1921
January, 15.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir George Knox.

ABDUL JALIL KHAN AND OTHERS (PLAINTIFFS) *v.* OBED-ULLAH KHAN AND OTHERS (DEFENDANTS)*.

Civil Procedure Code (1908), section 66—Benami auction purchase—Suit against transferee from certified purchaser—Transfer made before but suit brought after the coming into force of the present Code—Suit governed by the present Code—Waqf—Hanafi law—Requirements of valid waqf where waqif appoints himself as mutawalli.

Prior to 1900 certain properties were purchased at auction sales, ostensibly by X and Y, who were recorded as the certified purchasers, but the purchase money was in fact provided by A. S. and A. L. In 1900 these properties were transferred, or purported to be transferred to Z. In 1916 the representatives of A. S. and A. L. sued Z for possession of these properties upon the ground that both the original purchases and the subsequent transfers to Z were benami transactions and that the plaintiffs were the real owners of the properties.

Held that section 66 of the present Code of Civil Procedure, and not section 317 of the Code of 1882, applied, and the suit was barred.

Quære whether even under the former Code the interpretation placed upon section 317, that it did not extend to a suit against the transferee from a certified purchaser, was correct? *Sibia Kunwar* v. *Bhagoli* (1) referred to.

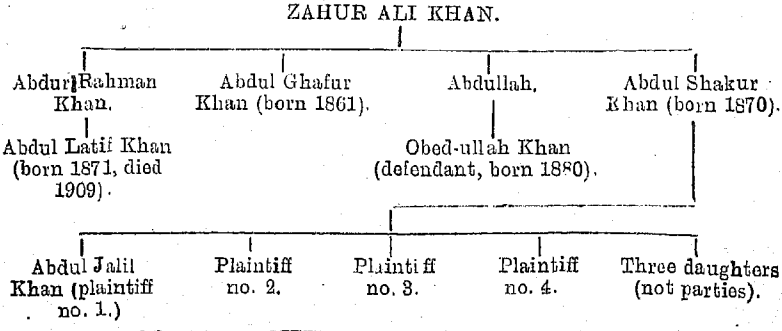
According to the Hanafi law, where the owner of property has declared it to be *waqf* and has appointed himself as *mutawalli* there is no need for any further formal transfer of possession, neither will the conduct of a subsequent *mutawalli* accepting his appointment under the terms of the *waqf-namah* invalidate the *waqf*.

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

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

Maulvi *Iqbal Ahmad*, Mr. *B. E. O'Conor*, Mr. *Ishaq Khan* and Dr. *Surendra Nath Sen*, for the respondents.

MEARS, C. J., and KNOX, J.:—The following pedigree will make clear the relationship of the parties to this appeal:—



* First Appeal No. 25 of 1918 from a decree of Lal Gopal Mukerji, Second Additional Subordinate Judge of Aligarh, dated the 18th of July, 1917.

(1) (1899) I. L. R., 21 All., 196.

The plaintiffs claim as heirs of Abdul Shakur Khan and Abdul Latif Khan certain properties in villages Chakathal and Khakethal.

The principal issue in the court below was whether the greater portion of the properties in suit were acquired by Abdul Ghafur Khan for and on behalf of Abdul Shakur Khan and Abdul Latif Khan and whether two persons, Mahmud Ali Khan and Seraj-ul-Haq were benamidars for Abdul Shakur Khan and Abdul Latif Khan, and later whether Obed-ullah Khan, the defendant, occupied the same position by virtue of conveyances from Mahmud Ali Khan and Seraj-ul-Haq.

Though the defendant denied that any of the transactions were *ismfarzi*, he contended, in the alternative, that if they were, the plaintiffs were estopped from claiming any of the properties included in certain auction sales, by reason of the provisions of section 66 of the Code of Civil Procedure, 1908.

In answer to this contention the plaintiffs asserted that section 317 of the Code of Civil Procedure, 1882, was the appropriate section by which the rights of the parties were regulated and that the disability created by that section should be confined to an action brought against a certified purchaser and could not include Obed-ullah Khan who was a transferee from certified purchasers.

The learned Subordinate Judge decreed the claim in part. The plaintiffs appealed in respect of those heads of claim which the Judge had decided against them and the defendant filed objections in relation to certain property alleged to be waqf.

It is now necessary to set out as succinctly as possible the histories of the properties in suit.

On the 20th of July, 1883, one Ata-ullah Khan mortgaged to Abdul Ghafur Khan his rights and interests in 20 biswas of mauza Khakethal and also a 19 biswas 11½ biswansi share in mauza Chakathal for Rs. 55,000.

On the 12th of July, 1884, Ata-ullah Khan agreed to execute a usufructuary mortgage in favour of Abdul Ghafur Khan reciting an indebtedness to him of Rs. 80,000, and the shares in villages Khakethal and Chakathal were amongst the properties agreed to be covered by the usufructuary mortgage. On the 21st of July,

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1884, Ata-ullah Khan sold his shares in villages Khakethal and Chakathal to one Barkat Ali Khan reciting that he left Rs. 19,000 in the hands of the vendee for payment over to Abdul Ghafur Khan. That sum was not paid, and Abdul Ghafur Khan brought a suit for specific performanee against Ata-ul'ah Khan based on the agreement of July, 1884, and obtained a decree in his favour on the 23rd of December, 1885. Ata-ullah Khan was ordered to pay Rs. 64,976 within a given time or to execute a mortgage in terms of the agreement of the 12th of July, 1884. Abdul Ghafur Khan was not satisfied with this amount and appealed to the High Court, who awarded him on the 31st of May, 1887, a further sum of Rs. 18,125.

On the 29th of June, 1895, Abdul Ghafur Khan executed a deed of transfer of mortgagee rights, to the extent of one half of his then interest, in the mortgage bond of July, 1883, in favour of Abdul Shakur Khan. Certain payments had been made and the amount outstanding was said to be Rs. 58,000, and the reasons given for the transfer of the moiety interest were that Abdul Shakur Khan had advanced one half of the original mortgage money and that the Rs. 58,000 could not be recovered without a fresh suit, to which he, Abdul Ghafur Khan, did not wish to be a party. On the same date Abdul Ghafur Khan, by deed of gift in which he stated that he was the owner of one half of the original mortgage money, made over to Abdul Latif the other outstanding sum of Rs. 29,000.

Abdul Shakur Khan and Abdul Latif Khan brought an action against Ata-ullah Khan and Barkat Ali Khan and others and obtained on the 29th of June, 1896, a decree for Rs. 18,708 and an order that unless that amount were paid within six months certain mortgaged properties including the 9 biswa 11½ biswansi share in Chakathal should be sold. On the 2nd of April, 1900, that decree was affirmed by the High Court.

It is now necessary to refer to other transactions relating to other portions of villages Khakethal and Chakathal.

On the 20th of August, 1885, a share of 14 biswas odd in village Khakethal belonging to Ata-ullah Khan was sold by auction to Mahmud Ali Khan for Rs. 5,750 and this sale was confirmed on the 2nd of March, 1886.

On the 15th of September, 1898, Abdul Ghafur Khan, after reciting his ownership of a moiety of a 17 biswansi, 10 kachwansi share in village Khakethal, made a gift of his 8 biswansi, 15 kachwansi share to Obed-ullah Khan, the defendant. This was said to have been done with the object of making Obed-ullah Khan a co-sharer in the village, it being intended to put him in as benamidar of the property in Khakethal then recorded in the name of Mahmud Ali Khan.

The transactions as regards village Chakathal were as follows :—

On the 21st of March, 1892, Seraj-ul-Haq purchased at an auction sale a 9 biswa 2½ biswansi share of Ata-ullah Khan and others in village Chakathal, being 34 sihams out of 74 sihams, for Rs. 7,000. The sale was confirmed on the 10th of November, 1892.

In 1894 Seraj-ul-Haq as a co-sharer in village Chakathal, brought a suit for pre-emption and obtained a decree putting him in possession of Mahal Panjum on payment of Rs. 8,000. This amount was duly paid in November, 1894.

On the 7th of July, 1900, Seraj-ul-Haq sold or purported to sell to Obed-ullah Khan, the defendant, the properties in mauza Chakathal acquired by him in March, 1892, and November, 1894, for the sum of Rs. 40,000.

On the 8th of July, 1900, Mahmud Ali Khan, reciting himself to be owner by virtue of the purchase made at auction of 34 sihams out of 51 sihams in a 13 biswa 10 biswansi 15 kachwansi share in Mahal Kunwar Abdul Shakur Khan in mauza Khakethal, sold or purported to sell the same to Obed-ullah Khan, the defendant, for Rs. 38,000.

The plaintiffs contend that the Rs. 55,000 paid in 1883 to Ata-ullah Khan in fact belonged to Abdul Shakur Khan and Abdul Latif Khan and that Abdul Ghafur Khan had no beneficial interest in the mortgage but was merely acting on their behalf.

They also say that the Rs. 5,750 paid by Mahmud Ali Khan in 1885 was similarly provided out of their moneys as also the Rs. 7,000 and Rs. 8,000 paid by Seraj-ul-Haq in 1892 and 1894.

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They point out that in 1898 Mahmud Ali Khan and Seraj-ul-Haq were both elderly men and therefore it was considered desirable that they should cease to act as benamidars and that Obed-ullah Khan was chosen to become benamidar in place of both of them, and it was under those circumstances that he was given in September, 1898, the small share in village Khakethal and the properties subsequently transferred to him on the 7th of July, 1900, and the 8th of July, 1900, by Seraj ul-Haq and Mahmud Ali Khan, respectively.

We think that all these contentions are correct.

[The judgment proceeded to discuss the evidence and then continued.]

We agree with the learned Subordinate Judge in his findings of fact, and we approve of his reasons, and we hold that the real purchasers throughout all these transactions were Abdul Shakur Khan and Abdul Latif Khan and that Mahmud Ali Khan, Seraj-ul-Haq, and subsequently, Obed-ullah Khan were benamidars for them.

That being so, the next question that arises is whether there is any statutory bar which prevents the plaintiffs from succeeding, as regards those portions of villages Khakethal and Chakathal which were purchased at auction.

As it has been suggested that section 66 of the Code of Civil Procedure of 1908 imposes a wider disability on the plaintiffs than section 317 of the earlier Code, we must first of all decide by which section the rights of the plaintiffs must be determined.

The transfers to Obed-ullah Khan were made in 1900. The action was commenced in 1916.

Dr. *Sulaiman* contends that the plaintiffs' rights must be judged, not by section 66 but by section 317, and that on the proper construction of that latter section, whilst Abdul Shakur Khan and Abdul Latif Khan would have been unable to maintain an action against Mahmud Ali Khan and Seraj-ul-Haq, they are nevertheless entitled to bring one against Obed-ullah Khan, the transferee from Mahmud Ali Khan and Seraj-ul-Haq.

He contends that retrospective effect must not be given to the opening words of section 66; that the section relates to procedure and was not intended to cut down already vested rights of a plaintiff.

With this view we do not agree. We are of opinion that the essential difference in the drafting of section 66 shows that the Legislature did not approve of the narrow construction of section 317 given to it by decisions of which *Sibta Kunwar* v. *Bhagoli*, (1) is an example.

We think that the section intended to make it clear that the Legislature, disapproving of benami transactions, meant to prevent actions against certified purchasers and their transferees. To that extent, the Legislature did by section 66 deprive a plaintiff of a right which possibly was not previously negatived.

The plaintiffs' rights must in our view be judged by section 66. [See *Moon* v. *Durden* (2).]

Dr. *Sulaiman* concedes that if this be so he cannot maintain the suit against Obed-ullah Khan on the ground that the purchases made by Mahmud Ali Khan and Seraj-ul-Haq were for the plaintiffs' benefit and he agrees that Obed-ullah Khan must be regarded as a "person claiming title under a purchase certified by the Court."

The learned Subordinate Judge came to the conclusion that the suit was barred, as far as the properties purchased at auction were concerned, and we agree with him.

There remains for decision the question whether the document purporting to be a waqf executed by Abdul Latif Khan is in fact a waqf which is binding on the property to-day.

The parties to this litigation are sunnis and their rights are regulated by the Hanafi law.

Imam Abu Hanifa and his two disciples Abu Yusuf and Muhammad have each dealt with the circumstances under which a waqf is complete. According to Abu Hanifa it becomes complete when a Qazi has passed a decree necessary for extinguishing the waqif's power to resile from the waqf. Abu Yusuf, however, is of opinion that a mere declaration of waqf operates as a transfer of the property from the waqif to the implied ownership of God. Muhammad lays it down that a valid waqf requires—

(i) declaration of the waqf,

(ii) appointment of a mutawalli,

(iii) transfer of possession to the mutawalli.

(1) (1899) I. L. R., 21 All., 196. (2) (1848) 2 Exch., 42.

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See, generally, Wilson's Digest of Anglo-Muhammadan law, 3rd edition, page 343.

In the present case we must follow the opinions of Abu Yusuf and Muhammad.

The facts as found by the learned Subordinate Judge are that Abdul Latif Khan did intend to create a valid waqf, and did intend to make a genuine dedication He declared the property to be waqf, he appointed a mutawalli (i.e. himself) and as he himself was the mutawalli there was no need of formal transfer of possession. After the death of Abdul Latif Khan, Abdul Ghafur Khan, in pursuance of the terms of the deed of waqf, appointed Obed-ullah Khan as mutawalli and the latter accepted the appointment and took possession. His subsequent conduct would not in our opinion invalidate the waqf.

In these circumstances we think that the learned Subordinate Judge was wrong in restoring the plaintiffs to possession of so much of the property as was covered by the waqf and his decision on this point must be set aside

The result, therefore, is that we dismiss the plaintiffs' appeal and allow the cross-objections of the defendant and declare that the plaintiffs are not entitled to possession of that part of the property covered by the deed of waqf. The appeal is dismissed with costs, and the cross-objections allowed with costs.

Appeal dismissed.
Cross-objections allowed.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

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January, 18.

RADHA MADHO LALJI (PLAINTIFF) *v.* RAM SEWAK AND ANOTHER (DEFENDANTS).*

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), sections* 56 *and* 86—*Cess*—"Gaon kharch"—*Civil and Revenue Courts—Jurisdiction.*

In a permanently settled portion of the Mirzapur district the tenants were in the habit of paying to their zamindars an addition to their rent of 3 to 4 pies per rupee under the name of *gaon kharch*. This additional payment, however, was not recorded under section 56 or section 86 of the United Provinces Land Revenue Act, and it did not appear from the evidence that it could be regarded as part and parcel of the contract of rent.

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*Second Appeal No. 597 of 1918 from a decree of F. D. Simpson, District Judge of Allahabad, dated the 9th of February, 1918, modifying a decree of Anrudh Lal Mahendra, Assistant Collector, first class, of Mirzapur, dated the 14th of August, 1916.