

Before Mr. Justice Bennet and Mr. Justice Ismail

1937
November, 9

WAKF BANAM KHUDAWAND KARIM (PLAINTIFF) v.
RAJKALI (DEFENDANT)*

Agra Pre-emption Act (Local Act XI of 1922), section 4—"Co-sharer"—Wakf in favour of God—Wakf can claim pre-emption as a co-sharer, through the mutwalli—Civil Procedure Code, order XXXI—Mutwalli represents the wakf and the estate in the matter of suits.

A wakf in favour of God Almighty is entitled to claim pre-emption as a "co-sharer" within the meaning of section 4 of the Agra Pre-emption Act and can sue for the same through the mutwalli, who represents the wakf property and the estate under order XXXI of the Civil Procedure Code.

Mr. Mushtaq Ahmad, for the appellant.

Messrs. B. Malik, Akhtar Husain Khan and Jaliluddin Ahmad, for the respondent.

BENNET and ISMAIL, JJ.:—This is a second appeal brought by a plaintiff whose suit was decreed by the trial court but was dismissed by the lower appellate court on the ground that the plaintiff was not entitled to sue. The suit was one for pre-emption and the plaintiff is described in the plaint as "Wakf in the name of God, mahal Faiz Muhammad Khan, situate in mauza Islamnagar, under the supervision of Mst. Chandar Begam, daughter of Faiz Muhammad Khan." Now it is found by the court below that Faiz Muhammad Khan made a wakf of his property and in January, 1921, on his death his daughter Mst. Chandar Begam succeeded as mutwalli. The court below has taken the view that the plaintiff is not a person contemplated by section 4(1) of the Pre-emption Act because the plaintiff "is neither a sentient being nor a company association nor a body of individuals juristically clothed with legal rights." The court below has distinguished the case of an idol installed in a temple by stating that the idol is clad with clothes, and fed with food and that such acts do not take place in the case of a wakf. No authority is mentioned by the lower

*Second Appeal No. 757 of 1934, from a decree of Makhan Lal, Second Civil Judge of Saharanpur, dated the 12th of May, 1934, reversing a decree of Bijay Pal Singh, Munsif of Haveli, dated the 27th of May, 1933.

court for the proposition that a suit for pre-emption cannot be brought on behalf of property owned by a wakf. Learned counsel for the respondent alluded to the terms of the Agra Pre-emption Act, of which section 12 states that persons of the following classes shall be entitled to pre-empt: "Class II—Co-sharers in the sub-division of the mahal in which the property is situated." "Co-sharer" is defined in section 4 of the Act as "any person, other than a petty proprietor, entitled as proprietor to any share or part in a mahal or village". Now learned counsel for the respondent argued and we think correctly that a mutwalli is not the proprietor of the wakf property and that view need not be considered and indeed it has not been put forward on behalf of the appellant. The view put forward for the appellant is that the ownership of this share in the village is held by God Almighty under the dedication of a wakfnama and that the mutwalli is the person who is entitled to appear in the courts on behalf of the property. Now the appearance by proxy of a person in courts in various cases is dealt with in certain orders of the Civil Procedure Code: Order XXVII—Suits by or against the Government or public officers in their official capacity; order XXVIII—Suits by or against military men; order XXIX—Suits by or against corporations; order XXX—Suits by or against firms and persons carrying on business in names other than their own; order XXXI—Suits by or against trustees, executors and administrators; order XXXII—Suits by or against minors and persons of unsound mind. So far therefore as the procedure in courts is concerned, the Civil Procedure Code intends by these six orders to cover the cases of suits where the person appears by a representative. For the matter of procedure therefore it appears that in the case of wakf the mutwalli does represent the wakf property and the estate under order XXXI. Now the argument is that the substantive ownership of this share is held in some manner preventing a right of pre-emption arising under sections 4 and

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12 of the Agra Pre-emption Act. Learned counsel for the respondent has not been able to define exactly what is the defect which would prevent God Almighty from being a juristic person. No ruling has been produced which indicates that there is any legal difficulty in the conception of the deity as a juristic person. In the case of a Hindu deity the conception of a deity as a juristic person is well known and has been laid down many years ago by their Lordships of the Privy Council. We are quite unable to see any defect or difficulty in the conception of the deity as a juristic person in the case of a Muhammadan wakf. We may also point out that in English law the deity can also be considered as a juristic person and suits may be brought or defended by a vestry on behalf of church property. The incidents of the legal dedication of property held by a mutwalli representing the wakf have been shown in various rulings. In *Abdul Rahim Khan v. Ramzan* (1) it was held that a mutwalli can sue for arrears of rent. In *Muhammad Qamar Shah Khan v. Muhammad Salamat Ali Khan* (2) the mutwalli was held to be a co-sharer for the purpose of the Agra Tenancy Act. Another line of attack has been made on the rights of the plaintiff appellant based on a certain passage in Baillie's Digest of Muhammadan Law, edition of 1865, volume I, page 474. In a very brief passage of two lines dealing with the subject of pre-emption under the Muhammadan law it was stated: "When it is said that *akar* are proper objects of the right of pre-emption, it is by virtue of a right of *milk*, or ownership, that they are so. Hence, if a mansion were sold by the side of a wakf, the appropriator would have no right of pre-emption; nor could the mutwalli, or superintendent, take it under that right." No authority is quoted for this proposition by Baillie and a foot-note merely says "Because he is not the proprietor." The passage in Baillie does not appear to consider whether the mutwalli cannot claim pre-emption on behalf of the deity. This

(1) A.I.R. 1929 All. 518.

(2) (1938) LL.R. 55 All. 512.

passage of Baillie has been the subject of judicial decision in the Punjab Chief Court in the case of *Jindu Ram v. Hussain Bakhsh* (1). On pages 102 and 103 the court dealt exhaustively with this passage in Baillie and came to the conclusion that the passage did not prevent a right of pre-emption accruing to a wakf. With the argument set forth there we are in agreement and it is unnecessary to recapitulate it. It is to be noted that that suit was brought under section 31 of the Punjab Pre-emption Act and the present suit is brought under the Agra Pre-emption Act, section 12. Now Baillie of course was not dealing with the rights of persons under these Pre-emption Acts which were passed long after his book was written and his observations, sound or unsound, merely relate to the right of pre-emption under the Muhammadan law. We are of opinion for the reasons already stated that the plaintiff has a perfect right of pre-emption and that no disability whatever attaches to the juristic rights in the case of a wakf. Learned counsel for respondent admits that no further point remains in the grounds of appeal which were brought before the lower appellate court and that our decision on the point mentioned above governs the whole case. For these reasons we allow this appeal with costs throughout.

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REVISIONAL CIVIL

Before Mr. Justice Bennet and Mr. Justice Ismail

PUTTU LAL (APPLICANT) *v.* BHAGWAN DAS AND OTHERS
(OPPOSITE PARTIES)*

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November, 12

Limitation Act (IX of 1908), section 12(2)—“Time requisite for obtaining copy”—Judgment delivered on last working day before vacation—Application for copy made after the re-opening day—Whether period of vacation should be excluded.

Judgment was delivered in a suit on 2nd June, 1936, the last working day before the long vacation. The courts re-opened

*Civil Revision No. 534 of 1936.
(1) (1914) 24 Indian Cases 100.