PRIVY COUNCIL.

P. C.
1896
November
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December
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NAWAB IBRAHIM ALI KHAN (DEFENDANT) AND UMMAT-UL ZOHRA (PLAINTIFF).

[On appeal from the High Court at Allahabad.]

Evidence - Muhammadan law—Alleged gift by a Muhammadan father to his son.

Government securities were indorsed and delivered by a Muhammadan father to his son in the presence of the local Treasury Officer. On the question, raised after the father's death, whether this was intended to transfer the ownership, or was a *benami* transaction, leaving the true ownership in the father, the courts below had drawn different inferences from the proved facts. The first court decided that the ownership had been changed, the notes having been given with only a reservation of the temporary use of the interest. The High Court found that the ownership remained in the father.

On a review of the position of the parties at the time, and of their subsequent conduct down to the father's death, the Judicial Committee affirmed the judgment of the High Court, on the evidence, pointing out that the first Court's theory of the reservation differed from the case alleged by the defendant and from that actually made out by the plaintiff at the hearing.

APPEAL from a decree (27th February 1894) of the High Court, reversing a decree (30th September 1891) of the Subordinate Judge of Agra.

This suit was brought by Begam Ummat-ul Zohra to obtain, against her elder brother, her share, valued at Rs. 21,679, of the estate left by their father, Nawab General Muhammad Hasan Khan.

The question on this appeal was whether certain Government promissory notes, and cash representing them, were part of the estate of the Nawab at his death, or, by reason of their having been given by him while living to his son, belonged to the latter.

The late Nawab made a will, as to which the facts are stated, as well as all the other facts in the case, in their Lordships' judgment.

There were other children of the late Nawab, another son, and another daughter, besides the plaintiff and the defendant.

On the 28th September the late Nawab executed a power appointing his elder son his agent to draw the interest on the

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promissory notes and to get them renewed. On the 5th March 1885 he indorsed and delivered them to his elder son in the presence of the Treasury Officer at Agra. They were renewed in the name of that son on the 21st March in the same year, and retained by him in his possession.

On the 25th June 1886 the father died. The promissory notes, or their value in cash, Rs. 1,01,000, were the only part of his estate yielding any income, and rest of his property was of little value as compared with this part of it. In 1887 suits were brought by the daughter, Hazrat Begam and the son, Muhammad Ali Mirza, to have the notes declared part of their father's estate. These suits ended in a compromise by which the plaintiffs got decrees for parts of their respective claims. By agreement of the parties to the present suit, instituted by the Begum Ummat-ul Zohra on the 5th July 1890, the evidence taken in those suits was treated as evidence in the present one. The defendant's case was that the whole of the Rs. 1,01,000 had been transferred to him as a gift followed by delivery, and was complete by law. The Subordinate Judge having framed an issue upon this defence found that the transfer of the 5th March 1885, by the father to the son, was not a merely formal proceeding by which it was not intended to vest the property in him, but was an actually operating gift, accompanied by possession of the principal money. This gift had been subject to certain reservations of the interest upon the notes for the donor's lifetime, and after his death for certain stipends payable out of that interest. The Judge found that the notes did not form part of the estate left by the father; and decreed the plaintiff's claim only for her proportionate share in the sale proceeds of a house and movables, with other rights of property, the value of such share amounting only to Rs. 1,757. He directed that each party should pay their own costs. His judgment referred to *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1), decided in 1867, a case which had been relied on for the defence. The judgment stated that to be a case

(1) 11 Moo. I. A., 517.

in which the father had transferred to his only son Government papers by indorsing them to the son, but had reserved to himself the use of the interest thereon during his lifetime. On that state of things it had been held by this Committee that the father intended to transfer the promissory notes with the above reservation, and that, under the circumstances, the validity of the intended transfer was not affected thereby.

The plaintiff appealed to the High Court, and the defendant filed a cross-objection to obtain his costs.

A division Bench (TYRRELL and BLAIR, J. J.) found "that the "defendant was not the exclusive owner of the promissory notes "once belonging to his father; and that in June 1886 the whole "of the notes formed part of an unalienated estate of General "Muhammad Hasan Khan." The appeal was decreed with costs in both Courts, and the defendant's objection dismissed.

On this appeal Mr. *H. Cowell* and Mr. *G. E. A. Ross* for the appellant argued that the indorsement and delivery of the notes passed the title thereto, in accordance with Act XXVI of 1881, section 50; and that the presumption, in the absence of proof of their having been subjected to a trust for the donor, was that the beneficial interest therein passed to the donee. The case of *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1) showed that by Muhammadan law a valid gift could be made with a reservation by the donor for himself. Here the evidence was that a reservation was made of the usufruct, not continuing, but only for the life of the donor, and until certain payments should have been made after his death. Till then the gift would be of the principal. That, on the other hand, a mere nominal transfer should have been made, was not borne out by the evidence, express declarations by the father having been made which would be inconsistent with that intention on his part. Inferences from his conduct did not outweigh his own expressions, and such inferences were consistent only with the reservation by him of a temporary, and limited, interest for himself and his own purposes.

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The respondent did not appear.

Afterwards, on the 9th December, their Lordships' judgment was delivered by LORD HOBHOUSE.

The appellant in this case, who was the defendant in the original suit, is the eldest son of the late Nawab General Muhammad Hasan Khan, who in these proceedings has been commonly called "The General." The respondent, who was plaintiff below, and who does not now appear, is his eldest daughter. He died on the 25th June 1886, leaving also another son and another daughter. This suit was instituted by the plaintiff to obtain her legal share of the General's estate. The defendant does not dispute her right to that, but as regards a sum of Rs. 1,01,000 secured by Government promissory notes, and a sum of cash the produce of those notes, he contends that they form no part of the General's estate, but are his own property by virtue of a gift made by the General in his lifetime.

The other son and daughter also sued for their shares, and were met by the same plea. They obtained decrees in their favour from the then Subordinate Judge of Agra, but pending appeals to the High Court compromises were effected; and these previous suits are of no importance now except for the circumstance that evidence taken in them has by consent been used in this suit.

As regards the overt acts of the parties there is not much dispute; but the Courts below have drawn different inferences from the proved facts. Notes of the stated value were undoubtedy transferred by the General to the defendant on the 5th March 1885, and were afterwards renewed by the defendant in his own name. The question is whether this transaction was intended to be a transfer of the true ownership or was a *benami* transaction, leaving the true ownership in the General. To determine that it is necessary to see, first, what was the position of the parties at the time, and, secondly, how they conducted themselves between that time and the General's death.

It is mentioned by both the Courts below that in the year 1876, the General executed a registered deed conveying to the defendant

his whole property, including the promissory notes. In the former suits the defendant rested his title on that deed. But it was shown that at the same time the General made a will, showing that his heirs were still to get their shares out of the transferred property. The defendant then gave up his claim under that deed, and he has not renewed it. But he and his legal adviser Mr. Willis have in their evidence represented the General's endorsement of the notes as being a completion of the gift left imperfect by the transfer-deed of 1876. The High Court on the other hand have referred to the same transfer as showing that the General then intended that a transfer, on the face of it complete, should not interfere with the claims of his other heirs.

On the 28th September 1880, the General executed a deed by which he appointed the defendant to be his attorney in the Treasury Office at Agra to realize interest under promissory notes, and to get the specified notes renewed. The defendant after that drew the interest, but the General had the disposal of it. Such was the position of affairs up to the 5th March 1885. It should be added that the notes were at this date, and continued to be, the sole source of income, to the General. He had some other property, but it produced no income, and it was worth less than Rs. 20,000 to sell. It is also clear that the General had become very infirm in more than one way.

The only material witnesses who speak to the circumstances of the endorsement are the defendant himself, his pleader Mr. Willis, and Mr. Hollingbery the Treasury officer in whose presence it was made. There is indeed another witness called, one of the clerks of the Treasury, who professes to have been present, and who relates particulars more in the defendant's favour. But his story is on the face of it suspicious; it is not consistent with the accounts either of the defendants or of Hollingbery; and both the lower Courts pass it over in silence. Their Lordships do the same.

Mr. Willis was consulted by the General about his affairs at various times prior to March 1885. He was informed of the

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transfer-deed of 1876, and of the power-of-attorney. He pointed out that endorsement was required for complete transfer of the notes. Then he says:—

"I suggested to him that after he had endorsed the promissory "notes he should make over possession of the notes to his son, "Ibrahim Ali Khan, and in the presence of Mr. Hollingbery "and his son to say that he had gifted them to him of his own free "will, and that they formed his exclusive property, and that "neither the General nor his heirs or relatives have any claim or "right over them. From what I knew of the Muhammadan law I "thought that that would be sufficient for a gift."

The defendant says that he and his father went alone to Holingbery's office and stayed half an hour. He further states:—

"When my father went to Mr. Hollingbery there was no talk "with him, but when my father's hand was shaking at the time of "signing Mr. Hollingbery said to me 'Guide your father's hand.' "In reply to the question regarding the conversation which the "witness' father had in the office before Mr. Hollingbery, in "respect of the gift (the witness, stated): 'This conversation did "'not take place between me and my father, but it took place "'between my father and Mr. Hollingbery. My father was asked by "'Mr. Hollingbery whether he wanted to give the notes in gift, and "'my father replied, yes, he wanted to give them in gift. This "'conversation took place in English. My father could speak "'broken English. I was all the time sitting there quite silent.'"

A little afterwards he says: "All that Mr. Hollingbery said to "me is what I have stated above in English. Besides this there "was a talk in English between my father and Mr. Hollingbery, "and what is usual in a gift was also done."

The defendant's examination extended over eight days between the 22nd of November 1887 and the 11th of January 1888. He gave the evidence above quoted on the 28th of November. By the 10th of January it occurred to him to say something more. On that day he was examined by Willis and answered a question about the endorsements. The following is the Judge's note:—

"After having given this answer to the question, he also "added: 'He made them over before Mr. Hollingbery, the Deputy "Collector, and said: 'I make a gift of these to Muhammad "'Ibrahim Ali Khan. They belong to him, and in them I or "any member of the family has no right.'"

Their Lordships cannot believe that the defendant did not give at first a full account of what was said: or that the important addition he made six weeks afterwards was not a repetition of what was said by or to Mr. Willis, rather than of his father's declaration.

Mr. Hollingbery was examined on the 19th January 1888. He deposes as follows:—

"General Muhammad Hasan Khan appeared before me when "he signed the endorsements. I cannot recollect what conversation "passed between us at the time. I remember his son (pointing to "Ibrahim Ali Khan) was with him at the time. I remember so far "that I understood the transferor to say that, owing to his "extreme old age, he had transferred the notes to his son. "Judging from the renewal certificate, the son must have taken "renewed Government notes instead of these. General Muhammad "Hasan Khan signed the endorsement in my presence. He did so "in my official capacity as Treasury Officer.

"To Court (Mr. Ball):—To the best of my recollection the "General signed the endorsements unaided. If any one had held "his hand, and he had written with his assistance, I would have "refused, or at least certainly noted that fact in making the "certificate."

He was examined again on commission in this suit, but added nothing. It is clear that he knew nothing about the important declaration comprised in the defendant's afterthought.

If the history of the case stopped at this moment, it would present some doubtful considerations. In 1876 the notes were the subject of a *benami* transfer to the defendant. In 1880 he received power to draw the interest, but when drawn it was distributed by the General. In 1885 the General under Willis' advice perfected the legal transfer to the defendant. He did so, as Hollingbery

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understood from him, on account of his extreme old age. Old age may be a good cause for transferring such dominion as enables the transferee to deal with others; but whether it would induce the General to strip himself bare, and to leave himself and the rest of his family at the mercy of his eldest son is another consideration. If, as Willis avers, he was then advised to make a formal public declaration disclaiming all interest for himself and his heirs, he did not do it. Considering the extreme readiness of Indian owners of property to admit the idea of *benami* transfers, and considering what the General had already done with this very property, it would be at least very doubtful whether the transaction of 1885 was not of the same character with that of 1876. Then comes the question what light is thrown on the transaction by the subsequent conduct of the parties.

Immediately after the endorsement the General set about making a will, which was prepared by Mr. Willis. That gentleman tells us that the General and the defendant came to his office, where the parties conferred.

"The General wound up by saying: 'Bear witness, Mr. Willis, "'that I have gifted the notes to Nawab Ibrahim Ali Khan, and "'that these are his property and that neither I nor my "'*khandan* have any right or claim over them.' These words "he repeated twice. On both occasions the eldest son, Ibrahim "Ali Khan, had come with his father."

He is substantially corroborated by the defendant. If these declarations could be taken as they are stated, and as being a true expression of the General's mind, they would be very important. But they are so inconsistent with the overt acts which followed that they cannot be relied on; and neither of the Courts below has relied on them.

The will was duly prepared, and on the 15th of July it was signed. By it the General gives all his property to the defendant, subject to payments which he directs the defendant to consider as a trust or charge on the property bequeathed. These payments consist of life annuities amounting to Rs. 1,700 a year, and of

annuities and other payments, either in absolute perpetuity or of a permanent nature, amounting to Rs. 910 a year. The defendant says that his income from the notes is about Rs. 3,662 a year. Making full allowance for the facts that life annuities to the extent of Rs. 420 a year, given to the defendant's wife and daughters, may be discontinued at his discretion, and that there was some property which, though producing no income, might be sold to meet part of the charges, it is clear that the General looked to the notes as the source of payment. Willis can suggest no other source. He says:—"I have heard of nothing else yielding an income "except these promissory notes. The will mentions no source "from where the monthly allowances and other charges were "to be paid. I cannot suggest any other income but the interest "of the notes. The Government promissory notes were excluded "from the description of the properties given in the will. "I asked the General from what source these charges and "allowances were to be paid. He said his son would pay "them from his own income. At that time I did not know if "Ibrahim Ali Khan had any income independently of the notes. "Do you now know if he had any? I don't know." It is impossible to believe that the General looked on the defendant as the true owner of the notes when he was making so large an inroad on them. The defendant says that the will was read out in his presence, and that he did not object to any of the clauses in it. In point of fact the will has never been treated as valid in law. Its importance consists in the light it throws on the intentions of the General.

Then comes another important piece of evidence. The General was in the habit of making out monthly statements of amounts payable to his family and servants, from himself downwards, and of paying those amounts. That practice was continued after the endorsement just the same as before. So far as the recipients could see or know, the money remained the money of the General.

Being examined on this point on the 24th November the defendant said:—"The members of the family and servants used

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"to receive their pay from my father, *i.e.* he used to pay them "with his own hand. So long as he was alive he sent for the "servants and the members of the family and the relations, and "paid them with his own hands." That is quite intelligible if the General remained the master of the income; otherwise not so easily intelligible.

Between the 24th November and the 11th January the defendant, probably being advised that his statement was damaging to him, sought to modify it. In answer to his own pleader, Willis, he says:—

"Dr. Mukand Lal was our family doctor. I used to pay his "money and used to have it paid by my father. Out of reverence "and respect, I used to have it paid through him. Similarly, "after the transfer of the notes, I used to pay the monthly "allowances fixed for my brother and other members of the family "as well as the servants; but I used to have the payment made "through my father. Besides reverence and respect, there was "this special reason for making payments through my father, that "if money had not been paid through his hands, those persons "should not have obeyed his orders.

"*Q.*—Is there any special reason why they should not have "obeyed his order?

"*A.*—He had transferred the notes to me."

The truth of those assertions it is impossible to test. As far as overt acts went, the General remained paymaster to the end.

The Subordinate Judge, not the same official who tried the previous cases, found in favour of the defendant. He thought indeed that the facts subsequent to the endorsement of the notes tell against the defendant. But he held that they admit of explanation. His theory is that the General, though giving away the notes, reserved to himself the right of using the interest during his lifetime and of charging the income with certain bequests to be paid after his death. He made a decree accordingly, giving the plaintiff her share of the general estate, but no part of the notes or cash.

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The High Court came to a different conclusion. They point out that the Subordinate Judge's explanation is a mere theory without evidence. Their Lordships add that it is against the evidence of the defendant and his pleader. Their case throughout has been that the gift was complete on the 5th of March 1885. Both were examined closely upon the circumstances of the endorsement, and both asserted an absolute gift divesting the General of all interest in the notes. From beginning to end, neither in pleading nor in evidence, do they give a hint of the very peculiar, and very vague, bargain now suggested. The case actually made has in the judgment of both Courts broken down. It is hardly right to invent a new case when the judgment comes to be delivered. At all events there is no material evidence except such as has been stated above. In their Lordship's judgment the conduct of the parties after the endorsement removes every doubt which might otherwise have affected that transaction, and leaves it certain that the General remained the true owner of the notes.

Their Lordships will humbly advise Her Majesty to dismiss this appeal and affirm the decree of the High Court.

Appeal dismissed.

Solicitors for the Appellant—Messrs. *Barrow* and *Rogers*.

BITTO KUNWAR (APPELLANT) AND KESHO PRASAD MISR (RESPONDENT).

[On appeal from the High Court at Allahabad]

1896 *December* 4*th*, 1897 *February* 6*th*.

Act No. II of 1882 (*Indian Trusts Act*), *sections* 63, 64—*Trust not established*—*Civil Procedure, section* 13—*Res judicata not made out.*

A claim made for a share of property by inheritance from a deceased relation who had been in joint possession of it with the defendant, was met by the defence that the estate had been jointly held for religious and charitable purposes under a will, the deceased having had no beneficial, or heritable, interest. The defendant alleged that the original owner of the property had bequeathed the property in trust for these purposes. The claimant alleged a revocation of the will, and denied that there was such a trust.

The judgment of the High Court, decreeing the claim, observed that, even assuming that there had been a trust under the will, recognised by the deceased and the defendant, the property which had come into their possession had been

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