

APPELLATE CIVIL.

Before Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice
Muhammad Raza.

1927
April, 20.

MIRZA ABID HUSAIN (PLAINTIFF-APPELLANT) v.
MUNNOO BIBI (DEFENDANT-RESPONDENT).*

Muhammadan law—Gift of property to which one has undisputed title, but is not in possession of it, validity of—Properties which may be the subject of gift under Muhammadan law—Lis Pendens, doctrine of, whether applies to voluntary transfers—Mortgage—Subsequent mortgagee not made a party to a suit by prior mortgagee, effect of.

Under Muhammadan law anything over which dominion or the right of property may be exercised, or anything which can be reduced into possession or which exists either as a specific entity or as an *enforceable right*, or anything in fact which comes within the meaning of the word "mal," may form the subject of gift.

Where a property was sold in execution of a decree and was purchased by the donor, though the deed of gift was executed before the confirmation of sale, the property had, under section 65 of the Code of Civil Procedure, vested in the donor from the date of the sale and he had undisputed title in it, though it was not actually in his possession and he made a gift thereof authorizing the donee to take possession, held, that the gift was quite a valid one. [*Mohammad Bakhsh v. Hosseini Bibi* (1), followed.]

The doctrine of *lis pendens* applies to voluntary as well as involuntary transfers.

If a subsequent mortgagee is not made a party to the suit brought by the prior mortgagee on the basis of his mortgage he is not affected by its result and cannot be deprived of his right to redeem the property as a subsequent transferee.

Mr. Ghulam Husain (holding brief of Mr. M. Wasim), for the appellant.

*Second Civil Appeal No. 369 of 1926, against the decree of Tika Ram Misra, Subordinate Judge of Mohanlalganj, Lucknow, dated the 7th of August, 1926, affirming a decree of Munsif, Lucknow, dated the 20th of October, 1925.

Messrs. *Anant Prasad Nigam and R. N. Shukla*,
for the respondent.

STUART, C. J., and RAZA, J. :—This is an appeal from a decree of the Subordinate Judge, Mohanlal-ganj at Lucknow, dated the 7th of August, 1926, affirming a decree of Munsif, Lucknow, dated the 20th of October, 1925.

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The appeal arises out of a suit brought by the plaintiff for a declaration that he is owner of a 7 pies 17 kirants $17\frac{1}{2}$ decimal share, in Chak Imambagh estate, comprising four villages in the district of Lucknow. The relevant facts which are no longer in dispute lie within a small compass.

Nawab Zegum-ud-doula owned a $\frac{4}{9}$ th share in the said estate along with other properties at the time of his death. He left him surviving three sons, one daughter and one widow as his heirs under the Muhammadan law. On the 26th of June, 1900 his widow, Musammat Ummat-ul-Fatima, mortgaged a 4 annas 5 pies 2 kirants share in the said estate to Mirza Sadiq Husain (since deceased), the father and predecessor-in-title of the plaintiff, Mirza Abid Husain. She executed the mortgage personally and also on behalf of her two sons who were minors. She was a certificated guardian of her minor sons and the mortgage was executed by her with the permission of the District Judge. On the 1st of November, 1900 she mortgaged her legal share out of the share comprised in the mortgage of the 26th of June, 1900 to one Lala Bhola Nath. The defendant, Musammat Munnoo Bibi, is the widow and legal representative of Lala Bhola Nath, deceased. Mirza Sadiq Husain filed a suit on the basis of his mortgage for sale of the mortgaged property in April, 1907. His claim was decreed by the Subordinate Judge of Lucknow in October, 1909; but the decree was modified by the

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Judicial Commissioner of Oudh on appeal in November, 1911. It was held that Mirza Sadiq Husain could sell only a one anna 5 pies 14 kirants share out of the property comprised in the mortgage. Mirza Sadiq Husain then appealed to His Majesty in Council and in the meantime took out execution proceedings in respect of the share decreed by the court of the Judicial Commissioner. That share was sold in February, 1915 and it was purchased by the decree-holder, Mirza Sadiq Husain, himself. In July, 1916 their Lordships of the Privy Council restored the decree of the Subordinate Judge, and the result was that the remaining 2 annas 11 pies 8 kirants share was also sold and purchased by the decree-holder, Mirza Sadiq Husain himself, on the 21st of February, 1921. The sale certificate was issued to the auction purchaser, Mirza Sadiq Husain, on the 13th of June, 1921. It is not clear on what date the sale was confirmed, but it was admittedly confirmed some time after the 21st of April, 1921. Mirza Sadiq Husain made a gift of all his properties in favour of his son, Mirza Abid Husain, plaintiff in this case, on the 21st of April, 1921. Mirza Abid Husain bases his claim in the present suit on the said deed of gift. Mirza Sadiq Husain had not impleaded Lala Bhola Nath, the subsequent mortgagee, in his mortgage suit. While Mirza Sadiq Husain's suit was pending, Lala Bhola Nath brought a suit on the basis of his own mortgage without impleading the prior mortgagee (Mirza Sadiq Husain) and got a decree for sale of the mortgaged property on the 31st of August, 1911. There was an appeal to the Court of the Judicial Commissioner of Oudh and in that court a compromise was filed in which it was stated that Musammat Ummat-ul-Fatima and her two sons had already executed a sale deed in favour of Musammat Munnoo

Bibi, widow and legal representative of Lala Bhola Nath, deceased in respect of a 7/8th share out of the 1/9th share comprised in the mortgage (i.e., Bhola Nath's mortgage of the 1st of November, 1900). This sale-deed was executed on the 24th of October, 1914. A decree was passed by the Court of the Judicial Commissioner of Oudh in terms of the compromise on the 22nd of December, 1914. The share of 7/8th of 1/9th is equal to 7 pies 17 kirants 17½ decimals, and the present suit has been brought in respect of that very share. Mutation has been effected in favour of Musammat Munnoo Bibi, defendant, in respect of the said share.

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She succeeded in obtaining a decree for profits of the said share against the plaintiff, who is a lam-bardar, in 1924. The present suit was then brought by Mirza Abid Husain in December, 1924.

The learned Munsif found that the defendant's purchase during the pendency of Mirza Sadiq Husain's suit was inoperative as the doctrine of *lis pendens* applied to the transfer and that the defendant was only entitled to redeem, as her predecessor-in-title, Lala Bhola Nath, had not been made a party to that suit. The present suit was, however, dismissed on the finding that the deed of gift, dated the 21st of April, 1921, neither transferred nor was intended to transfer the property in suit to the plaintiff.

The plaintiff appealed, but the learned Subordinate Judge dismissed the appeal agreeing with the findings of the learned Munsif on both the points. It has been found that the property in suit forms part of the property which was comprised in the mortgage of Mirza Sadiq Husain and was purchased by him at the auction sale mentioned above. The

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plaintiff Mirza Abid Husain has now come to this Court in second appeal.

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We have carefully examined the deed of gift, dated the 21st of April, 1921. We are not prepared to agree with the finding of the lower courts that the plaintiff is not entitled to the property in suit under that deed. The deed of gift relates to all the properties of the donor, Mirza Sadiq Husain. The decree under which the property in suit was sold was also referred to in that deed. There is no doubt that Mirza Sadiq Husain intended to transfer all his properties to his son Mirza Abid Husain by that deed. It is true that the deed was executed before the confirmation of sale, but under section 65 of the Code of Civil Procedure "where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute." Mirza Sadiq Husain had undisputed title in the property, though it was not actually in his possession, and he made a gift thereof authorizing the donee to take possession. Such a gift is valid as pointed out by their Lordships of the Privy Council in the case of *Mohammad Baksh v. Hosseini Bibi* (1). The plaintiff is admittedly in actual possession of the property in suit.

Though mutation has been effected in favour of the defendant, the fact is that the plaintiff is in actual possession of the property. The defendant herself had to sue the plaintiff for profits in the revenue court. It may be that the plaintiff is in possession of the entire property, including the property in suit, as he is the lambardar; but the fact remains that the defendant is not in actual possession of the property and the person who is in actual possession of the property

(1) (1888) L.R., 15 I.A., 81.

is the plaintiff, who is the donee from Mirza Sadiq Husain, the prior mortgagee and auction purchaser, as stated above. It should also be noted that under the Muhammadan law "anything over which dominion or the right of property may be exercised, or anything which can be reduced into possession or which exists either as a specific entity or as an *enforceable right*, or anything, in fact, which comes within the meaning of the word 'mal', may form the subject of gift." (See Ameer Ali's Muhammadan law, 4th Ed., page 64.)

We are of opinion, therefore, that Mirza Sadiq Husain validly transferred, and intended to transfer, to the plaintiff the property in dispute by the deed of gift dated the 21st of April, 1921. Hence the plaintiff is entitled to claim the said property under that deed.

The respondent's learned Counsel has attempted to question the correctness of the findings of the lower courts on the question of *lis pendens*. We think the doctrine of *lis pendens* has been rightly held to apply to the sale relied on by the defendant. In the first place, the sale in question was not an involuntary sale. The parties to the suit in which the compromise was filed settled the matter amicably out of court and then the sale deed in question was executed in favour of the defendant on the 24th of October, 1914. The compromise was then filed in court on the 22nd of December, 1914. It was a private sale by Ummat-ul-Fatima and her sons during the active prosecution of the litigation which resulted in the sale of the property in favour of the decree-holder, Mirza Sadiq Husain. The protection lasts till the execution has been carried out. In the second place, the doctrine of *lis pendens* may be held to apply as well to involuntary as to voluntary transfers.

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In the present case the lower courts were perfectly right in applying the rule to the sale relied on by the defendant.

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Though the plaintiff is entitled to the property in suit as donee from the prior mortgagee and auction purchaser, Mirza Sadiq Husain, he cannot deprive the defendant of her right to redeem the property as a subsequent transferee. She is the legal representative of Lala Bhola Nath, the subsequent transferee of the property. Mirza Sadiq Husain had brought the suit on the basis of his mortgage without impleading Lala Bhola Nath. The defendant is in no way affected by the suit of Mirza Sadiq Husain, prior mortgagee, or its results.

The result is that this appeal is allowed to this extent only:—

It is declared that the plaintiff is entitled to the property in suit as donee from the auction purchaser, Mirza Sadiq Husain, the prior mortgagee, but he holds the same subject to the right of the defendant to redeem, as the legal representative of the subsequent mortgagee, Lala Bhola Nath, deceased. Having regard to all the facts and circumstances of the case, we think it proper to order that the parties should bear their own costs in all the courts. We order accordingly.

Appeal partly allowed.