***Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sham Chand Pal* v. *Protap Chunder Pal, from the High Court of Judicature at Fort William in Bengal; delivered* 3*rd July* 1897.**

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Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The question at issue on this appeal arises in a partition suit in which the Respondent was Plaintiff and the Appellant who is the Respondent's full brother and an older man by about three years was Defendant.

The two brothers who were for some time engaged in a yarn or twist business on their joint account had, it seems, acquired a considerable amount of property while they were living together as members of an undivided Hindoo family. The Plaintiff's case was that part of the joint property consisting of certain houses in Calcutta was divided in 1880 under two instruments described as deeds of gift both dated the 30th of August in that year and both duly registered on the following day. He now claimed partition of the rest of the property as specified in a schedule to the plaint.

The Defendant in his written statement alleged that the arrangement appearing on the face of the deeds was not a real or *bonâ fide* transaction. His story was this:—There was he said some dissension in the family owing

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to quarrels between his two wives. The result was that his second wife together with his mother and the Plaintiff left the house No. 16 Baranasi Ghos's Street which had been the joint residence of the family up to that time. He was very ill himself and he had no male child and so fearing lest in the event of his death half the property comprised in the two deeds would fall into the hands of his wives and be wasted he executed the deed of gift in favour of his brother and at the same time in order to give colour to the transaction the Plaintiff executed the other deed in his favour. The property however still remained in the joint possession of his brother and himself and he kept the deed of gift which he had executed in his brother's favour. He had now two sons born to him and he wished to have the whole property partitioned.

The two deeds which of course must be regarded as parts of the same transaction, were both in the same form. Each referred to the other. By the one the Defendant purported to give to the Plaintiff out and out a moiety of six houses stated to be valued in their entirety at Rs. 25,250. By the other the Plaintiff purported to give to the Defendant a moiety of No. 16 Baranasi Ghos's Street which was stated to be valued in its entirety at Rs. 3,500. Both the deeds contained a declaration that the parties would continue to own jointly the rest of their joint property and that if it became necessary to make a further partition the rest of the property should be divided in equal shares and that neither of the parties should then claim anything or raise any objection on the ground of inequality of valuation in respect of the gifts comprised in the two deeds of August 1880.

The only question at the hearing was whether the transaction of August 1880 was a reality or a pretence.

As the deeds were duly executed and duly registered the burden of proving that the transaction was not real lay upon the Defendant.

Their Lordships agree with the High Court in thinking that the Defendant failed in the proof.

The Defendant's case rested merely upon his own testimony. In his examination-in-chief he repeated in substance the story told in his written statement varying it slightly by stating that the deed of gift in favour of the Plaintiff was executed simply to prevent all of his properties from falling after his death into the hands of his two wives in case he died of the disease from which he was then suffering. He said he executed the instrument "only in name," and for that reason he had kept it in his possession.

In his cross-examination however he set up a very different case. "Before I signed the deed "of gift," he said, "no proposal thereof was "made to me and I did not know a bit of it. "The Plaintiff and Punchanun Banerji"—Punchanun was their manager and received their rents—"having taken me to the registration "office when I was out of my senses made me "sign the deed of gift. Before I was taken to "the said office nobody told me I should have "to sign a deed of gift." This story as the learned Counsel for the Appellant admitted was an absolute falsehood. The story told by the Defendant in his examination-in-chief seems hardly more worthy of credence. It is wholly uncorroborated. On the face of it it is extremely improbable. The Defendant had only to make a will in order to carry out his alleged intentions. There seems to have been no reason for concocting such an elaborate piece of deception. And it is difficult to understand why the Plaintiff should have been a party to the scheme at a time when it is common ground

that the two brothers were not on good terms. It was suggested by the learned Counsel for the Appellant that the deed which he executed was not a mere pretence but that it was intended to be operative in the event of his having no male issue. But there is nothing in the deed or in the evidence to support that suggestion. Nor does it account for the execution of the deed of gift in his favour.

It is undisputed that the Defendant was a man of dissipated life and extravagant habits and that he spent a large amount of the joint property on his vices. The Plaintiff's case was that his brother's conduct led to remonstrances and reproaches from his mother and from an uncle who is now dead as well as from the Plaintiff himself and that ultimately the Defendant was prevailed upon to come to the arrangement embodied in the two deeds with the view of making some amends and saving the family property.

The fact that the deeds themselves contain a detailed statement as to the values of the respective lots is a circumstance certainly more consistent with the Plaintiff's story than with the Defendant's. Accept the Plaintiff's story and the difference in value is seen to be an important element in the arrangement and one which would naturally find a place in deeds intended to carry it into effect. On the other hand if the deeds were a mere blind and false in all other respects why should they contain this one unnecessary truth the record of which seems only calculated to provoke inquiry and to suggest grounds for attacking the arrangement.

The only part of the Defendant's case which seems to be true is that he had possession of the deed of gift which he executed in favour of the Plaintiff. It is not very clear how he came to have that deed. The Plaintiff was the only person who could have obtained it from the

Registry Office. He says he took it to No. 16 and left it with his brother for safe custody. That may be so if the Defendant is correct in saying as he does that the Plaintiff continued to live on at No. 16 for about eight months. But after all it is not very material what became of the deed seeing that it was duly registered.

As regards possession of the property comprised in the deeds of 1880 it is quite clear that the Defendant was left in occupation of No. 16 without any interference on the part of the Plaintiff. And he has not succeeded in proving that after the execution of the Deeds he ever received any portion of the rents of the property comprised in the deed of gift in favour of the Plaintiff. The Plaintiff avers that that property remained in his sole possession and that he executed repairs and made additions and improvements to it out of his own monies. There is no evidence to disprove or contradict that assertion.

The Subordinate Judge found in favour of the Defendant. The High Court reversed his decision and their Lordships have no difficulty in affirming the decree of the High Court. The decree as it stands only applies to the property specified in the schedules. Before their Lordships the Appellant suggested and the Respondent admitted that the partition should go to the whole of the undivided property if there be any other property now undivided.

Their Lordships therefore will humbly advise Her Majesty that the decree of the High Court with this slight variation ought to be affirmed and the Appeal dismissed.

The Appellant will pay the costs of the Appeal.