Special Appeals Nos. 115 *and* 840 *of* 1865.

MUHAMMAD valad A'BDUL MU'LNA' .....*Appellant.*
IBRAHIM valad HASAN and others .....*Respondents.*

Religious endowment—Mortgage—Redemption—Secondary evidence—Stamp—Remand.

In a suit brought by A, to recover a half-share in certain ancestral land, which he claimed, first by right of inheritance, and secondly under a deed of settlement executed by the other half-sharer, B, since deceased, the widow of B answered that the whole of the land had been assigned for the support of a mosque by B's father; and the lower appellate court found that it was so, and reversed the decree of the Munsif, who had allowed A's claim :—

Held, on special appeal, that the document relied upon as creating an endowment had been improperly admitted in evidence; it being only a copy, and the absence of the original not having been accounted for; the Court further observing that the document only purported to be a mortgage, and did not create any religious endowment.

And, on the suit being remanded, the lower appellate court found no reason to alter its former decree; the absence of the original mortgage deed, executed in A.D. 1834, having been accounted for; and a second deed, bearing date A. D. 1846, having been produced, by which B's father assigned the whole of the land in dispute to the *jamát* of the community as trustees of religious property :—

Held, on a second special appeal, that the deed of 1846, being unstamped was inadmissible in evidence; and that the deed of 1834 being only a mortgage, the equity of redemption was not lost, notwithstanding the failure of the condition that the property was to be considered as sold if the mortgage debt was not paid before A.D. 1846.

Rámji v. *Chinto*, 1 Bom. H. C. Rep. 199, followed.

The Court also, finding that the lower appellate court had not determined material questions of law and fact necessary for the decision of the suit, framed certain issues for its guidance, and again remanded the case.

1866.
July 18.
S. A. Nos. 115 & 840 of 1865.

THIS case first came before the court as a Special Appeal (No. 115 of 1865) from the decision of A. T. Crawford, Senior Assistant Judge of the Konkaṇ at Ratnágirí, in Appeal Suits Nos. 200 and 234 of 1864, by which he reversed the decree of the Munsif of Ratnágirí in the Original Suit.

Muhammad brought the suit: claiming his one-half share of a certain ancestral thikán, regarding which the infant defendant's deceased father, Hasan, had passed him a deed.

1866.
July 18.
S. A. Nos. 115 & 840 of 1865.

A'isha, the widow of Hasan, and guardian of the infant defendant, answered that the ṭhikán had been given for the support of the masjid by Hasan's father, Isák, and, having been so appropriated, that no division of it could subsequently be made.

Certain other persons were made defendants as representing the Bhusári Muhammadan community.

The Munsif decided in favour of the plaintiff: finding that the ṭhikán had not been given over to the masjid; and that the agreement executed by Hasan in plaintiff's favour was valid.

A'isha then appealed to the Senior Assistant Judge: urging that the agreement had been obtained by fraud from Hasan, who was a person of weak intellect. The representatives of the community also appealed: alleging that the ṭhikán had already been given over to the masjid by Isák; and that the subsequent deed, obtained by fraud from Hasan, was invalid.

The following judgment was recorded on the 21st of October 1864:—

"The issues for decision are: (1) Whether the ṭhikán is the common property of the Muhammadan community, and allotted to the support of the mosque, or whether it is the ancestral property of the defendant No. 1; (2) If the latter, whether the agreement, alleged to have been executed to the plaintiff by the deceased Hasanji, is trustworthy and valid.

"On the first issue, I find that the ṭhikán is now the common property of the Muhammadan community, and allotted to the mosque. I have already, in a former suit, declared that by Muhammadan law such land cannot be divided. I, therefore, reverse the Acting Munsif's decree, and throw out Muhammad's claim, with all costs upon him.

"The representatives of the Muhammadan community have put in a certified copy, from the Zilláh Register, of a deed executed to them by Isákji, the grandfather of the infant defendant, in whose name the ṭhikán stands. On a reference

1866.
July 18.
S. A. Nos. 115 & 840 of 1865.

to the original register and the receipt book in the court's records, I have ascertained beyond all doubt that such a deed was executed by deceased Isákji. It was he who presented it for registration, paid the fees, and received it back again. By the terms of that deed the Muhammadan community acquired a title *in toto* to the land in dispute, to which it had always a partial claim. No subsequent deed executed by his descendants will vitiate the transfer. It is clear, from the papers in this case, that A'ishá, on the part of her infant son, is allowed to occupy the thikán on the condition of rendering certain services to the mosque."

The first special appeal was then preferred.

Shántárám Náráyan for the appellant.

Pándurang Balibhadra for the respondent.

PER CURIAM (FORBES and NEWTON, JJ.):—The Court finds that the exhibit No. 7 was improperly admitted in evidence by the Senior Assistant Judge; it being only a copy, and the absence of the original not having been accounted for.

The Court, therefore, reverses the decree of the Senior Assistant Judge; and remands the case, in order that the defendants may have an opportunity of producing the original document, or of accounting for its absence; and that a new decision may be passed.

The Court remarks that from the copy of the document it would appear that it is only a mortgage, and that it does not create any religious endowment.

Case remanded.

The case was thus remanded on the 22nd of June 1865, and, in the following September, the Acting Senior Assistant Judge, W. H. Newnham, recorded the following decision:—

"The defendants account for the non-production of the original document by saying that it was consumed in a fire. Witnesses now examined prove that the 'Daldiváda' of Goláp was consumed by a fire some fourteen years ago, and in it the house of defendant Kásim Ismáel. Of course, there is no direct evidence that the original document was in his house, and was then consumed, nor could such be expected;

1866. July 18.

S.A. Nos. 115 & 840 of 1865.

and any attempt to prove this, after so many years, would render the case suspicious. But this is sufficient to warrant the admission of the copy, No. 7, as the register records prove that such a document was produced and registered in due form; as it cannot be alleged that such original did not exist, and as defendants have done all they can to account for its non-production, there is no reasonable ground for any longer rejecting it.

"As observed by the High Court, the said document, a mortgage of 1834, with condition of foreclosure in twelve years, does not distinctly create any religious endowment. Defendants produce another document (No. 14), deposed to by witnesses, in which (dated 1846, or the year when the condition of foreclosure took effect) Isákji, after reciting the contents of the former deed, No. 7, assigns the property altogether to the jamát, or committee of the Musalmán community. This deed, if proved, vests the land in the jamát as trustees of religious property. (It should be remarked that Isákji was himself one of the jamát, as well as the private donor in this deed.) Plaintiff's counsel takes objection to this document, and asks, plausibly enough, how it comes that this was preserved when all the other property, including deed No. 7, was destroyed by the fire; and this is not explained. But whether this document be proved or no, I find the result to be the same. If it is proved—and A'ishá has certainly been in occupancy as if it were a genuine one—the property is now a religious endowment managed by the jamát. If it is not, the deed of mortgage, No. 7, has a condition of foreclosure in 1846, and Isákji's ownership then determined, fifteen years before this suit was brought; and the jamát have been since then managing the land as held in trust for the masjid, they having been the original mortgagees. I find no reason to alter the former decree of this court, and reverse the Acting Munsif's decree: costs on respondent."

Against this decision the second special appeal (No. 840 of 1865) was preferred, which came on for hearing this day before TUCKER and GIBBS, JJ.

1866.
July 18.
S. A. Nos. 115 & 840 of 1865.

Shántárám Náráyaṇ, for the appellant:—The document No. 14, relied upon as creating an endowment in favour of the mosque, was inadmissible in evidence, not being stamped. Document No. 7 was only a mortgage; and the mortgaged property might be redeemed: *Rámji* v. *Chinto*, S. A. No. 299 of 1864. The appellant did not claim under Isákji or his son Hasanji; but claimed a half-share in his own right, and merely relied upon the deed of Hasanji as recognising that right.

Páṇḍurang Balibhadra, for the respondent:—Even though the appellant may claim to have a share in the property independently of Isákji, still he cannot in equity disown the mortgage made by Isákji for the joint benefit of all interested in the property. There was no finding in the judgment of the lower appellate court on the point set up by A'ishá, that Hasanji was of weak intellect, and had been under the undue influence of the appellant.

PER CURIAM:—The Court finds that the deed, No. 14, being unstamped, is inadmissible in evidence; and that, consequently, there is no proof of the grant by Isákji of the land in dispute as a religious endowment; also that, under the deed of mortgage (exhibit 7) executed by Isákji to the heads of the Muhammadan community (defendants Nos. 2 to 12), the equity of redemption was not lost, notwithstanding the entry in the said deed of a condition, that the property was to be treated as sold, if the mortgage debt were not liquidated within a specified term, which expired in A.D. 1846. This point was settled by the decision of the High Court in *Rámji* v. *Chinto*, S. A. No. 299 of 1864 (*a*), which has been followed in all subsequent cases.

The case, then, stands thus:—The plaintiff, Muhammad valad A'bdulji Mulná, claimed a moiety of the plot of land described in the plaint: (1) by general right of inheritance, (2) under a deed of settlement (exhibit No. 3), dated 13th September 1854, which purports to have been executed to him by Hasanji, the son of Isákji, the mortgagor aforesaid; and by which it is alleged that the right of plaintiff to a

(*a*) 1 Bom. C. H. Rep. 199.

1866.
July 18.
S. A. Nos. 115 & 840 of 1865.

half-share in the said land was acknowledged. The competency of Hasanji to execute a deed of this character has been questioned by the defendant Aíshá, Hasanji's widow, who states that her husband was a man of weak intellect, and that he was duped by the plaintiff; and in her appeal to the Assistant Judge she prayed to be allowed to adduce additional evidence on this point.

The mortgage, under the deed (exhibit No. 7), appears to have been made by Isákji in A.D. 1834, to secure a debt which had been incurred by him to defray the expense of the legal proceedings which he had been compelled to take to recover the land from other persons.

It would seem clear, therefore, that if the plaintiff can establish, independently of the deed by Hasanji, a right to share in the land, which had not been extinguished by the long adverse possession of Isákji, and of those who hold under him, he will be entitled to recover from the mortgagees a half-share in the land, on the liquidation of the half of the mortgage debt; and that if the only right which he can substantiate takes its origin in the act of Hasanji, he can only redeem the land on the payment of the entire mortgage debt: for as Hasanji, at the time he executed the deed No. 3, possessed only the equity of redemption, he could not have conveyed to plaintiff anything more than a share in this equity, which share would only invest the plaintiff with a right to redeem the entire estate.

Such being the position of affairs between the parties, there has been no sufficient determination by the lower court of the issues necessary for the decision of this case; and the Court must, therefore, reverse the Senior Assistant Judge's decree, and remand the suit, that the following issues may be decided:—(1) Has the plaintiff established that he or his ancestors were originally entitled to a half-share in the land in dispute, which was recovered by Isákji from other persons so far back as A.D. 1832; and that, at the time when it is alleged that the deed of settlement (No. 3) was executed by Hasanji, Isákji and his descendants had not acquired a good title against him by uninterrupted adverse

1866.
July 18.
S. A. Nos. 115 & 840 of 1865.

possession for a term exceeding thirty years. (2) Has the defendant established that Hasanji was of unsound mind, and of such weak intellect as to be incapable of making a valid contract. (3) Has the plaintiff established that Hasanji did execute the deed of settlement (No. 3) for sufficient consideration, and under circumstances which forbid the conclusion that any fraud was practised on him; and if the transaction was honest, but no consideration given, would the deed operate under Muhammadan law as a valid conveyance to the plaintiff of a half-share of the interest which Hasanji then possessed in the property, *i.e.*, a half-share in the equity of redemption only.

The lower appellate court will itself determine these issues, and not refer them to the court of first instance. Each party should be allowed to adduce any additional evidence which may be forthcoming, and the witnesses who were produced by the plaintiff before the Munsif to establish the execution of No. 3 should be recalled, if either party desire it. If the plaintiff be found to have established either of the claims which he has set up, a decree declaring his right to redeem to the extent, and on one or other of the conditions, stated in the first part of this interlocutory judgment, should be pronounced.

The amount of the existing mortgage debt cannot be properly settled in this action, which has not been brought for redemption; but should be left for future adjudication, if the plaintiff's right to redeem, in the manner which the Court shall declare, shall thereafter be resisted.

It is not intended that the lower court in giving judgment shall be confined to the issues which have been fixed, if it should appear to the trying Judge, from the disclosure of new facts, or for any other reason, that the decision of other points has become necessary. Costs to be apportioned at the final decision.

Decree reversed and suit remanded.