

1912.
November, 11.

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

MASIH-UD-DIN (PLAINTIFF) v. BALLABH DAS AND OTHERS (DEFENDANTS). *
Muhammadian law—Waqf—Subsequent failure of title of waqif—Right of mutawalli to sue on indemnity bond executed in favour of waqif as purchaser—Right of plaintiff to shift basis of claim during suit—Practice.

A. purchased a village, the vendors giving him an indemnity bond in case he should be dispossessed. A. then made a waqf of the property purchased, naming himself as mutawalli and after him his son M. A. lost the property as the result of a suit, and subsequently (A meanwhile having died) M. sued as mutawalli to enforce the terms of the indemnity bond. *Held* that the waqf was invalid, and that M. could not be permitted to change the character of the suit by claiming as one of the heirs of A.

Per CHAMIER, J.:—Even if the waqf was valid, the mutawalli was not entitled to maintain the suit in the absence of a transfer to him as such of the vendee's rights under the indemnity bond.

The facts of this case were as follows :—

By a sale deed, dated the 12th of November, 1889, Seth Kishan Chand and Gokul Chand sold the village Lasra to Shaikh Abdullah, and on the same date they executed an indemnity bond to the effect that in case the village sold went out of the hands of the vendee for want of a clear title in the vendors, the former would pay back the price together with damages to the latter, and as a security for the due performance of that agreement mortgaged certain villages to Abdullah. On the 22nd of May, 1897, Abdullah made a waqf of the village Lasra and himself became a mutawalli. On his death his son, the plaintiff in this case, became mutawalli. There was some litigation with respect to Lasra, with the result that for want of title in the vendors it went out of the hands of the plaintiff (under a decree of the High Court) on the 11th of May, 1906. He was held also liable to pay mesne profits and costs. The plaintiff, therefore, sued to enforce the indemnity bond. The defendants pleaded, *inter alia*, that the plaintiff as mutawalli was not entitled to sue as the mortgagee inasmuch as the rights arising under the indemnity bond were not included in the waqf. It was further pleaded that Abdullah having acquired no clear title in the village Lasra, could not make a valid waqf of that property and the indemnity bond was without consideration. The Subordinate Judge dismissed the suit, holding that the sale was *void ab initio* ; that there was no

* First Appeal No. 214 of 1911 from a decree of Achal Behari, Subordinate Judge of Banda, dated the 29th of March, 1911.

valid waqf; that the waqf that did not include the indemnity bond and that there was no separate legal consideration for the bond. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (with him Maulvi *Rahmatullah*), for the appellant, contended that Abdullah, when he became a mutawalli, could himself enforce his rights under the indemnity bond. He had in him vested all the rights arising out of that bond. In this case it could not be said that those rights did not pass to the plaintiff. He cited the Transfer of Property Act, section 55(2). The subject-matter of the waqf must belong to the owner of the property and in this case it did belong to him under the sale deed. These rights would pass because there was a clear intention that they should. The reservation of such a right would clearly be inconsistent with the intention of the waqf. The extinction of his own rights was absolute. The waqf attached to the money. It was for the benefit of the waqf that the suit had been brought. The second position of the appellant was that if he could not enforce the indemnity bond as a mutawalli, he should be permitted to enforce it as one of the heirs of Abdullah as a personal claim.

The Hon'ble Dr. *Sundur Lal*, The Hon'ble Pandit *Moti Lal Nehru*, Babu *Durgu Charan Banerji* and Pandit *Uma Shankar Bajpai*, for the respondents, were not called upon.

GRIFFIN, J:—This appeal arises out of a suit to enforce a claim under an indemnity bond executed in favour of one Abdullah by Kishan Chand and Gokul Chand on the 12th of November, 1889. On that date Kishan Chand and Gokul Chand executed a sale deed of a village named Lasra, in favour of Abdullah. The latter apparently had some doubts as to the validity of his vendors' title, for, on the same date, he took from his vendors an indemnity bond the conditions of which have given rise to the present suit. By this indemnity bond the vendors undertook to make good to Abdullah the sale price together with any loss he might sustain on account of any defect of title in the property conveyed by the sale deed. Apparently, Abdullah entered into possession of the property sold and remained in possession until the 27th of May, 1897, when he made a dedication of this village along with others for certain religious purposes. Under the waqfnamah he appointed himself the first mutawalli

1912

MASIH-UD-
DIN
v.
BALLABH
DAS.

Griffin J.

and nominated his son, the appellant before us, his successor. In the life-time of Abdullah, Musammat Naraini appeared as a claimant of the ownership of the village Lasra. She was the adoptive mother of one Ram Gopal, a nephew of Abdullah's vendors. Her suit was decreed by this Court on the 21st of December, 1905, and Musammat Naraini obtained possession of the village Lasra in May, 1906. This suit was instituted on the 3rd of August, 1910, to recover a sum of Rs. 52,000 on account of the price of the village, Lasra, and the loss incurred by the plaintiff owing to the village having passed out of his possession. The defendants 1 to 5 are transferees from the vendors of Abdullah of the village hypothecated under the indemnity bond mentioned above. Musammat Naraini, the sixth defendant, is the person who, under a decree of this Court, obtained possession of the village Lasra. The defendants 7, 8 and 9 are representatives of the vendors. They have not appeared to defend the suit, and no relief was asked as against them. Abdullah died during the pendency of the appeal in this Court in the suit brought by Musammat Naraini, and his son, who is the appellant here, was brought on the record as his representative. The present suit was defended on various grounds, and we are concerned here with two only. The lower Court has upheld the contention of the defendants; first, that the waqf is invalid and, therefore, the plaintiff is not entitled to maintain the suit, and secondly, that Abdullah, the vendee, at the time he created the waqf, did not at the same time convey to the mutawalli his rights under the indemnity bond. In appeal, it is contended that the court below was wrong in holding that the waqf was invalid and that the plaintiff has no right to maintain the suit because the waqfnamah contained no mention of a conveyance to the mutawalli of the vendee's rights under the indemnity bond. It is, further, contended that if the present suit cannot be maintained by reason of any defect in the plaintiff's position as mutawalli, he ought to be allowed to continue the suit as heir of the vendee, Abdullah. This Court in its decision of the 21st December, 1905, held that the sale to Shaikh Abdullah was not a valid sale and that Abdullah was not a *bona fide* purchaser under that sale. The Muhammadan law on the

subject of waqf, which it is necessary to refer to in this case, will be found at page 134 of Ameer Ali's Muhammadan Law, Volume I:—"The subject-matter of the dedication must be the property of the waqf at the time the waqf is made, that is, he must be in a position to exercise dominion over it. Consequently, if a waqf is made by a person of some property of which he is in unlawful possession, but which he, subsequently purchases from the rightful owner, such waqf is invalid. So also, when a man makes a waqf for certain good purposes of land belonging to another, and then becomes the proprietor of it, the waqf is not lawful, but it would become validly dedicated if ratified by the proprietor. Accordingly, when a person purports to make a waqf of property which does not belong to him, and such waqf is subsequently ratified by the true owner, the dedication is valid." Here, it will be seen that Abdullah made a dedication of certain property of which he was not the true owner. There has been no ratification of the waqf by the true owner, and I am not satisfied that, according to the Muhammadan law as set out above, the so-called waqf, so far as the particular village Lasra was concerned, was valid. I agree, therefore, with the lower court in dismissing the plaintiff's suit on that ground. I do not consider it necessary to go into the second ground as to what was the exact intention of Abdullah in regard to his rights under the indemnity bond at the time he executed the waqfnamah. As to the plea advanced on behalf of the appellant that he should be permitted to continue the suit in his capacity as heir of the deceased, Abdullah, I do not think that the request is one which should be acceded to at this stage of the case. It is not pretended that the plaintiff is the one and only heir of Abdullah, and I am not prepared at this stage of the case to allow the plaintiff to continue the suit in an entirely different capacity. In my opinion the suit was rightly dismissed by the court below. and I dismiss this appeal with costs.

CHAMIER, J:—I agree that the appeal should be dismissed, but I should prefer to rest the dismissal of the appeal on the ground that even if the waqf was valid, the plaintiff has no right to sue on the deed of indemnity as mutawalli of the waqf.

1912

 MASIH-UD-
 DIN
 v.
 BALLABH
 DAS.

Griffin J.

1912

MASIH-UD-
DIN
v.
BALLABH
DAS.

The right to sue on that deed does not appear to have been transferred to the mutawalli for the time being. Under the waqfnamah Abdullah abandoned his title to mauza Lasra, but did not mention or in any way refer to the deed of indemnity. The right to sue on that deed is not appurtenant to the interest of Abdullah in mauza Lasra and did not pass to the mutawalli for the time being under section 8 of the Transfer of Property Act or under any other provision of which I am aware. If it was intended that the mutawalli for the time being should have the right to sue on the deed of indemnity, I can only say that, in my opinion, no such intention has been expressed in the waqfnamah. I agree that the plaintiff should not, at this stage, be allowed to convert the suit by him as mutawalli into a suit by him as one of the heirs of Abdullah.

BY THE COURT:—The appeal is dismissed with costs so far as defendants 1 to 5 are concerned.

Appeal dismissed.

1912

November, 15.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

KARTA KISHAN, (PLAINTIFF) v. HARNAM CHAND, (DEFENDANT) *

Act No. XVI of 1908 (Indian Registration Act), section 32—"Presentation"—Presentation by a servant of the mortgagor in the presence of mortgagor.

Where a mortgage-deed was handed over to the sub-registrar for the purpose of registration by a person other than the mortgagor, but the mortgagor was present assenting to the registration of the document with full knowledge of what was being done in the office of the sub-registrar: *held* that the presentation was a valid presentation within the meaning of section 32 of the Registration Act. *Nath Mal v. Abdul Wahid Khan* (1) followed. *Mujib-un-nissa v. Abdur Rahim* (2) distinguished. *Jambu Prasad v. Aftab Ali Khan* (3) not followed.

This was a plaintiff's appeal in a suit for sale upon a mortgage. Both the courts below dismissed the suit upon the ground that the registration of the document was defective, and the sole question in appeal before the High Court was whether in the circumstances the mortgage-deed was validly registered. The circumstances in which registration was effected are detailed in the judgement of the Court.

* Second Appeal No. 51 of 1912 from a decree of W. D. Burkitt, District Judge of Saharanpur, dated the 19th of July, 1912, confirming a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 26th of September, 1911.

(1) (1912) I L. R., 34 All., 355.

(2) (1901) I. L. R., 23 All., 293.

(3) (1912) I. L. R., 34 All., 331.