Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal (heard ex-parte) of Ismail Ariff v. *Mahomed Ghouse, from the High Court of Judicature at Fort William in Bengal; delivered* 18*th February* 1893.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Sir Richard 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 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

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title, and alleged in collusion with him that the land had been dedicated to religious and charitable purposes, and that the defendant was the matwali 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 wakfnamah 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 Baty, 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 matwalis in rotation every year; and that the defendant had been appointed matwali of the wakf lands and property. It also stated another wakfnamah by Ramjanullah, 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 wakfnamah was executed by Khubulla, he said he had come to the conclusion that there was nothing in the evidence to show that the wakfnamah 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 wasiutnamah (meaning a dedication by will) and a wakfnamah 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 wakfnamah. 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 pos- "session, 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 *waqfnama* of Ramjanullah created a "good *waqf*. The Defendant has no title of "any kind, and the Plaintiff has, at least, a title "subject to the *waqf*. I must make a decree "in accordance with the first and second para- "graphs 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 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 Ghouse, "the Defendant, appears to be this. He claims "to be the mutwalee, but the evidence upon "this record, not only does not show that he is "the mutwalee, but it shows that he is not, so "that, so far as Mahomed Ghouse 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 de-"clared, 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 Plain-
" tiff, 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 certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrongdoer 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; 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 Courts 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 en- " titled to possession," and after the words ' in " this suit mentioned," omitting " and that the " same have not been dedicated for religious or " charitable purposes." The Respondent will pay " the costs of this appeal.