

1921

RAM DHAN  
v.  
PRAYAG  
NARAIN.

*sadabart* or *chattar* at Agra. But there is no evidence to prove that this expenditure was incurred out of the income of the village of Itaura. It cannot, therefore, be said that the income of the village was devoted to the maintenance of the charity to which a reference was made in the document of 1863. Since the date of the document Rao Joti Prasad, as we have stated above, treated the property as if it was his own private property. As already stated, he in 1866 caused the name of his son Bishambhar Nath to be entered as owner of this property. In 1869 he executed a deed of gift by which he bestowed this property on Bishambhar Nath. In 1881 Bishambhar Nath and his brother dealt with the property as their private property and not as endowed property; and in 1882 Bishambhar Nath mortgaged it as the owner of it. There is nothing to show that the income of the property was devoted to the purposes of the endowment and that it was ever treated as endowed property which did not form part of the estate of Joti Prasad or of Bishambhar Nath. In these circumstances we think that the plaintiff has failed to prove that a completed and valid endowment was made by Rao Joti Prasad and that the property has not been acquired by the defendants by virtue of their auction purchase.

In the view we have taken above, it is unnecessary to enter into the question of limitation or into the question of *res judicata* with which the court below has dealt.

We accordingly dismiss the appeal with costs.

*Appeal dismissed.*

*Before Sir Griinwool Mears, Knight, Chief Justice, and Justice  
Sir Pramada Charan Banerji.*

MUHAMMAD ISMAIL AND ANOTHER (PLAINTIFFS) v. MUHAMMAD  
ISHAQ AND OTHERS (DEFENDANTS) \*

*Muhammadan law—Waqf—Will—Construction of document.*

A Muhammadan lady by her will devised certain property to her two brothers enjoining them to sell the same and with the proceeds erect a mosque. The will, however, provided further that if the devisees preferred to keep the property themselves, they could do so if they devoted the value of the property (given in the will at Rs. 2,500) to the construction of a mosque. Held on a construction of the will that the waqf created thereby was a waqf

\* First Appeal No. 259 of 1918 from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 25th of March, 1918.

1921  
March, 2.

of the value of the property and not of the property itself, and would not render the property exempt from sale in execution of a decree against the devisees.

THE facts of this case sufficiently appear from the judgment of the Court.

*Dr. Kailas Nath Katju*, for the appellants.

*Mr. B. E. O'Connor*, for the respondents.

MEARS, C. J., and BANERJI, J.:—This and the connected appeal No. 410 arise out of a suit brought under section 92 of the Code of Civil Procedure. It was alleged that one Musammat Wafatan made a waqf of certain property for the construction of a mosque and that a breach of the said trust had been committed. It was prayed that new trustees should be appointed and many other reliefs were asked for.

The alleged waqf is said to have been made under a will executed by Musammat Wafatan. That document in its preamble states that besides making a disposition of her property it was necessary to make some provision for charitable purposes for the benefit of her soul. The document then directs that her brothers Dilawar and Shukr-ullah should, as regards three shops and a house with a shop, sell the said property and with the proceeds of the sale construct a mosque. It is further provided in the document that if Dilawar and Shukr-ullah wanted to keep the property, they should devote the value thereof, which is mentioned in the document as being Rs. 2,500, to the construction of a mosque and continue to be the owners of the property. This alleged will was made in 1898. Musammat Wafatan died in 1900 and shortly afterwards Shukr-ullah died. Dilawar lived until 1909: but nothing was done with respect to the property. After the death of Dilawar, in execution of a decree obtained against one of his sons, Yakub, a portion of the property was sold by auction and was purchased by Bihari Lal, who is the principal respondent in this appeal. The learned Judge has held that there was no valid waqf and has dismissed the suit as against Bihari Lal. At the same time he proceeded to try the suit as against the other defendants, and in the end he appointed new trustees and provided a scheme for the management of the trust. This was somewhat inconsistent in view of his finding that there was no valid waqf. The plaintiffs have preferred this appeal and it is

1921

---

MUHAMMAD  
ISMAIL  
v.  
MUHAMMAD  
ISHAQ.

1921

MUHAMMAD  
ISMAIL  
v.  
MUHAMMAD  
ISHAQ.

contended on their behalf that a valid waqf of the three shops and the house in dispute was created by Musammāt Wafatan. In our opinion upon a true construction of the will of Musammāt Wafatan there was a waqf of the value of the property for the erection of a mosque and not of the property itself. The property was not to be appropriated to the erection of a mosque but the proceeds of the sale of the property, whether it was purchased by a stranger or kept by Dilawar and Shukr-ullah, were to be devoted to the construction of a mosque. In these circumstances we think that the waqf was in fact a waqf of the value of the property and not as we have said above of the property itself. This being our view, there was no case against Bihari Lal, the purchaser of a part of the property, and the suit was rightly dismissed as against him. We accordingly dismiss this appeal with costs to Bihari Lal.

*Appeal dismissed.*

### FULL BENCH.

*Before Mr. Justice Tudball, Mr. Justice Muhammad Rafiq and  
Mr. Justice Ryves.*

KALKA DAS (PLAINTIFF) v. GAJJU SINGH AND ANOTHER (DEFENDANTS). \*  
Act No III of 1907 (Provincial Insolvency Act), sections 16 (2), 56(2)—Act  
(Local) No. II of 1901 (Agra Tenancy Act), sections 193, 20—Insolvency  
—Occupancy holding—Position of insolvent occupancy tenant.

An occupancy holding being altogether outside the provisions of the Provincial Insolvency Act, 1907, that Act is no bar to a suit for arrears of rent brought by the zamindar pending proceedings in insolvency. *Raghubir Singh v. Ram Chandar* (1) overruled.

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

*Dr. Kailas Nath Katju*, for the appellant.

*Dr. S. M. Sulaiman*, for the respondents.

TUDBALL, MUHAMMAD RAFIQ and RYVES, JJ. :—This appeal arises out of a suit brought by the plaintiff appellant for the

---

Second Appeal No. 720 of 1918, from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 2nd of March, 1918, confirming a decree of Gobind Ram Agha Dhanal, Assistant Collector, First Class of Cawnpore, dated the 12th of July, 1917.