*Privy Council Appeal No. 82 of 1917.*

*Allahabad Appeal No. 1 of 1916.*

**Hakim Maulvi Muhammad Mahbub Ali Khan** - *Appellant*

*v.*

**Bharat Indu and Others** - - - - *Respondents.*

FROM

**THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 26TH JULY, 1918.

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*Present at the Hearing:*

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.

[*Delivered by* LORD SHAW.]

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This is an appeal from a judgment and decree of the High Court of Judicature for the North-Western Provinces, Allahabad, which reversed a judgment and decree of the Subordinate Judge of Bareilly.

The principal object of the suit is to obtain a declaration that the defendant No. 1 has no right or share in a 13-biswa and 8-biswansi zemindari share in mauza Tigra Khanpur, and that that share is saleable in satisfaction of a balance of debt, still unpaid, by Wilayat Ali Khan.

Wilayat was the husband of Musammat Bigga Begam. He was indebted to Durga Parshad in a considerable sum of money, which he had borrowed under a bond dated the 5th February, 1878, hypothecating, among other properties, the share in mauza Tigra Khanpur just mentioned. The mortgagee obtained a decree on the bond against the mortgagor on the 26th March, 1896, and that decree was made absolute in the following December. Some of the mortgaged properties were then sold. Among others the share in mauza Tigra Khanpur was sold in execution of the mortgage decree, and on the 20th July, 1898, was purchased by Musammat Bigga Begam, Wilayat's wife, and Hakim Ahsan Ali Khan for 10,000 rupees. There is nothing surprising in the transaction. Wilayat

and his wife seem to have been persons in good position, and the purchase by her and the co-purchaser, named Hakim Ahsan, appears to have been considered by the family and all concerned as quite natural. This was in the year 1898. On the 20th December, 1899, Hakim Ahsan Ali Khan executed a deed relinquishing all his rights to the property. Bigga Begam obtained possession. Her name was duly recorded in the revenue papers, and a great quantity of receipts and documents of that kind has been produced, showing that she duly received the rents and produce of the property up to the time of her death. This event occurred on the 21st October, 1908.

About a fortnight before, namely, on the 9th October, she executed a will in favour of the appellant. Her husband, Wilayat, and her nephews, Iqbal Husain, *alias* Kallan, Aulad Husain, and Hamid Husain, consented to the testamentary disposition of her entire estate. It cannot be denied that they did so both during her life and after her death. The will bears the husband's attestation, and it is proved that husband and nephews were informed by her of her testamentary intentions and consented thereto. On the 4th December, 1908, the husband and the nephews executed deeds of relinquishment of the shares, ratifying their consent, and on the 20th January, 1909, two applications were made by the husband and the nephews respectively for mutation of names in favour of the appellant.

The appellant, having thus inherited the property in dispute, obtained possession thereof, his name was duly recorded in the revenue papers, and he has been in actual possession ever since.

It will be observed accordingly that for about ten years the share in this mauza had passed out of the possession of Wilayat and into the possession of his wife, and thereafter of her devisee. This unquestionably must have been to the knowledge of Durga Parshad.

When, however, in October 1908, Bigga Begam died, it appears then to have occurred to Durga Parshad that he might attach and realise under his judgment decree the interest which Wilayat would have under the Mahomedan Law in the property of Bigga Begam, his wife, notwithstanding her will. By the Mahomedan Law, explained in the Hedaya, Hamilton's Edition, IV, 469, and founded upon a declaration of the Prophet, the power of a testator to leave his property by will is limited to a one-third share. By the same law the husband would have been entitled to another third and the nephews to the remaining third. Durga Parshad was advised at this period by one Ramji Mal, who was his general attorney and is now the general attorney of his sons, and who is the principal witness in the present case for them as plaintiffs. His evidence is not believed by either of the Courts below, but this much is corroborated by the recorded proceedings, namely: "On the death of Bigga Begam, I informed by master and told him that half of her estate in the Tigra Khanpur property devolved on Wilayat Ali

Khan, and I made an application to the Court for the attachment of the same." The proceedings were grounded on the acknowledgment by Durga Parshad, advised by Ramji Mal, of the fundamental fact that Bigga Begam when she died was the owner of the shares in this mauza, and that, by reason of her death, Wilayat succeeded by force of law to a certain portion thereof.

These proceedings ended in failure. Possibly it was then demonstrated that Wilayat and the nephews had consented, and did consent, to the will, and that accordingly nothing passed to them, but that the will should have effect in its entirety. This is in complete accord with the Mahomedan Law (see, for instance, *Cherachom Vittil Ayisha Kutti Umah* v. *Valia Pudiakel Biathu Umah and others*, 2 Madras H.C., 350 ; *Daulatram Khushalchand* v. *Abdul Kayum Nurudin and others*, XXVI Bombay, 497 ; and section 270 of Sir R. K. Wilson's "Digest of Mahomedan Law."

So matters stood until the 28th September, 1910, when the present suit was instituted. Its foundation in law is section 90 of Act IV of 1882, which provides for the event of the proceeds of anterior sales or realisations having failed to satisfy the full decretal amount due by the judgment debtor. Its foundation in fact is that the share in the mauza never belonged to Bigga Begam at all, but remained Wilayat's, and that in short the purchase by Bigga Begam was a simulate transaction, and that the property was held in her name benami for Wilayat. This allegation is made, and this totally new attitude is assumed after the lady is dead, and after Durga Parshad is dead. It is of course inconsistent with Durga Parshad's prior allegation, in which the property was admitted to be that of Bigga Begam, and Wilayat was alleged to have succeeded to her as one of her heirs. Their Lordships do not enter into consideration of the evidence. Having perused it they are of opinion that the Subordinate Judge has come to a correct conclusion as set forth in his careful judgment. He does not credit the story.

The learned Judges of the High Court do not differ from the Subordinate Judge in disbelieving the plaintiff's witnesses. In the opinion of the Board they have not attached due significance to, indeed they have ignored, an important and crucial element in the case, viz., the position taken up during the life of Durga Parshad, the mortgagee in the litigation already alluded to. They have thus failed to reach a correct conclusion upon any balancing of evidence that might be required. They proceed apparently on the view of the improbability of Bigga Begam having 10,000 rupees to spare for the purchase of the share in this village. In their Lordships' opinion, whether the conjectures which they make upon that topic be or be not correct, they are mere conjectures. Lord Westbury observed in the benami case of *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (XI Moore's I.A.C., 43), "Undoubtedly there are in the evidence, circumstances which may create suspicion, and

doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony." Their Lordships are far from agreeing that any circumstances of suspicion have been established in the present case; and the observations of Lord Westbury are accordingly *a fortiori*.

On the other hand, in regard to benami transactions, courts of law should not approach them with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for or holds the same for the interest of another. Benami transactions are very familiar in Indian practice, and as Lord Hobhouse said in *Uman Parshad* v. *Gandharp Singh* (14 I.A., 129), "Even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose." The learned Judge, however, added, "Still, such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a benami or sham transaction." This brings the legal situation into line with the general doctrine already cited from Lord Westbury.

It is, however, in the present case their Lordships' opinion that proof that Bigga Begam's ownership was benami for Wilayat has entirely failed. The action is brought after years of possession, and when the principal parties to the transaction challenged and also the mortgagee himself are dead. This is a circumstance not without weight in such cases, and it involves a certain addition to that duty or onus of proof which in benami cases does undoubtedly rest upon the assertor.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the Subordinate Judge should be reverted to, and that the appellant be found entitled to costs from the date thereof, namely, the 16th September, 1912, and to the costs of this appeal.

In the Privy Council.

HAKIM MAULVI MUHAMMAD
MAHBUB ALI KHAN

*v.*

BHARAT INDU AND OTHERS.

DELIVERED BY LORD SHAW.

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