1913

February, 12.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BIHARI LAL AND OTHERS (DEFENDANTS) *v.* MAKHDUM BAKHSH AND OTHERS (PLAINTIFFS) AND ALIM-ULLAH KHAN AND OTHERS (DEFENDANTS)*.

Evidence—Mortgage—Recital of receipt of consideration—Recital admissible as against representatives of original mortgagor.

Held that the admission of the receipt of consideration contained in a mortgage deed is admissible in evidence against the representatives in interest of the original mortgagors. *Brajeshware Peshakar* v. *Budhanuddi* (1), *Nawal Kunwar* v. *Bakhtawar Singh* (2) and *Abdul Majid* v. *Mahbub Ali* (3) followed. *Manohar Singh* v. *Sumirta Kuar* (4) not followed. *Bisheswar Dayal* v. *Harbans Sahay* (5), *Ghurphekni* v. *Parmeshwar Dayal Dubey* (6) and *Rahim Jan Bibi* v. *Imam Jan* (7) doubted.

THE facts of this case were as follows:—

This was a suit upon a mortgage made by one Najaf Khan in favour of an ancestor of the plaintiff in May, 1868. The first set of defendants are the heirs of Najaf Khan. The second set are purchasers after the mortgage of various portions of the mortgaged property. The mortgage purported to have been made in consideration of a sum of Rs. 22 due on a prior mortgage of 1887 and two sums said to have been paid just before and just after the execution of the deed. The courts below held that the payment of these two sums had not been proved, but that the mortgage was good for the sum of Rs. 92 and interest thereon. The evidence that the last mentioned sum was due upon a prior mortgage consisted of a recital in the deed in suit and the production by heirs of the mortgagor of the earlier deed, which does not bear endorsement showing that it had been paid off.

The court of first instance decreed the claim to the extent mentioned, and this decree was affirmed in appeal by the District Judge. The defendants appealed, contending that the recital in the mortgage deed of receipt of consideration was not admissible as regards them.

The Hon'ble Munshi *Gokul Prasad* (with him Munshi *Haribans Sahai*), for the appellants, submitted that such a recital was no

* Second Appeal No. 24 of 1912 from a decree of B. J. Dalal, District Judge of Jaunpur, dated the 30th of November, 1911, confirming a decree of Debi Prasad Chaturvedi, Second Additional Munsif of Jaunpur, dated the 5th of September, 1911.

(1) (1880) I. L. R., 6 Calc., 268.
(2) (1912) 10 A. L. J., 390.
(3) F. A. No. 129 of 1911.
(4) (1895) I. L. R., 17 All., 428.
(5) (1907) 6 C. L. J., 659.
(6) (1907) 5 C. L. J., 653.
(7) (1911) 17 C. L. J., 173.

evidence against a purchaser of property and should be proved against him. He relied on *Manohar Singh* v. *Sumirta Kuar* (1), *Brajesheware Peshakar* v. *Budhanuddi* (2), *Ghurphekni* v. *Purmeshwar Dayal Dubey* (3), *Bisheswar Dayal* v. *Harbans Sahay* (4) and *Rahim Jan Bibi* v. *Imam Jan* (5).

Mr. *S. A. Haidar*, for the respondents, cited *Lalak Singh* v. *Ajudhia Prasad* (6).

The Hon'ble Munshi *Gokul Prasad*, replied.

GRIFFIN and CHAMIER, JJ. :—This was a suit upon a mortgage made by one Najaf Khan in favour of an ancestor of the plaintiff in May, 1868. The first set of defendants are the heirs of Najaf Khan. The second set are purchasers after the mortgage of various portions of the mortgaged property. The mortgage purports to have been made in consideration of a sum of Rs. 22 due on a prior mortgage of 1867 and two sums said to have been paid just before and just after the execution of the deed. The courts below have held that the payment of these two sums has not been proved, but that the mortgage holds good for the sum of Rs. 92 and interest thereon.

The evidence that the last mentioned sum was due upon a prior mortgage consists of a recital in the deed in suit and the production by the heirs of the mortgagor of the earlier deed which does not bear any endorsement showing that it had been paid off.

In second appeal it is contended that the recital in the deed is not admissible in evidence against the defendants. The defendants appellants rely upon the decisions of this Court in *Manohar Singh* v. *Sumirta Kuar* (1) and the decisions of the Calcutta High Court in *Brajeshware Peshakar* v. *Budhanuddi* (2), *Ghurphekni* v. *Purmeshwar Dayal Dubey* (3), *Bisheswar Dayal* v. *Harbans Sahay* (4) and *Rahim Jan Bibi* v. *Imam Jan* (5).

The first of the Calcutta cases is no authority for the proposition that a recital of the receipt of consideration contained in a mortgage is not admissible in evidence against a subsequent transferee of the property. On the contrary, the Chief Justice, the only

(1) (1895) I. L. R., 17 All., 428.
(2) (1880) I. L. R., 6 Calc., 268.
(3) (1907) 5 C. L. J., 653.
(4) (1907) 6 C. L. J., 659.
(5) (1911) 17 C. L. J., 173
(6) (1912) 10 A. L. J., 108.

1913

BIHARI LAL v. MAKHDUM BAKESH.

one of the three Judges who discusses the question at all, shows at page 278 of the report how the mortgagor's admission of the receipt of consideration was admissible against a subsequent purchaser of the property. The statement at the foot of page 277 of the report, that a recital in a deed is not evidence against third persons must be read in conjunction with what follows. This seems to have been overlooked by the learned Judges who decided the case of *Manohar Singh* v. *Sumirta Kuar* (1). In the last mentioned case and in the case of *Bisheswar Dayal* v. *Hurbans Sahay* (2) the question was whether the admission by a mortgagor of the receipt of the consideration contained in a deed was admissible in evidence against subsequent auction purchasers of the property. That question does not arise in the present case. There may be, we do not say that there is, some ground for distinguishing between the case of an auction purchaser and the case of mortgagee or a purchaser by private treaty. In the case of *Ghurphekni* v. *Purmeshwar Dayal Dubey* (3) all that was held was that an admission of the receipt of consideration made by a mortgagor was not admissible against her step-daughters who, however, did not claim title under her. That decision has no bearing upon the present case. In the case of *Rahim Jan Bibi* v. *Imam Jan* (4) it was held that the recital of the receipt of consideration contained in a *hibabilewaz* was not admissible against his daughter after his death. If, as seems to have been the case, the daughter was one of his heirs, we think that the correctness of the decision is open to doubt, for under section 21 of the Evidence Act an admission is relevant and may be proved as against the person who makes it or his representative in interest.

In *Nawal Kunwar* v. *Bakhtawar Singh* (5) it was held that a recital in a mortgage deed that a certain sum was due to the mortgagee was admissible in evidence against a subsequent purchaser, by private treaty, of the property mortgaged, and in *Abdul Majid* v. *Mahbub Ali* (6) it was held that a recital of the receipt of consideration contained in a deed of mortgage was as much binding upon his heirs as upon the mortgagor himself.

(1) (1895) I. L. R., 17 All., 428.
(2) (1907) 6 C. L. J., 659.
(3) (1907) 5 C. L. J., 653.
(4) (1911) 17 C. L. J., 173
(5) (1912) 10 A. L. J., 390.
(6) F. A. No. 129 of 1911.

1913

BIHARI LAL v. MAKHDUM BAKHSH.

It seems to us that the decisions in the two last mentioned cases are in reality supported by the decision in *Brajeshware Peshakar* v. *Budhanuddi*, and we must hold that the admission of the receipt of consideration contained in the mortgage deed now in suit is admissible against the defendants appellants, who are representatives in interest of the original mortgagor.

It is not for us in second appeal to consider the value of the admission, but we may say that it receives in our opinion strong support from the production of the deed of 1867 which bears no signs of having been paid off.

For the above reasons we dismiss the appeal with costs.

Appeal dismissed.

1913

February, 13.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

RAM CHANDRA AND OTHERS (DEFENDANTS) *v.* ALI MUHAMMAD AND OTHERS (PLAINTIFFS) AND KAMARUDDIN BEG (PRO FORMÂ DEFENDANT)*.

Muhammadan law—Waqf—*Right of Muhammadans to worship in mosques—Suit by individual Muhammadans whose right is infringed—Civil Procedure Code* (1908), *order I, rule* 8.

Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise, but if he brings his suit in his personal capacity and not on behalf of the whole Muhammadan community, the decision will be binding only as between the plaintiff and the defendant and cannot be taken advantage of by, or be binding on, the Muhammadan community in general. *Jawahra* v. *Akbar Husain* (1) and *Dasondhay* v. *Muhammad Abu Nasar* (2) followed.

THE facts of this case are fully set forth in the judgement of the Court.

Pandit *Shiam Krishna Dar*, for the appellants.

Maulvi *Ghulam Mujtaba* and Munshi *Muhammad Ishaq*, for the respondents.

GRIFFIN and CHAMIER, JJ. :—The plaintiffs in this case, who are Muhammadans, allege that in the time of the Muhammadan kings a mosque and some houses were built in the town of Agra; that from that time the Muhammadans have always worshipped in the mosque and the property has all along been waqf; that some time

* Second Appeal No. 405 of 1912 from a decree of H. W. Lyle, District Judge of Agra, dated the 6th of January, 1912, confirming a decree of Muhammad Amanul Haq, Additional Munsif of Agra, dated the 25th of February, 1911.

(1) (1894) I. L. R., 7 All., 178. (2) (1911) I. L. R., 33 All., 660.