1898

NIHALI v. MITTAR SEN.

(1) which has been acted upon by a Bench of this Court in the case of *Raham Ilahi Khan* v. *Ghasita* (2). In this case a decree was made under section 86 of the Transfer of Property Act, but had not been brought to maturity by an order absolute under section 87. The money to be paid for redemption of the mortgage was tendered and deposited in Court. In our opinion, if the sum tendered were sufficient, it ought to have been accepted and an order given for redemption. That must now be done. We allow the appeal. The appellant will have his costs.

*Appeal decreed.*

## PRIVY COUNCIL.

P. C.
1898
*April* 21*st*,
*May* 14*th*.

HAKIM MUHAMMAD IKRAM-UD-DIN (DEFENDANT-APPELLANT) *v* NAJIBAN (PLAINTIFF-RESPONDENT).

On appeal from the High Court for the North-Western Provinces, Allahabad.

*Sale of villages by a wife to her husband.*

The purchase money had not been paid on what purported to be a deed of sale of villages by a Muhammadan wife to her husband for a price which, however, the deed acknowledged to have been paid. After her death two of her relations, disputing the due execution of the sale deed, sued the husband, who had obtained possession, claiming, in the alternative, either that they should obtain their shares in the property of the deceased, or, if the sale of the villages should be maintained, that they should receive their proportion of the price as due to the estate left by her.

The two Courts below concurred in finding that the wife, a *parda-nashin*, was capable of managing her own affairs, and that she had not received the price.

The first Court inferred from the state of things that the wife had in a manner made a gift of the villages to the husband. The High Court reversed that judgment, and decided that, with regard to the probability of influence on the part of the husband, the absence of any independent advice for the wife and other circumstances, the transaction was without effect.

*Present*:—Lords WATSON, HOBHOUSE, MORRIS and DAVEY, and SIR R. COUCH.

(1) I. L. R., 16 Calc., 246. (2) I. L. R., 20 All., 375.

1898

HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN.

The Judicial Committee found that there had not been a case of undue influence exercised either made by the plaint or raised by the issues; they found no evidence that the price stated was inadequate, or the sale an improvident one, or that the husband had been released from having to pay the price. From the findings on the evidence the presumption was that the wife intended to pass the property for some purpose, and that, the suggestion of a gift being excluded, the deed operated as a sale according to what it purported to be.

They did not throw any doubt on the sound doctrine, laid down in numerous cases, as to the obligations upon persons taking benefits from *parda-nashin* ladies.

To the one surviving plaintiff was awarded a moiety of the price payable by the husband, who himself inherited the balance.

CONSOLIDATED appeals, one by special leave, from two decrees (7th January 1891) of the High Court, in the same suit, modifying a decree (23rd January 1889) of the Subordinate Judge of Bareilly.

This suit was brought on the 7th February 1888 by Najiban and her sister, Zahur Begam. The latter died in 1888, and Najiban was entered on the record as her heir and representative before the judgment in the Court of first instance. The defendant, now appellant, was the husband of Imami Begam, sister of the two plaintiffs, who survived her and on her death claimed to share in the estate that she left.

This appeal related to twenty shares in each of two mauzas, one Jabida Chapri and the other Pachtaur, in the Bareilly district, the yearly *jama* of the one being Rs. 1,000, and of the other Rs. 200. They were the subject of a registered deed of sale dated the 9th November 1887, by which Imami Begam purported to have sold them to her husband, having transferred possession to him for Rs. 30,000 then paid as the deed said. He obtained *dakhil kharij*. As to the title of the plaintiffs to sue, there were concurrent findings of fact in the Courts below, and it was not now disputed that the wife, Imami Begam, and the plaintiffs, were three daughters of the same mother, Waziran, deceased. There was no appeal preferred from the decision of the High Court that they were not her legitimate daughters—facts which, according to the High Court, entitled the two plaintiffs to one

moiety between them as their combined shares in the late Imami Begam's estate, the other moiety going to the surviving husband. There were also concurrent findings below that the payment of the consideration acknowledged in the deed of the 9th November 1887 had not taken place.

The principal question on these appeals was whether the *parda-nashin* wife had executed that deed with full comprehension of its effect, and free volition on her part that the transaction should be carried out, with the result of the transfer of her property to her husband.

The facts are stated in their Lordships' judgment.

The Subordinate Judge was of opinion that the effect of the sale deed, without the payment of the consideration having been made, was virtually that there was a voluntary transfer or gift of the property by the wife to the husband, which was valid according to the Muhammadan Law. This in the Judge's view had deprived the plaintiff Najiban of all right to the villages, or to any part of the consideration for which they were ostensibly alienated; he therefore dismissed the suit. Both parties appealed to the High Court from the decision of the first Court, the plaintiff Najiban contesting the validity of the transaction of the 9th November 1887, and the defendant objecting to her claiming as a sharer in the estate inherited from her alleged sisters. The question as to the proportionate share which the daughters of one mother would take, under the circumstances, was decided by the High Court as above stated, with the result that their decision on that point was not disputed at the present hearing. On Najiban's appeal the decision of the bench (SIR JOHN EDGE, *C. J.* and KNOX, *J.*), was given in one judgment, which dealt with both questions. They reversed the finding of the lower Court that there had been a gift to Ikram-ud-din.

After referring to the written statement of the latter and the evidence, the judgment of the Chief Justice concluded as follows:—

1898

HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN.

"Under these circumstances the view I take is that, if Mus-"sammat Imami Begam really understood what the transaction "was, it was not the transaction which was evidenced by the sale "deed, *i.e.* a transaction of sale; it was not the transaction which "the defendant in his pleadings and in his evidence put before "the Court. Although this lady could not fairly be described "as a drunkard, she undoubtedly had impaired her health by "drink. She was a person very liable to be influenced by her "newly-married husband, who was many years her junior; and "although she might have desired to confer a benefit upon him, "either by making a free gift of those villages to him, or by trans-"ferring them to him for an inadequate consideration, still I "think we ought not to give Ikram-ud-din a decree in respect "of these villages unless, having regard to the circumstances, "we are satisfied that this old lady had independent advice, and "thoroughly understood what she was doing on that occasion. "It has not been shown to us that this lady had any independent "advice; and under these circumstances, and having regard to the "doubt and mystery in which Ikram-ud-din himself has involved "the transaction of the 9th November 1887, I think we should "hold that Ikram-ud-din has not made out a title other than "his title as heir of his wife Imami Begam to these villages, or "any part of them. As the surviving husband of Imami Begam "he is entitled to one-half of these villages; Najiban in her "own right, and as heiress of her sister, is entitled to the other moiety."

Mr. *H. H. Cozens-Hardy*, Q.C. and Mr. *H. Cowell*, for the appellant, argued that the two villages were not part of the divisible estate left by the wife, but had been effectively transferrred to the husband, who was exclusively entitled thereby to the property. Effect should be given to the facts found, in concurrence by the Courts below, that Imami had executed the sale deed with knowledge of its effect, she being a capable woman who understood the transaction. The inference from these facts, with that of the transfer of possession was that Imami intended

to convey the property; proof of payment of the price was not essential in order to establish the sale. The general requirement that a *parda-nashin* lady parting with her property should have the advice of some independent person, was not disputed; but here it was contended that the principle had no application, for the sufficient reason that the evidence showed that Imami was in this instance fully competent to manage her own affairs. That the wife was desirous of favouring her husband would not of itself be any proof of the husband having influenced her unduly; of the latter there was no evidence. Reference was made to *Nedby* v. *Nedby* (1); *Rance Khujooroonissa* v. *Mt. Roushun Jehan* (2); *Kamarunnissa Bibi* v. *Husaini Bibi* (3); *Rujabai* v. *Ismail Ahmed* (4); *Mahomed Buksh Khan* v. *Hosseini Bibi* (5).

Mr. *J. D. Mayne*, and Mr. *G. E. A. Ross*, for the respondent, argued that the judgment of the High Court was right. That the transaction could not be supported as a gift was clear, for if the wife was intelligent enough to understand what took place on the 9th November 1887, she must have understood it to be a sale to her husband for value and no gift. As a sale, moreover, the husband relied upon the transaction. That it should now be held a gift would contravene the general principle expressed in *Eshenchunder Singh* v. *Shamachurn Bhutto* (6). A different case would be made from that which was then put forward if the transaction could be held to be a gift. The High Court was also right in declining to give effect to the sale deed when the circumstances under which the husband sought to have it maintained were all before them. There was direct concealment in the matter of the non-payment of the money. A fiduciary relation subsisted between the parties to the deed at the time, the husband having on the 3rd of the same month accepted his wife's general power as her agent over her property.

(1) (1852) 5 DeGex and Smale, Chy. R. 377.
(2) (1867) L. R., 3 I. A., 291, 307; I. L. R., 2 Calc., 184.
(3) (1880) I. L. R., 3 All., 266.
(4) (1870) 7 Bom., H. C. Rep., 27.
(5) (1888) L. R., 15 I. A., 81; I. L. R., 15 Calc., 684.
(6) (1866) 11 Moo., I. A., 7 at p. 24.

1898

HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN.

The wife's ill-health, her secluded state, the entire absence of independent advice, or means for her getting it, were rightly considered, and had had the right degree of weight given to them by the High Court. Thus the claim in respect of the villages had been rightly allowed, and the judgment should be upheld. In reference to transactions entered into by a *parda-nashin* were cited.—*Geresh Chunder Lahoree* v. *Mussumat Bhuggobutty Debia* (1); *Tucoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (2); *Sudisht Lal* v. *Mussummat Sheobarat Koer* (3); *Mahomed Buksh Khan* v. *Hosseini Bibi* (4).

Mr. *H. H. Cozens-Hardy*, Q. C., replied. Afterwards, on May 14th, their Lordships' judgment was delivered by LORD DAVEY.

In October 1887 the present appellant was married to Mussamat Imami Begam; she was then about sixty years of age, and the appellant was some sixteen years younger. Mussamat Imami Begam had been twice previously married, and from one of her former husbands she had inherited a considerable fortune, and at the date of her marriage to the appellant was a woman of large wealth. On the other hand, the appellant appears to have been a person of very small means.

Mussamat Imami Begam executed a power-of-attorney, dated the 3rd November 1887, in favour of the appellant, by which she empowered him to collect her rents and grant receipts, and exercise other large powers over her property.

A few days afterwards Mussamat Imami Begam executed a sale deed, dated the 9th November 1887, by which she declared that she had sold two villages to the appellant for Rs. 30,000; and having received the sale consideration in full from the aforesaid vendee, had put him in proprietary possession of the property sold, like herself. Jamna Prasad, the Special Sub-Registrar, in his report stated that he had attended at the house of Mus-

(1) (1870) 13 Moo., I. A., 419, at p. 431.
(2) (1874) L. R., 1 I. A., 192, 108.
(3) (1881) L. R., 8 I. A., 39, 43; I. L. R., 7 Calc., 245.
(4) (1888) L. R., 15 I. A., 81; I. L. R., 15 Calc., 684.

samat Imami Begam on the 11th November 1887, and that the Mussamat heard word by word the contents of the sale deed, and admitted from behind a screen the execution and completion thereof, and admitted that she had already received gold mohurs worth Rs. 20,000; and the Sub-Registrar further reported that the appellant, the vendee, paid in his presence ten bags containing Rs. 10,000 to the Mussamat, the vendor. Fifteen days afterwards she executed a power-of-attorney, dated the 24th November 1887, for the purpose of obtaining mutation of names, the execution of which was also verified by a commissioner.

Mussamat Imami Begam died in the month of January 1888, and shortly afterwards the present respondent and her sister, since deceased, alleging themselves to be the lawful sisters and co-heiresses of the Mussamat, commenced this suit against the appellant. By their plaint the plaintiffs denied the marriage between the Mussamat and the appellant, and alleged that he had taken exclusive possession of, and appropriated without any title, the bulk of her movable and immovable property. As to the sale deed they alleged that the Mussamat had no knowledge of that deed, nor was it read out to her, nor could she have understood it, as she was under the influence of liquor, and that in short the sale deed being spurious, forged, and without consideration was void. The prayer of the plaint was for possession of the villages (including the two in question) and other property as detailed; and that should the defendant prove the sale of the two villages to be genuine, the sale consideration thereof, instead of possession, should be awarded to the plaintiffs against the defendant, along with the movable property, and for possession of the Mussamat's movable property, or payment of its value. The appellant by his statement of defence denied the title of the plaintiffs, and relied on the sale deed.

The Subordinate Judge found that the respondent and her co-plaintiff were the legal heirs of Mussamat Imami Begam and, that a marriage had taken place between the appellant and the Mussamat. The first finding was varied by the High Court,

1898

HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN.

who found that, although the respondent and her co-plaintiff were daughters of the same mother as the Mussamat, they were illegitimate. The result of this was that the plaintiffs became entitled to one moiety only and the defendant (the appellant) to the other moiety of the property. These findings as varied by the High Court are not now in dispute.

The 4th and 5th issues relating to the sale deed were as follows:—

"4. Did Musammat Imami Begam execute the sale deed, "dated 9th November 1887, conveying certain villages to the "defendant, and did she do so while she was in a sound state of "mind, or when she was not in her senses, but in a state of intoxi- "cation, without understanding what she was doing; that is to say, "whether the contents of the said documents were understood "by her, or she was not capable of understanding them?

"5. What is the actual value of the property sold? Was "Rs. 30,000 a fiction, or the actual amount of the sale considera- "tion? Was the sum of Rs. 10,000 alleged to have been paid in "presence of the Sub-Registrar and the commissioner actually "paid, or was the transfer without consideration?"

It is unnecessary to discuss at any length the evidence given on those issues, because the two Courts are in substantial agreement as to the effect of it, although they are not agreed as to the legal result or consequence. Both Courts were satisfied that the Musammat was not intoxicated at the time of verification of the sale deed, and that she was a woman capable of managing her affairs, and that she did in fact manage them, and that she undoubtedly executed by her own hand the sale deed and power-of-attorney for the purpose of mutation of names being effected; and as to the consideration for the sale that, although the Musammat acknowledged receipt of Rs. 20,000, it was not in fact paid, and that the bags purporting to contain rupees were produced before the Sub-Registrar, but there was no actual evidence of their contents, or where the rupees (if rupees there were) came from, or afterwards went to, and in short that no part of the

consideration was proved to have been paid by the appellant to the Musammat.

On these findings of facts (in which their Lordships entirely agree) the Subordinate Judge held that the presumption was that out of affection the Musammat gave the property to the appellant as a matter of favour, and through some policy called that gift a sale, and that, instead of a deed of gift, she executed a deed of sale in order to sustain the honour and respectability of the appellant, who belonged to an old respectable family of the town, to screen him from any exposure. The learned Judges in the High Court dissented from this view, and their Lordships agree with them. There is no evidence of any intention to make a gift, and there is no suggestion in the pleadings that the villages had been given to the appellant or that his wife intended to remit to him, or release him from payment of, any part of the purchase money. The acknowledgment of the previous receipt of Rs. 20,000 would no doubt enable the vendor to transmit the property to a second purchaser, as between whom and the vendor the latter would not be entitled to deny the payment of that portion of the purchase money; but as between the vendor and vendee it had not the effect of discharging him.

But while their Lordships so far agree with the High Court, they do not altogether agree on the result, though probably the difference is more one of form than substance. The High Court seems to have thought that in the circumstances there was a presumption of undue influence on the part of the appellant, and that he ought to have shown that the old lady had independent advice, and thoroughly understood what she was doing, and accordingly the Court set aside the transaction altogether. Their Lordships doubt whether this was right, or altogether consistent with the previous findings by the Court. There is no case of undue influence made by the plaintiffs in their plaint, or raised in the issues on which the case was tried; and there is no evidence that Rs. 30,000 was an inadequate price, or that

1898

HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN.

the sale was an improvident one if the price had been paid. From the findings on the evidence their Lordships think it must be presumed that the Musammat intended to pass the property for some purpose; and, as the suggestion of a gift is excluded, the deed must operate (if at all) according to what it purports to be, *viz.* a sale. In coming to this conclusion in the case before them their Lordships do not intend to throw the slightest doubt on the sound doctrine laid down in numerous cases as to the obligations of persons taking benefits from a *parda-nashin* lady.

Their Lordships therefore will humbly advise Her Majesty that relief be given to the surviving plaintiff (the present respondent) in accordance with the fourth paragraph of the prayer of the plaint, and for that purpose the decree of the High Court be varied by inserting after the words "specified below" the words "except the two villages Jabida Chapri, with the garden "and houses, and Pachtaur, in the pargana of Nawabganj, but "including the sum of Rs. 15,000, being one moiety of the sum "of Rs. 30,000, the price of the said two villages, payable by the "defendant" and after the words "date of possession" the words "and together with interest on the said sum of Rs. 15,000 "from the 9th November 1887 up to date of payment" at the rate usually allowed by the Court, and instead of the words "the amount whereof shall be" the words "the respective amounts of such mesne profits and interest to be," and that in all other respects the said decree ought to be affirmed and the appeal dismissed.

As the appellant came before their Lordships to claim the property as a gift without any payment, and never in the course of the proceedings offered to pay or give credit for the price as part of Mussamat Imami Begam's estate, their Lordships will not advise Her Majesty to make any alteration in the disposal of the costs by the High Court, and for the same reason, and because the respondent has substantially succeeded, they do not think that the variation made by them in the decree should relieve the

appellant from the payment of the costs of these appeals, which the appellant must therefore pay.

*Appeal allowed, decree varied.*

Solicitors for the appellant—*Messrs. Ranken, Ford, Ford* and *Chester.*

Solicitors for the respondent—*Messrs. Pyke* and *Parrott.*

1898

HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN.

## APPELLATE CIVIL.

1896 *June* 9.

*Before Mr. Justice Blair and Mr. Justice Burkitt.*

ABBASI BEGAM (PLAINTIFF) *v.* AFZAL HUSEN AND ANOTHER (DEFENDANTS).*

*Muhammadan law—Pre-emption—Talab-i-ishtishhad—Reference to talab-i-mawasibat necessary.*

A pre-emptor claiming pre-emption under the Muhammadan law is bound at the time when he makes his *talab-i-ishtishhad* to state distinctly that he has already made *talab-i-mawasibat. Rujjab Ali Chopedar* v. *Chundi Churn Bhadra* (1) followed.

IN this case the appellant, a Muhammadan lady, was plaintiff in a suit for pre-emption, in respect of a share in certain zamindari and house property. The Court of first instance (Munsif of Hawali, Bareilly) decreed the claim. The defendant vendee appealed. The lower appellate Court, (District Judge of Bareilly) decreed the appeal and dismissed the suit. The District Judge found that, while the plaintiff had, on hearing of the sale which gave rise to her claim for pre-emption, at once declared that she was the *shafi*, thereby making the *talab-i-mawasibat* properly according to Muhammadan-law, she had, in making the *talab-i-ishtishhad*, which was made through an agent, omitted to refer to the fact of the *talab-i-mawasibat* having been made. The learned Judge accordingly held, that the strict formalities required by the Muhammadan law had not been complied with, and, as

* Second Appeal No. 381 of 1896 from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 18th February 1896, reversing a decree of Munshi Girraj Kishore Datt, Munsif of Hawali, Bareilly, dated the 4th December 1895.

(1) I. L. R., 17 Calc., 543.