s. 562 of the Code of Civil Procedure. On the remand the Deputy Commissioner decreed the claim. The defendant in that suit appealed and the Commissioner of Jhānsi modified the decree of the Deputy Commissioner by decreeing Narain Sakha Ram's claim in respect of one hundred bighas only. At the foot of the decree of the Deputy Commissioner on the remand, there was an entry that Rs. 40½ were due to Government as Court fees, and still more curious was the fact that Narain Sakha Ram was described in the decree as a pauper plaintiff. The decree of the Commissioner made no reference to any Court fees due to Government. In fact none were due. The suit in which the decrees were made was a suit instituted on a full Court fee stamp. The order in the appeal of Narain Sakha Ram having been made under s. 562 of the Code of Civil Procedure no fees remained payable by Narain Sakha Ram to Government. If he had appealed on a full Court fee it would under s. 13 of the Court Fees Act of 1870 have become repayable to Narain Sakha Ram. The trial of the suit on remand had to take place on the

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original Court fee, which had been paid. There was when the final decree was made not one farthing due to Government by Narain Sakha Ram. Some Government pleader, being of a different opinion apparently, applied to the Assistant Commissioner for an order to sell Narain Sakha Ram's hundred bighas which he had obtained by his decree in satisfaction of the Rs. 404 (four hundred and four) alleged to be due as Court fees. The Assistant Commissioner made an order, the property was sold and was purchased by Muhammad Husain, the second defendant here, a pleader, who had been concerned for one of the parties in the litigation. The case stands thus. There was no first charge in respect of Court fees under s. 411 of the Code of Civil Procedure on the land. Narain Sakha Ram, then plaintiff, had not sued as a pauper, there were no Court fees due to Government to be calculated and there were no Court fees that the Government could seek to recover by sale or otherwise. There was consequently no jurisdiction in any Court to make an order of sale. Further, and in any event, the Assistant Commissioner had no jurisdiction to make any order as to sale. His was not the Court which had jurisdiction to try the suit and the suit had not been brought in his Court. The order for sale was from every point of view *ultra vires*. The mortgage to the present plaintiff was made on the 25th of October 1885. The first Court decreed the claim in this suit, the second Court dismissed the suit on the ground that the plaintiff here had not asked for a decree setting aside the sale, and also on the view that s. 411 of the Code of Civil Procedure applied. The plaintiff brought this appeal. The sale having been made under an order, which, having been made absolutely without jurisdiction, was, as against Narain Sakha Ram and his mortgagee who had taken an interest prior to the sale, absolutely void, there was no necessity to ask as a relief in this suit that the sale should be set aside. We are confirmed in that view by the decision in *Ram Lall Moitra v. Bama Sundari Dabia* (1). Further if it was necessary as part of the decree in this suit to set aside the sale, the plaintiff here would have been entitled to that relief as subsidiary to the main relief he asked for in the suit.

However, it was not necessary to ask for any such relief. We cannot understand the conduct of Muhammad Husain, pleader. We agree with the first Court that, being the pleader of Narain Sakha Ram, he must have known at the time he purchased of the mortgage to the present plaintiff. We are asked on behalf of the respondent to refer an issue as to the title of Narain Sakha Ram, to grant the mortgage. Narain Sakha Ram cannot dispute his own title to grant the mortgage, he is estopped. Muhammad Husain took no interest under the sale which was void. If he took any interest at all, he would have to stand in the shoes of Narain Sakha Ram. It is unnecessary to make any reference. We decree the appeal with costs in this Court and the lower appellate Court and restore and confirm the decree of the first Court.

*Appeal decreed.*

*Before Justice Tyrrell and Mr. Justice Blair.*

PHUNDO (DEFENDANT) v. JANGI NATH AND OTHERS (PLAINIFFS)\*

*Civil Procedure Code, s. 13—Res judicata—Soundness in law of previous decision immaterial—Hindu law—Adoption—Baqāls.*

Where a judicial decision pleaded as constituting *res judicata*, in all other respects fulfils the requirements of s. 13 of the Code of Civil Procedure, and no appeal has been preferred against it within limitation, it is immaterial whether such decision is or is not sound law. *Parthasaradi Ayyangar v. Chinnakrishna Ayyangar* (1) dissented from.

*Semle* that *Baqāls* do not belong to the regenerate classes, and therefore the rule of law which forbids a Hindu to adopt a boy whose mother he could not have married, does not apply to them.

The facts of this case are as follows:—

On the 13th of February 1876, one Bhika Mal, who was the step-brother of the defendant-appellant's, Musammat Phundo's, deceased husband, Dwarka Das, mortgaged certain houses to one Baij Nath, the father of the plaintiffs-respondents, alleging that he was the adopted son of the said step-brother. On the 18th of July 1882, Baij Nath brought a suit upon that mortgage against Bhika

\* First Appeal No. 83 of 1891, from a decree of Babu Abinash Chandra Banerji, Judge of the Court of Small Causes (exercising the powers of a Subordinate Judge) of Agra, dated the 28th March 1891.

(1) I. L. R., 5 Mad. 204.

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