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page cclxxvii says as follows :—"The most generally known of all the Shia lawyers is the Shaikh Najm-ud-din Abu-al-Qasim Jafar Ben Muayyid-al-Hilli, commonly called the Shaikh Muayyid. He died in A. H. 676 (A.D. 1277). His great work, the Sharaya-ul-Islam is more universally referred to than any other Shia law book and is the chief authority for the law of the Indian followers of Ali."

Shama Charan Sircar in his Tagore Law Lectures for 1874 says as follows :—"As to the authority of the Sharaya, the Sharaya-ul-Islam written by Shaikh Najm-ud-din Abu-al-Qasim Jafar Ben Muayyid-al-Hilli, commonly called Shaikh Muayyid, is a work of the highest authority, at least in India, and is more universally referred to than any other Shia law-book and is the chief authority for the law of the Shias of India."

We, therefore, hold that under the Shia Law a gift made in *marz-ul-maut* (death-illness) holds good to the extent of only one-third of the donor's estate in spite of the delivery of possession prior to his death.

The result of our findings on the two points raised in the appeal is that the appeal fails. We dismiss it with costs.

*Appeal dismissed.*

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*February*, 27.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.*

JAMNA DAS AND OTHERS (DEFENDANTS) *v.* UMA SHANKAR (PLAINTIFF) AND LAL MUHAMMAD AND ANOTHER (DEFENDANTS.)*

*Act No. IV of* 1882 *(Transfer of Property Act), section* 41*—Ostensible owner—Finding as to question of fact—Second appeal.*

*Held* that the questions whether a person in apparent possession of immovable property is the "ostensible owner" with the consent, express or implied, of the real owner, within the meaning of section 41 of the Transfer of Property Act, 1882, and whether a transferee from such a person took the transfer *bonâ fide* after taking reasonable care to ascertain the title of his transferor, are questions of fact, the finding on which by the lower appellate court cannot be disturbed in second appeal.

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court. The facts of the case are set forth in the judgement under appeal, which was as follows :—

* Appeal No. 94 of 1913 under section 10 of the Letters Patent.

"This is a suit on a simple mortgage executed on the 18th of November, 1907, by Lal Muhammad. The suit is defended by the mortgagees under a second mortgage of the same property executed by Lal Muhammad and his wife Zahuran, in February, 1908. Money was left with the mortgagees under this deed to pay off the prior mortgage in suit, but the mortgagees did not pay it, but brought a suit on their mortgage without impleading the plaintiff, the prior mortgagee. The court of first instance decreed the suit, holding that Lal Muhammad was the *de facto* owner of the property and that, even if he was not, section 41 of the Transfer of Property Act applied. The lower appellate court reversed the decree on the ground that the real owners of the property were not Lal Muhammad, but his father-in-law, Muhammad Bakhsh, and after him his wife, Zahuran, and that section 41 did not apply. The plaintiff comes here in second appeal. As regards the first point, viz., who was the real owner of the property, I prefer the finding of the court of first instance. Muhammad Bakhsh, Zahuran and Lal Muhammad had none of them originally any real title to the property. They were trespassers, but acquired a right by more than twelve years' adverse possession. Muhammad Bakhsh held the property for many years. He took Zahuran, his daughter, and Lal Muhammad, her husband, to live with him, and long after his death these two lived in the house. I think it might very fairly be argued that they were in adverse possession jointly after the death of Muhammad Bakhsh. I do not, however, think it is necessary to discuss the question, as in my opinion, section 41 of the Transfer of Property Act clearly applies. The lower appellate court is of opinion that in realizing rents &c., Lal Muhammad did not act as owner of the house, but merely acted as agent for his wife, and that the least inquiry would have made the plaintiff aware of the real facts. I am unable to agree with this view. The original rightful owner of the house sued Lal Muhammad for possession. I cannot find any of the papers relating to that suit in the record, but it is not denied that Lal Muhammad defended that suit and was found to be entitled to it owing to his adverse possession for more than twelve years. He may have raised the plea that his wife was the real owner, but it does not appear that he was exempted from the suit. The fact that the rightful owner brought the suit against Lal Muhammad shows pretty clearly that he was regarded by the public as the ostensible owner. Lal Muhammad alone executed the deed in suit and no sort of objection was raised by Zahuran. In the deed executed in favour of the respondent, even she does not repudiate the loan, but professes to leave money with the mortgagees for its satisfaction, though it seems very doubtful whether she ever intended that it should be satisfied. I do not agree with the lower appellate court that plaintiff could have easily ascertained the true facts had he cared to inquire. Lal Muhammad was in possession of the house dealing with it as owner; he had been sued by the person originally entitled to it and had won the case. Was the plaintiff bound to push the inquiries as to what happened years before that and to ascertain whether it was Muhammad Bakhsh or Lal Muhammad who originally obtained adverse possession? I think not. It is not disputed that the respondents claim through Zahuran, and that if she is bound by section 41 they are bound also.

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"In my opinion the plaintiff is entitled to a mortgage decree, and I, therefore, set aside the decree of the lower appellate court and restore that of the court of first instance. The plaintiff does not now wish to put to sale more than one-third of the property and the decree will, therefore, relate to that share only.

"The plaintiff will receive costs in all courts. The appellant undertakes to make good the deficiency in court fees and that amount will be added to the costs."

The defendant appealed.

Mr. *M. L. Agarwala*, for the appellant, contended that as the lower court had found that the plaintiff was not entitled to the benefit of section 41 the learned Judge of this Court in second appeal could not go behind that finding.

Babu *Piari Lal Banerji*, for the respondent, urged that questions of adverse possession, acquiescence and estoppel were questions of law and the conclusion arrived at by the lower appellate court from the facts established or admitted was one which could be considered in second appeal. Upon the facts it was clear that Musammat Zahuran allowed her husband to hold himself out as the ostensible owner of the property, and even now she did not assert any claim inconsistent therewith. She admitted the force of the estoppel against her and admitted it in the deed through which the defendant claimed. The defendant as a representative in interest of Zahuran was bound by the estoppel which bound her. He could not question the title of Lal Muhammad when his mortgagor, Zahuran, did not dispute it and admitted it in so many words in the mortgage deed which is the defendant's title.

Mr. *M. L. Agarwala*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit on foot of a mortgage executed by one Lal Muhammad on the 13th of November, 1907. The suit was defended by persons who claimed under a mortgage made in 1908, by Lal Muhammad and his wife, Zahuran. They allege that Lal Muhammad had no interest in the property. The facts are practically admitted. One Muhammad Bakhsh entered into possession of the property adversely to the real owner. He had a daughter of the name of Zahuran, who married Lal Muhammad. These persons, and probably other members of the family of Muhammad Bakhsh, continued in possession of the property until Muhammad Bakhsh died,

After his death Lal Muhammad and his wife Musammat Zahuran continued in possession. No doubt the property was managed by Lal Muhammad after the death of his father-in-law. In the mortgage in favour of the defendant it is stated that the property was inherited by Musammat Zahuran from her father. There is also a statement that the executant No. 2 was in proprietary possession. Whether this was a mistake or not is not very clear, but the two statements are not consistent. The lower appellate court found that Lal Muhammad was only managing the property on behalf of his wife; furthermore, that had the plaintiff made the least inquiry, he would have found that Lal Muhammad had no title whatever. We may mention here one more fact connected with the mortgage in favour of the defendants. In the mortgage deed the mortgage now sued upon was mentioned, and it was also mentioned that money was left in the hands of the mortgagees to pay off the amount of that mortgage. The defendants appellants, who were the subsequent mortgagees, did not pay off the amount of the mortgage for the following reason. A suit was brought by a son of Muhammad Bakhsh, and he obtained a decree for two-thirds of the property. They considered that under these circumstances they were not bound to pay off the mortgages, but gave credit for the amount against their own mortgage and sued to realize the balance which they had actually advanced. Under these circumstances the lower appellate court dismissed the suit as against the mortgaged property, but gave a simple money decree against Lal Muhammad. On appeal to this Court a learned Judge reversed the decree of the lower appellate court and restored the decree of the court of first instance which had given a decree for the sale of the mortgaged property.

In our opinion the decree of the lower appellate court must be restored. We consider that under the circumstances of the present case the property must be deemed to have become the property of Muhammad Bakhsh, and after his death passed to his heirs. Lal Muhammad had no title of any kind. The suggestion whether Lal Muhammad was the ostensible owner of the property with the consent, express or implied, of the heirs of Muhammad Bakhsh, and the further question whether the plaintiff in the present case *bonâ fide* took the transfer after taking reasonable care to ascertain

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the title of Lal Muhammad, were questions of fact to be decided by the lower appellate court. This Court is bound by the findings of fact of the lower appellate court in second appeal and cannot go behind them, whether it approves of the finding or not. We must, therefore, take it that Lal Muhammad was not the ostensible owner within the meaning of section 41 of the Transfer of Property Act. We have already stated that in our opinion as a matter of law he had acquired no interest in the property by reason of the fact that he had lived with his father-in-law, Muhammad Bakhsh. This being so, no interest of any kind passed to the plaintiff under the mortgage of the 13th of November, 1907, and his suit, so far as it sought a sale of the mortgaged property, was rightly dismissed. We allow the appeal, set aside the decree of this Court, and restore the decree of the lower appellate court with costs of both hearings in this Court.

*Appeal allowed.*

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1914

*March*, 9.

*Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.*

ISHWARI SINGH AND OTHERS (PETITIONERS) *v.* NARAIN DAT AND OTHERS (OPPOSITE PARTIES).*

*Act No.* I *of* 1877 (*Specific Relief Act*), *section* 42—*Suit for declaration of title—Waste land—Plaintiff out of possession.*

*Held* that the fact that land was waste land and therefore of no immediate practical use was no bar to the application of section 42 of the Specific Relief Act, where the plaintiff, being admittedly out of possession, claimed only a declaration of his title. *Ramanuja* v. *Devanayaka* (1) distinguished.

THE plaintiffs in this case sued for a declaration of their title in respect of certain land, of which they were admittedly not in possession, and in fact it was admitted by them that they had not been in possession of the land in suit for at least seven years prior to the institution of the suit. The claim for the declaration sought was based on Mr. Beckett's settlement. It was resisted on the ground, among others, that section 42 of the Specific Relief Act barred it. The court of first instance dismissed the plaintiffs' claim both on the merits and on the ground that it was barred by section 42 of the Specific Relief Act. On appeal by the plaintiffs the learned Deputy

* Civil Miscellaneous No. 556 of 1913.

(1) (1885) I. L. R., 8 Mad., 361.