

entitled to the mortgage money. It is not alleged that the mortgage money has been paid or that the mortgages have been redeemed in any other way, nor is it stated that the mortgagors gave any other property to the mortgagees in substitution for the mortgaged properties. We cannot see any principle of law under which the mortgagors can say that the mortgages have been wiped off. We are distinctly of opinion that this is not a case of novation of contract. The mortgagees could not get back possession of the properties, because the lease in their favour has been declared to be invalid and the sale to them has been the subject of a decree for pre-emption in favour of defendants Nos. 3 to 5. The result is that the mortgages revive and the plaintiffs are entitled to fall back upon them, see *Kiam-ud-din v. Rajjo* (1). The present appeal is confined to the plaintiffs' claim for money against the defendants Nos. 1 and 2 and we think that, having regard to the fact that they have been deprived of their mortgage security, they are entitled to recover the money from the mortgagors respondents. The result is that we set aside the decree of the court below and restore that of the court of first instance with costs in all courts.

Appeal decreed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Stuart.

MUHAMMAD YUNUS (PLAINTIFF) v. MUHAMMAD ISHAQ KHAN
AND OTHERS (DEFENDANTS).*

1921

February, 11.

Muhammadan law—Sunnis—Waqf—Delivery of possession essential.

According to the Muhammadan law of the Hanafi school, it is essential to the validity of a *waqf* that the *waqif* should actually divest himself of the property to be made *waqf*. *Muhammad Ais-ud-din Ahmad Khan v. The Legal Remembrancer* (2) followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Mr. S. A. *Haidar*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondents.

MUHAMMAD RAFIQ and STUART, JJ. :—The suit out of which this appeal has arisen was instituted by the plaintiff appellant

* Second Appeal No. 1193 of 1918 from a decree of B. J. Dalal, District Judge of Aligarh, dated the 25th of July, 1918, confirming a decree of Babu Kedar Nath Mehra, Munsif of Havali, dated the 20th of May, 1918.

(1) (1898) I. L. R., 11 All., 13.

(2) (1893) I. L. R., 15 All., 321.

1921

MUHAMMAD
YUNUS
v.
MUHAMMAD
ISHAQ KHAN.

for the recovery of plot No. 611 measuring 16 biswas on the following allegations. He stated that one Abdul Malik executed a deed of *wagf* in respect of plot No. 611 in 1905 in favour of the school called Anjuman-i-Sherwani at Aligarh. Subsequent to the creation of the *wagf* Abdul Malik sold the whole of his property to the defendants. The latter are in possession of the *wagf* property also and resisted the claim of the school. The plaintiff, as the Secretary of the school, sued to recover possession of the *wagf* property. The claim was resisted on various pleas, one of which was that no valid *wagf* had been created. Both courts accepted the pleas in defence and dismissed the claim. In second appeal to this Court it is contended that the evidence on the record proves a valid *wagf* under the Hanafi law and that the view taken of that law by the courts below is erroneous. According to the case for the plaintiff a deed of *wagf* was executed and registered by Abdul Malik, but possession of the *wagf* property was not delivered to the school. The plaintiff contends that the mere execution of the document, unattended with the possession of the *wagf* property, is sufficient to have created the *wagf*. In support of this view reliance is placed upon the *fatwa* of Qazi Yusuf. Moreover, it is urged that where under the Hanafi law the Imam and his two disciples differ the opinion of Qazi Yusuf will prevail. We find that the contention raised on behalf of the plaintiff appellant in this case is covered directly by authority. The case of *Muhammad Aziz-ud-din Ahmad Khan v. The Legal Remembrancer* (1) is directly in point. It was laid down in that case that according to the law, of Sunni Muhammadans it is essential to the validity of a *wagf* that the *wagif* should actually divest himself of possession of the *wagf* property. This case has never been dissented from in this Court. We are bound by it. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) (1893) I. L. R., 15 All., 321.