1888

ABDUL RAHMAN v. BEHARI PURI.

with reference to Mata Ghulam's decree, had not the effect of superseding that decree or of creating another decretal right in addition to it or independent of it, and therefore there does not, out of this circumstance alone, arise any impediment to the maintenance of the present action, which, as we said above, is brought under s. 283 of the Code to establish against persons who are strangers to the decree of the 12th May, 1886 the right which the respondent claims to have in the carriage which was the subject of that decree, but has now passed into the possession and control of strangers to that decree.

It seems to us that the present action is founded upon a new and different cause of action, and being brought against persons who are no parties to Mata Ghulam's decree, there can be no question of the competence of the respondents to maintain his present action. The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.
J. C.
1887
December
13*th and* 14

THAKRO AND OTHERS (DEFENDANTS) *v.* GANGA PRASAD, (PLAINTIFF).

[On appeal from the High Court for the North-Western Provinces.]

Shares in village held by wife of former proprietor—Stridhan.—Mitakshara—Mutation of names in the settlement record.

A share in a pattidari village given by a Hindu proprietor to his wife may become her stridhan, within the contemplation of the Mitakshara, section 11, cl. 1, enabling her to make a valid gift of it.

A transfer from a husband of a share in a village was not formally carried out, otherwise than by its being evidenced by mutation of names in the settlement record; and a son, claiming as his father's heir, alleged that his mother's name was only used *benami* by the father.

Held, that a finding that such mutation was not for the purpose of putting the property into the name of the wife, *benami* for the husband, but for her own benefit, was substantially correct.

Appeal from a decree (23rd January, 1883) of the High Court, reversing a decree (15th July, 1880) of the Subordinate Judge of Aligarh.

The question on this appeal was whether a widow, whose deceased husband had been in his lifetime a lambardar and pat-

Present: LORD FITZGERALD, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

1887

THAKRO v. GANGA PRASAD.

tidar in the pattidari village of Shahpur Thator, tahsil Iglas, in the Aligarh district, was herself the owner of shares in the village, recorded in her name in the settlement record, or that husband had been, till his death, the actual proprietor, holding them in the name of his wife. He had gradually acquired all the shares in the mauza, which originally consisted of three thokes, and on his application, by petition filed in 1862, all the shares were entered in the name of his wife.

This petition stated that he, Ganesh Singh in partnership with his wife, Musammat Thakro, was a share-holder of mauza Shahpur Thator, and applied for the striking out of his name as a sharer in that mauza, and the name of Thakro alone should be entered as the proprietor of all the shares, as the administration paper was then being written. Whether the *dakhil kharij* that followed represented a merely nominal, or an actual, transaction was the question in this suit; which was brought by Ganga Prasad, the son of Ganesh Singh, who died on the 12th October, 1872, leaving Thakro, his widow, by whom he had one son, the said Ganga Prasad, and two daughters. He also left another son Dipchand, by another wife, a minor when this suit was brought. He made a will, it was said, five days before his death, leaving all his estate to his sons in equal parts. Upon the assumption that the name of Thakro was entered "*ism-farzi*" in respect of this mauza, Ganga Prasad would have had only a moiety. But he claimed to have inherited the whole mauza, alleging that Ganesh Singh had, by effecting mutation of names, as above stated, exempted it from the operation of his will. The plaint stated that Ganesh Singh acquired the whole of the mauza by taking mortgages of shares of other share-holders, and by purchases, partly in his own name, and partly in Thakro's name; and that in 1862 he caused her name to be recorded as owner of the entire property, although the mauza remained in his possession. That after Ganesh's death in 1872, the mauza remained under the plaintiff's management. Also that the deed of gift executed by Thakro on the 6th May, 1878, in favour of her daughters, was false in describing the mauza as her acquired property and *stridhan*.

The defence insisted on Thakro's having had a beneficial ownership. The defendants' written statement was that Ganesh Singh

"had given away his entire share consisting of 679 bighas 2 biswas in the disputed village to his wife Thakro, before the birth of the plaintiff, and put her in proprietary possession. The Musammat herself purchased 636 bighas 13 biswas of the mauza, and thus under two different titles she had been in possession of the entire village for more than 12 years."

On issues framed to question the point, the Subordinate Judge, Saiyad Farid-ud-din Ahmad Khan Bahadur, found that the whole of the shares were the property of Thakro, and up to the date of the deed of gift by her, had remained in her possession. The first of the three thokes of which the mauza at one time consisted was bought in 1845 in the names of the father and brother respectively of Ganesh Singh, who afterwards obtained *dakhil kharij* in his own name. The second *thoke* was let in farm, as a settlement operation, to Ganesh Singh about 1847; and he, in 1848, bought up the rights of the proprietors in his own name. In the same year, the rights of other proprietors of shares were bought at auction in the name of Thakro to the extent of 205 bighas 4 biswas. The shares in the third thoke were taken in mortgage in 1847, in the name of Thakro as mortgagee, and afterwards in the same year Ganesh Singh bought up the rights, subject to such mortgage, of seven proprietors, to the extent of 276 bighas 1½ biswas, at a sale in execution of decree. The Subordinate Judge also held that the mauza had become Thakro's stridhan, or separate property, and, as such, was transferable by gift. He also, having fixed an issue to this effect, "if the mauza be held to have been owned by Ganesh Singh, is the plaintiff entitled to sue for sole possession thereof, when the other son, Dip Chand, is alive:" held, on this issue, that the plaintiff could not, consistently with claiming an exclusive title, rely on an exclusive title through Ganesh Singh; inasmuch as the fact, if true, that the mauza remained Ganesh's property till his death, would have brought in Dip Chand as entitled to one-half.

The plaintiff appealed to the High Court denying that Thakro had any "exclusive property, or transferable right, in the mauza;" and he again asserted his sole right of inheritance.

The High Court (Straight and Tyrrell, J.J.) held that the plaintiff had made good his appeal "on the ground that the record

1887

THAKRO v. GANGA PRASAD.

of his mother's name was of the commonplace *ism-farzi* character, and that she consequently, and in fact, never had any possession of the property in any way adverse to Ganesh Singh, its owner, or to the plaintiff, who, with his half-brother, Dip Chand, was his heir."

The High Court, thereupon, decreed that the plaintiff should recover possession of the whole of the property, in which he was declared to be only entitled to a half share, the right of the donee from Thakro being declared null and void, and it being further declared that the decree should not affect the rights and interests of the minor son, Dip Chand.

On this appeal,

Mr. *J. Graham*, *Q.C.*, and Mr. *H. Cowell*, for the appellants, contended that the beneficial ownership of Thakro had been proved; and that her gift was valid, as having been made of her stridhan. The decree of the High Court was erroneous. Dip Chand's interest, if he had any, could not be protected in the way attempted by the decree, which, on the face of it showed that the case sought to be made out was an inconsistent one. They relied on prior representations made by the plaintiff himself, and on the evidence generally, as showing that the name of Thakro had not been used merely for that of her husband, but as indicating a real ownership.

Mr. *J. D. Mayne*, and Mr. *J. G. Witt*, for the respondent, relied on the evidence as to the actual management of the land comprised in the shares. This had been throughout in the hands, first of Ganesh Singh, and then of his son Ganga Prasad. Thakro had been proprietor in name only; and the judgment of the High Court was right.

The cases referred to on both sides were *Nawab Azimut Ali* v. *Hurdwaree Mull* (1) *Uman Parshad* v. *Gandharp Singh* (2), *Sreeman Chunder Dey* v. *Gopaul Chunder Chuckerbutty* (3), *Gopeekrist Gosain* v. *Gungapersaud Gosain* (4).

Counsel for the appellants, were not called upon to reply.

Their Lordships' judgment was delivered by SIR B. PEACOCK.

(1) 13 Moo. I. A. 395.
(2) L. R., 14 I. A., 127; I. L. R., 15 Calc. 20.
(3) 11 Moo. I. A. 28.
(4) 6 Moo. I. A. 53.

1887

THAKRO v. GANGA PRASAD.

SIR B. PEACOCK.—This is an appeal by Musammat Thakro and other ladies against Ganga Prasad, the respondent. The appeal is from a decree of the High Court of the North-Western Provinces at Allahabad. The suit was brought by Ganga Prasad against Musammat Thakro, his mother, and the other ladies, who were the daughters of Musammat Thakro, in whose favour the mother had executed a deed of conveyance. The plaintiff alleged that his father, Ganesh Singh, "had a large property; that he, on different occasions, by mortgage and private and public purchase, having obtained mauza Shahpur Thator in his own name, as well as in the name of Musammat Thakro, plaintiff's mother, himself remained in possession thereof. Subsequently, in 1862 and 1863, the name of the said Musammat was recorded in respect of the entire property in the said mauza, though the said Ganesh Singh continued in possession of it." He then alleged that on the 12th October, 1872, Ganesh Singh, executed a will, and "on the 17th October, 1872, died, and that Musammat Thakro, plaintiff's mother, continued to live with him (plaintiff), and the village in dispute, like other paternal estates, remained under the management of the plaintiff." Then he proceeded as follows:—"On the 6th May, 1878, the said Musammat Thakro executed a false deed of gift"—by which he meant a deed of gift which she had not the power to execute—"of the said mauza in favour of her two daughters, Musammat Radha and Bhawani, describing the said mauza to be her acquired property and *stridhan*, and thus effected the plaintiff's dispossession ever since the Musammat began to live separate, which is the time when the cause of action arose. The village in dispute being the acquired property of the plaintiff's father, who had simply on account of affection caused the name of Musammat Thakro to be entered, the latter was not, under the Hindu law, competent to transfer the property to her daughters. The plaintiff is, in every way, entitled to get the property. The plaintiff therefore seeks for the following reliefs: (1) that the plaintiff's right may be declared in respect of the disputed property, and the deed of gift executed on the 6th May, 1878, by Musammat Thakro, defendant, in favour of Musammats Bhawani and Radha, be declared invalid, void, and inoperative, as far as the plaintiff's right is concerned; (2) that both the last mentioned

1887

THAKRO v. GANGA PRASAD.

defendants may be dispossessed of the disputed mauza, and their right as donees declared null and void."

A written statement was put in on behalf of the ladies, and the case being tried by the Subordinate Judge, he raised several issues, the principal one of which was the fourth :"Whether Shahpur, the village in dispute, is wholly or partly the personal property of Ganesh Singh; and he alone remained in possession as long as he lived, and since his death, the plaintiff remained in possession thereof till the date of the accrual of the cause of action, and is therefore entitled to possession thereof; or the village in question is wholly or partly the personal property of Musammat Thakro, the widow of Ganesh Singh, deceased, who has been in possession thereof for more than 12 years, and the defendants are in possession from the date of gift, and the plaintiff's claim is therefore barred by lapse of time and he has no right in the property in dispute." Upon that the Subordinate Judge says :—" Just as the defendants have not proved their assertion, so the plaintiff also has not proved that Ganesh Singh fictitiously transferred that amount of land of the village of Shahpur Thator which was in his name to Musammat Thakro." The question really was whether, when the mutation of names was made from the name of Ganesh into the name of his wife, it was his intention to transfer the property into the name of his wife *benami* for him. The Subordinate Judge upon this point says :—"In short, a careful consideration of all the oral and documentary evidence and presumptions and probabilities clearly leads the Court to infer that the whole of the village in dispute is the property of Musammat Thakro, and is not the estate left by Ganesh Singh, and that up to the date of the deed of gift in question it remained in her possession." The Subordinate Judge therefore found in substance that the mutation of names in 1862 was not for the purpose of putting the property into the name of the wife *benami* for the husband, but for her own benefit.

Upon appeal to the High Court that Court came to a different conclusion. They held that the property was put by the husband into the name of the wife to hold it *benami* for him, and that consequently the property remained the property of the husband, and

that the wife had no power to assign it to her two daughters, although it stood in her name.

A considerable part of this property, as shown by the Subordinate Judge in his judgment, was purchased in the name of Ganesh, the husband, and certain other parts in the name of the wife. The wife gave evidence that that portion of the property which was purchased in her name was purchased for her benefit and with her own money. It is unnecessary to decide whether the part of the property which was purchased in the name of the wife was purchased with her money or with that of her husband, because even if the property which was purchased in the name of the wife was the property of the husband, as well as that which was purchased in his own name, the question still remains whether when the husband allowed the mutation of names from his name into the name of his wife, he intended that mutation to operate for his own benefit or for hers.

The wife in her evidence in the cause stated that in the year 1847, when the husband was about to marry a second wife, that portion of the property which had been purchased in the name of the husband was made over to her in consideration of his being about to marry a second wife, and that afterwards the other portions of the property were bought in her name, so as to make the whole her property.

In the Mitakshara, section 11, clause 1, speaking of the nature of *stridhan*, it is thus stated: "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other separate acquisition, is denominated a woman's property." It is not unusual for a husband, upon his being about to marry a second wife, to make a present to his first wife, and if he does so, the property so presented becomes her *stridhan* according to the doctrine above laid down. The wife says that in the year 1847, when the husband was about to marry a second wife, he did make her a present of the property which had been purchased in his own name. Although the High Court has found that there was no actual proof of that fact, it is not improbable that the husband, when about to marry a second wife, should have stated to his first

1887

THAKRO v. GANGA PRASAD.

wife that he would appropriate that part of the property which he had purchased in his own name as a present to her in consideration of his being about to marry the second wife. The statement of the wife is corroborated by the fact that in the year 1862 he caused the property to be changed from his own name into that of his wife. On the 4th March, 1862, he says :—"In partnership with my wife, Musammat Thakro, I am the lambardar and a shareholder of mauza Shahpur Bhatai, pargana Gori. Now, of my own free will, I pray that my name as sharer in the said mauza be expunged, and that of the said Musammat alone be entered as proprietor of both the shares, as the village administration paper is being written now. I have no longer any claim." If when he was about to marry the second wife he told his first wife that he would make her a present of the property and did not carry out the gift by an actual deed, and in 1862 caused a mutation of names declaring that he had then no longer any claim to the property, that would not show that he was causing the mutation in order that the wife might hold it *benami* for him. There was a complete mutation of names from the husband of all that he possessed in the village of Shahpur into the name of the wife. The subsequent purchases were made in the name of the wife. If he intended the subsequent purchases, though made with his own money, to be made in the name of his wife, the probability is that he intended the whole of Shahpur to be vested in her as her *stridhan*. The plaintiff claims it as his own property. It is to be remarked that by the second wife his father had another son, Dip Chand. If the property had been transferred in 1862 into the name of Thakro, *benami* for the father, it would have remained the father's property, and being the father's property would have descended to his two sons. But the plaintiff does not claim it as being the property of the two sons. He claims it as his own property, and as having been put into his mother's name in order that he might become entitled to the benefit of it; not that it was put into his mother's name in order that it might be held by the mother *benami* for the benefit of the father.

Several documents were put in. There is a copy of a petition "by Ganga Prasad against Musammat Thakro, his mother, and Musammats Radha and Bhawani, his sisters." That was dated in

1878, after the mother had executed the conveyance in favour of her daughters. In paragraph 3 he says:—"The appellant's father caused the name of Musammat Thakro, mother of the appellant, to be entered in respect of the property through some policy. The name of the appellant's mother was entered simply with a view that the children born of the other wife of the appellant's father might not get a share in this property, and that the appellant alone might get it." The father, when he made this transfer of Shahpur into the name of the mother, did not appear to have had any creditors or any particular reason for putting this portion of his property into the name of the mother instead of allowing it to remain in his own name, unless it was for the purpose of giving the mother a benefit. If he had intended to put the property into the hands of the mother in order to conceal it from his creditors, and to make it appear that it was his wife's property instead of his own, the probability is that he would have done the same with regard to his other property, and not only in respect of this particular village.

The representation on the part of the plaintiff shows that whatever the object of his father in making the mutation was, it was not to put the property into the hands of the mother to hold it *benami* for the father. If he had put it into her hands with that object, the two sons would have become entitled to it; but the case of the plaintiff is that the object of the father in putting it into the name of the mother was that the issue of the second wife should have no share in it.

Further, a petition of guardianship was put in evidence. It was an application by Ganga Prasad, the plaintiff. He there says:—"My father, Ganesh Singh, died in October, 1872, leaving two sons, *i.e.*, myself and Dip Chand, a minor"—that is, the son of the second wife—"who is now 2½ years old, as his heirs, and we two sons of the deceased are owners in equal shares of the property left by him." If the property remained the father's, Shahpur, as as well as all the other properties, would have been the joint property of the two sons, Dip Chand and himself; but in a schedule to the petition particularising the property which his father left, he excluded Shahpur. That was either a gross fraud upon his bro-

1887

THAKRO v. GANGA PRASAD.

ther, whose guardian and trustee he then was, with the intention of causing it to be believed that Shahpur, which was held, as he alleged, by his mother for the benefit of his father, was not the property of his father, or he must have believed at the time that the property was put into the hands of the mother, not *benami* for the father, but for some other purpose. He afterwards filed a list of the property left by his father, in which Shahpur is excluded, which shows that there was no mistake in the omission of Shahpur. In both these documents Shahpur is excluded as property left by the father, which if left by the father would have belonged to himself and his brother. In his evidence, he says :— "I know and consider Shahpur Bhatai to be my own share and not that of Dip Chand." In the face of these statements he cannot now contend that the property was held by his mother *benami* for his father. He contended at one time that the property was put into his mother's name *benami* for himself. If that were so, it was for him to prove the fact, which he was unable to do.

Looking at the conduct of the plaintiff and at the representations which he made, which would have been grossly fraudulent if the property had been in the mother's name *benami* for the father, their Lordships have come to the conclusion that the case of the plaintiff is not made out, *viz.*, that the property was put into the hands of the mother *benami* for the father. Their Lordships do not believe that it was put into the hands of the mother for the purpose of giving the plaintiff the sole interest in the property, or that it was put into the hands of the mother *benami* for the father.

Under these circumstances their Lordships think that the High Court came to an erroneous conclusion in reversing the judgment of the Subordinate Judge upon the fourth issue, in which he found, upon the evidence and upon the statements of the plaintiff, that the property was the property of Thakro and not the property of the plaintiff. The plaintiff even in his plaint does not state that the property was that of himself and Dip Chand, but claimed it as his own property. Dip Chand was no party to the suit, as he ought to have been if the property was that of the father.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed and the decree of

1887

THAKRO v. GANGA PRASÁD.

the Subordinate Judge affirmed, and that the respondent be ordered to pay the costs of the appeal to the High Court. The respondent must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *Ford, Ranken Ford,* and *Ford.*

Solicitors for the respondent: Messrs. *Pritchard and Sons.*

APPELLATE CRIMINAL.

1888
January 16.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* MARU AND ANOTHER.

Evidence—Witnesses—Competency of persons of tender years—Act I of 1872 *(Evidence Act), s.* 118*—Judicial oath or affirmation—Act X of* 1873 *(Oaths Act) ss.* 6, 13*—Omission to take evidence on oath or affirmation.*

S. 6 of the Oaths Act (X of 1873) imperatively requires that no person shall testify as a witness except on oath or affirmation; and, notwithstanding s. 13 of the same Act, the evidence of a child of eight or nine years of age is inadmissible if it has been advisedly recorded without any oath or affirmation. *The Queen* v. *Sewa Bhogta* (1) dissented from.

The nature of judicial oaths and affirmations and the history of Indian legislation on the subject discussed.

The facts of this case are stated in the judgment of the Court.

The appellant was not represented.

The *Public Prosecutor* (Mr. *G. E. A. Ross*) for the Crown.

MAHMOOD, J.—In this case the two prisoners, Maru and Fatteh, were tried together and both have been convicted. The prisoner Maru has been convicted under s. 363 of the Indian Penal Code and sentenced to two years' rigorous imprisonment, and the other prisoner, Fatteh, has been convicted under s. 368 read with s. 363 of the Indian Penal Code, and sentenced to one year's rigorous imprisonment.

Both prisoners have appealed. So far as Maru is concerned I have arrived at the same conclusions on the evidence as the assessors and the learned Sessions Judge. The substantive offence charged against Maru was that of kidnapping within the meaning of s. 363

(1) 14 B. L. R. 294.