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MAHOMED ABDUL HAI v. GUJRAJ SAHAI.

Abdul Hai must pay to the respondent, Gujraj Sahai, his costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent, Gujraj Sahai: Mr. *J. F. Watkins.*

C. B.

P.C. * 1893 *February* 1 & 18.

ISMAIL ARIFF (PLAINTIFF) *v.* MAHOMED GHOUS. (DEFENDANT).

[On appeal from the High Court at Calcutta.]

Declaratory decree, suit for—Specific Relief Act (I of 1877), s. 42—*Mere possession on the one side and unjustifiable dispossession on the other—Right of the possessor dispossessed by a wrong-doer, as against the latter—Injunction—Wakf.*

Lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree, and an injunction restraining the wrong-doer.

In such a suit the defence was that the land was *wakf*, and the defendant *mutwalli* of it. Both Courts found that the plaintiff was in possession as purchaser from some of those who were entitled to sell. But the first Court did not find a fact, which the Appellate Court found, *viz.*, that the property had been constituted *wakf*. Both Courts, however, concurred in the finding that the defendant at all events was not the *mutwalli*, and had no title.

Held, that the plaintiff was entitled to a declaratory decree against this defendant as to his right, and an injunction restraining him from interfering with his possession. For the purposes of the plaintiff's claiming such a decree, it was not necessary that he should negative the *wakf*, as to the validity of the endowment no decision being needed. This could not be decided either way in this suit, as parties interested were not before the Court.

APPEAL from a decree (27th July 1888) of the Appellate High Court, reversing a decree (27th March 1888) of the High Court in its Original Jurisdiction.

The main question between the plaintiff, appellant, and the defendant, respondent, was whether, on the state of facts that

* *Present:* LORDS WATSON, HOBHOUSE and MORRIS, and SIR R. COUCH.

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the plaintiff's possession of his purchased land had been interfered with by the defendant, who had no title to it, and was acting of his own wrong, it was or was not sufficient for the plaintiff to prove that he was in quiet possession when the interference took place, without negativing an alleged defect in his title. The Courts below had differed as to whether the claim for a decree declaring the plaintiff's right, and restraining the defendant from interfering with his possession, had been made out.

The plaintiff was in possession of the land, about two bighas in Machua Bazar in Calcutta, which he had purchased in 1885 from Anna Baba Saheb, who had previously purchased from the descendants of one Sheikh Khubulla. His plaint alleged that after he had obtained possession, the defendant served notices to quit on some of the tenants, acting as if he, the defendant, was the owner, and involved the plaintiff in a claim that the land had been made *wakf* by Khubulla, and that the defendant had been appointed *mutwalli* thereof. The prayer was that the plaintiff should be declared the sole and absolute owner of the land, which had not been dedicated or made *wakf*, and that it should be declared that the defendant had no right in the land: also that the latter should be restrained from interfering with the plaintiff's possession.

The defence was that the land having belonged to the Sheikh above named, he had made it *wakf* by a *wasiatnama* executed by him on the 3rd of May 1850, having dedicated it for the purpose of defraying the expenses of lighting and repairing a *musjid* in mauza Bara Bati, and of the support of poor persons, directing that his five sons should in yearly rotation act as *mutwallis*, or curators of the dedicated property. Khubulla died in 1854, and it was further stated that his eldest son, Ramzanulla, had confirmed the *wakf* by executing a *wakfnama* to the same effect as his father's *wasiatnama* in this respect. It was also stated for the defence that, in 1877, the sole surviving son, Sheikh Enayetulla, had appointed one Abdula Ghogari to be *mutwalli* of the *wakf* property. This last person had on the 9th March 1882 appointed the defendant to that office. The defendant also alleged that some of Khubulla's descendants had in 1881 and 1882 fraudulently executed deeds purporting to convey the land to Anna Baba Saheb. At the original hearing TREVELYAN, J.,

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having fixed issues as to the title of the parties, and the existence of a *wakf*, was of opinion that, in the view which he took of the case, it was not necessary for him to decide whether or not the *wasiatnama* of Khubulla, and the *wakfnama* of Ramzanulla, his son, created valid and subsisting trusts. He, however, made the following observations :—

"I think it is clear law that the mere fact of the execution of a document which purports to devote land to religious or charitable uses does not preclude a person contesting the operation of the trusts of such document from contending that the so-called '*wakf*' was a device for the purpose of providing for the *wakif's* family. The question is whether this endowment is a nominal one, or a *bonâ fide* one.

"Owners of property have in India, as in other countries, frequently been anxious to prevent their descendants from alienating their property, and in this country the means attempted to be used for this purpose have often consisted of so-called deeds of endowment. This has been the case with both Hindus and Mahomedans.

"If a settlor, settling property by means of a so-called deed of endowment, is simply and solely intending to benefit his family, and only uses the form of a religious trust for the purpose of benefitting that family and of preventing the property from being alienated by his descendants, or from being seized and sold at the instance of creditors of his descendants, then the endowment is, I think, not real, but sham.

"For the purpose of ascertaining whether the endowment is real, one may, I think, look not only at the document itself, but one may also see how the settlor himself and his descendants after him have treated the so-called trust."

The Judge then considered the evidence in the suit, and found nothing to show that the alleged *wakfnamas* were ever acted upon: that the sons of Khubulla received the rents of the property until the sale to Baba Saheb: and that there was no evidence of the application of the rents to the purposes of the *wakf*. If anything, the evidence was the other way. In 1873, before there was apparently any intention to sell the property, the brothers, without any mention of the *wakf*, gave to Hafiz Mahomed Hossein a *muktearnama* to collect the rents of this property; and the evidence intended to show the application of the rents to religious objects failed. On the 2nd December 1881, Piruzulla, son of Kudrutulla, and other descendents of Khubulla, conveyed the property to Baba Saheb, who was put into possession before any disputes arose with Mahomed Ghous. There was nothing

to show that Abdula Ghogari was ever appointed *mutwalli*. He seemed to have been simply a tenant on the property.

After a full examination of the evidence, the judgment concluded thus:—

"On the 10th March 1883 Enayetulla conveyed his interest in the property to Baba Saheb.

"On the 24th of September 1885 Baba Saheb sold this property to Ismail Ariff, who on the 11th of September 1886 brought this suit.

"Some sort of suggestion was made in cross-examination that the purchases by Baba Saheb and by Ismail Ariff were not *bonâ fide*. I have no reason for supposing that these purchases were in any way unreal. If they were not real, the persons entitled to the property would be the heirs of Khubulla. Mahomed Ghous would have had no answer to a suit by these persons, and there is, as far as I can see, no reason why they should have put up other persons to sue on their behalf.

"There is no doubt that before this suit was brought the plaintiff had not got a title from all the heirs of Khubulla. Since the suit has been instituted the plaintiff has obtained releases from the other heirs, but on behalf of two such heirs who are minors their mother, who has no authority so to do, has released the plaintiff.

"The question is this. Is the plaintiff who purchased from some of the persons entitled, who received possession from the persons then in complete possession either for themselves or on behalf of themselves and others, and was actually, as I have found, in complete possession, entitled to have his rights declared as against a mere trespasser who, without any shadow of title, is contesting the plaintiff's right?

"I think he is, and I think that he is so entitled whether or not the will of Khubulla and the *wakfnama* of Ramzanulla created a good *wakf*.

"The defendant has no title of any kind, and the plaintiff has at least a title subject to the *wakf*. I must make a decree in accordance with the first and second paragraphs of the prayer of the plaint."

An appeal was heard by a Bench of three Judges (PETHERAM, C.J., NORRIS and BEVERLEY, JJ.). They were of opinion that the main point was as to the will of Khubulla, whether it constituted an endowment, and as to this, that it in effect did so; with the result that the plaintiff's title through Khubulla's heirs was not proved. As to the respondent, they were of opinion that he was shown by the facts not to be the *mutwalli*; and they found that his action in interfering with the tenants, and in preventing them from paying their rents, was illegal and unjustifiable. They considered the effect of section 42 of the Specific Relief Act, I of 1877, and

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were of opinion that the suit could not be maintained under it, the plaintiff not having shown a good title in himself. They referred to the alleged dedication of the property having been by will, which could only affect one-third of the property, as the consent of the heirs had not been shown. But they decided that the suit had not been framed to obtain any declaration of such an interest as this might afford to the plaintiff, who had not made out a title; and that the suit should, on this defect of title, have been dismissed.

On this appeal

The *Attorney-General* (Sir *C. Russell, Q.C.*) and Mr. *J. H. A. Branson* appeared for the appellant.

The respondent did not appear.

For the appellant it was argued that the decree of the first Court ought to have been maintained by the Appellate Court and should now be restored. There was no proof of a valid *wakf* having been constituted, so as to prevent the heirs of Khubulla from conveying a good title to a purchaser, as Baba Saheb was. The arrangements in the *wasiatnama* or will of Khubulla appeared to be only intended for the purpose of securing the property in the family of the testator, and there had been no genuine dedication for religious objects or charitable uses. On the subject of attempts to perpetuate property in a testator's family by means of an unsubstantial *wakf*, reference was made to *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1). Also in reference to the title to sue of a person who was not connected with a religious institution otherwise than as a person professing the religion supported by it, and who desired to secure the carrying out the trusts of that institution, *Panchcowrie Mull* v. *Chumroolall* (2) was cited. The effect of some of the heirs of Khubulla not being shown to have consented to the appropriation was a question. Baillie's Mahommedan Law, Book X, Chapter 1, was referred to. The principal point, however, was that the Appellate Court had overlooked that the plaintiff was entitled to have his lawful possession protected as against a mere wrong-doer. Both the Courts below had concurred in finding that the defendant had no title whatever, while, on the other hand, it was apparent, from what had been found by

(1) I. L. R., 17 Calc., 498; L. R., 17 I. A., 28.
(2) I. L. R., 3 Calc., 563.

the Appellate Court, as well as by the original Court, that the plaintiff was in quiet possession at the time when the defendant interfered with him. The general power of the Courts to give relief against such unlawful interference still remained, notwithstanding the enactment of remedies in the Specific Relief Act, I of 1877. This point had been rightly disposed of by the judgment of Garth, C.J., in *Mohabeer Pershad Singh* v. *Mohabeer Singh* (1), who said that, where the plaintiff had been dispossessed by a person who was found to have no title, and to be a trespasser, it was sufficient for the plaintiff to prove that he was in quiet possession at the time; and this was sufficient to establish a *primâ facie* case against the defendant, entitling the plaintiff to a decree. That this was so had been stated as their opinion by the Judges in *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry* (2), though they felt bound in the latter case to follow recent rulings of the High Court, which went to this, that mere possession would not entitle the plaintiff to a decree for recovery of possession, except under the special Act or Statute which might entitle him to recover possession. The Judge who delivered the judgment in that case said that he would have preferred to follow, but for those rulings which it was now submitted were incorrect, the decision in *Enaetoollah Chowdhry* v. *Kishen Soondur Surma* (3), also the judgment of Garth, C.J., in the case of *Mohabeer Pershad Singh* v. *Mohabeer Singh* (1); and the judgment of Westropp, C.J., in *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (4).

It was submitted that for this last reason the judgment of the Appellate Court should be reversed, and that of the first Court should be restored.

Afterwards, on the 18th February 1893, their Lordships, judgment was delivered by

SIR R. COUCH:—The suit which is the subject of this appeal relates to land and premises in the town of Calcutta, which were purchased by the appellant from one Baba Saheb and conveyed to him on the 24th September 1885. Baba Saheb had purchased the property from the heirs of one Khubulla, the former

(1) I. L. R., 7 Calc., 591.
(2) I. L. R., 17 Calc., 256.
(3) 8 W. R., 386.
(4) I. L. R., 6 Bom., 215.

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owner, who died in 1852, and had taken conveyances from them, the first being made on the 2nd December 1881. He was then put in possession, the heirs having previously been in possession, and receiving the rents of the property. Baba Saheb remained in possession until the sale to the appellant, who then received possession and had it when the suit was brought. Both these purchases were *bonâ fide*. The suit was brought by the appellant, and the cause of bringing it is stated in the plaint to be that all the tenants of the property had attorned to the plaintiff and paid rent to him except four, who, at the instigation of the defendant, the respondent in this appeal, had refused to recognize the plaintiff's title, and alleged in collusion with him that the land had been dedicated to religious and charitable purposes, and that the defendant was the *mutwalli* thereof, and as such alone entitled to recover the rents; that collusive suits had been brought by the defendant in the Calcutta Court of Small Causes against the four tenants, and decrees for possession obtained therein by consent or non-appearance; and the plaint prayed for a declaration that the plaintiff was the sole and absolute owner of the land, that the same was not dedicated for religious or charitable purposes, and that the defendant had no sort of right, title, or interest therein, and for an injunction and damages. The defence stated that the lands belonged originally to Khubulla who, by a deed of *wakfnama* dated a native date corresponding with the 3rd May 1850, granted and dedicated the lands for the purpose of defraying the expenses of lighting and doing the repairs of a certain mosque in mouzah Bara Bati, and for the support of travellers, mendicants, &c., and widows residing in the house, and by the deed further provided that his five sons therein mentioned should be the *mutwallis* in rotation every year; and that the defendant had been appointed *mutwalli* of the *wakf* lands and property. It also stated another *wakfnama* by Ramzanulla, the eldest son of Khubulla, made about four years after his death.

The suit was heard by Mr. Justice Trevelyan on the Original Side of the High Court at Calcutta. In his judgment, after a careful examination of the evidence and a finding that the *wakfnama* was executed by Khubulla, he said he had come to the

conclusion that there was nothing in the evidence to show that the *wakfnama* was ever acted upon ; that the brothers and their descendants received the rents of the property until the sale to Baba Saheb, and there was nothing to show that the rents were applied for the purposes of the *wakf* ; that in the view which he took of the case, it was not, he thought, necessary for him to decide whether or not the *wasiatnama* (meaning a dedication by will) and a *wakfnama* made by one of the sons created trusts which were valid and subsisting ; but that, as evidence had been taken, and there had been much discussion on the subject, he thought he ought to make certain observations. The learned Judge appears not to have intended these observations to be a decision upon the validity of the *wakfnama*. The actual judgment is contained in the passage at the end of the judgment, where the learned Judge says: "The question is this. Is the plaintiff who purchased from some of the persons entitled, who received possession from the persons then in complete possession either for themselves or on behalf of themselves and others, and was actually, as I have found, in complete possession, entitled to have his rights declared as against a mere trespasser, who without any shadow of title is contesting the plaintiff's right? I think he is, and I think that he is so entitled, whether or not the will of Khubulla and the *wakfnama* of Ramzanulla created a good *wakf*. The defendant has no title of any kind, and the plaintiff has at least a title subject to the *wakf*. I must make a decree in accordance with the first and second paragraphs of the prayer of the plaint." By the decree as drawn up, it is declared that the plaintiff is "the sole and absolute owner of the land and premises in the plaint mentioned," and that the same have not been dedicated for religious or charitable purposes, and that the defendant has no interest therein or in any part thereof." It is to be observed that, according to the judgment, the decree apparently was not intended to declare that there had been no dedication. The defendant appealed, and the case was heard before the Chief Justice and two other Judges. They were of opinion that there was a dedication, and that consequently the property could not be alienated by the heirs of Khubulla as their own ; that the persons

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from whom "the plaintiff" purchased had no title to convey; and that, although "the plaintiff" had been in possession for the last six years, he had been in possession without title. The judgment proceeds as follows:—"The position of Mahomed Ghous, the defendant, appears to be this. He claims to be the *mutwalli*, but the evidence upon this record not only does not show that he is the *mutwalli*, but it shows that he is not, so that, so far as Mahomed Ghous is concerned, he had not absolutely any more interest in this property, and any more right to interfere with it, than any coolie in the street, and his action in interfering with the tenants and in preventing them from paying the rent was absolutely illegal, and absolutely unjustifiable upon the evidence as it appears before us. Then we have this state of things: we have a person in possession of this property for six years past without any title, and we have him wilfully, improperly, and illegally interfered with by a person who has no title himself. Under these circumstances the plaintiff claims relief under section 42 of the Specific Relief Act, and we then have to consider what his rights are under that section. That section, as I said just now, was passed for the purpose of enabling persons who have a title, and whose title has been threatened, to bring this action for the purpose of having that title declared, but such an action seems to us to be absolutely inappropriate in cases in which the person has no title whatever, because we cannot give a declaration of something that is untrue; we cannot declare that this person, the plaintiff, has a title, when, as a matter of fact, it is shown he has none."

It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By section 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is

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certainly right and just that he should be able, against a person who has no title and is a mere wrong-doer, to obtain a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession. The Appellate Court, in accordance with the judgment above quoted, has dismissed the suit. Consequently, the defendant may continue to wilfully, improperly, and illegally interfere with the plaintiff's possession, as the learned Judges say he has done, and the plaintiff has no remedy. Their Lordships are of opinion that the suit should not have been dismissed; and that the plaintiff was entitled in it to a declaration of his title to the land. It was not necessary for him to negative that the land was dedicated to religious or charitable purposes, a question upon which the Original and Appellate Court have differed, and which, as the only defendant was not entitled to maintain the *wakfnama*, and other persons would not be bound by an adverse decision, their Lordships do not decide. That declaration should be omitted from the decree. Their Lordships will humbly advise Her Majesty to reverse the decree of the Appellate Court, and order the defendant to pay the costs of the appeal to that Court, and to affirm the decree of Mr. Justice Trevelyan, substituting for the words "the sole and absolute owner"—"lawfully entitled to possession," and after the words "in the plaint mentioned," omitting "and that the same have not been dedicated for religious or charitable purposes." The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co*

C. B.

RAGHUNATH AND ANOTHER (REPRESENTATIVES OF THE PLAINTIFF) *v.* NIL KANTH AND OTHERS (DEFENDANTS).

*P.C.** 1893 *January* 30, *February* 25.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Champerty—Agreement to share property the subject of suit—Claim for payment for work done and expenses properly incurred.

The English law of champerty is not in force in India. Agreements made by claimants of property in litigation to share it with others on their

* *Present:*—LORDS WATSON, HOBHOUSE, MACNAGHTEN, and MORRIS, and SIR R. COUCH.