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on March 16th of this year. But for the purposes of this appeal, it is needless to determine that question. If the plaintiff is estopped, he cannot recover, for that reason, in this suit. If he is not, defendant is not barred by s. 13 from showing that under the Mitakshara law plaintiff has no title; and in either case the suit must fail.

We should add that had we felt able to sustain the decree of the Subordinate Judge, we should have felt some difficulty in doing so without giving the defendant an opportunity of showing how far, if at all, the very great increase in the value of the property since the pre-emption suit is attributable to the paying off of incumbrances at that time affecting it by the defendant. It has admittedly doubled in value at the least.

We set aside the decree of the Subordinate Judge, and dismiss the suit with all costs here and in the original Court.

C. D. P. *Appeal allowed.*

Before Mr. Justice Pigot and Mr. Justice Rampini.

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SARAT CHUNDER DEY AND OTHERS (DEFENDANTS 1 to 5) *v.* GOPAL CHUNDER LAHA (PLAINTIFF), AND OTHERS (DEFENDANTS 6 TO 10).*

Benami transaction—Estoppel—Persons claiming under person who creates the benami.

The mere fact of a benami transfer does not in itself constitute such a misrepresentation as to bind all persons claiming under the person who creates the benami.

O made a benami gift of his property to his wife *A*. The deed of gift was registered and purported to be made in consideration of the fixed dower due to *A*. There was no mutation of names; but *O* managed the property as *A's* am-muktar under a general power-of-attorney executed by her in his favor. On the death of *O*, *A* mortgaged the property. At a sale in execution of a decree obtained by the mortgagee against *A*, the mortgaged property was purchased by the defendants. On the death of *A*, *H* and *R*, the son and daughter of *A*, sold their shares in the property, which they had inherited from their father *O*, to the plaintiff. In a suit by the plaintiff against the defendants for a declaration of his right to the shares of *H* and *R*, and for partition.

* Appeal from Appellate Decree No. 1560 of 1887, against the decree of H. Beveridge, Esq., Additional Judge of 24-Pergunnahs, dated the 18th June 1887, reversing the decree of Baboo Karuna Das Bose, Munsiff of Sealdah, dated the 30th December, 1886.

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Held, that the acts of O were not such as to constitute an estoppel as against his heirs, and, therefore, the plaintiff was entitled to the relief he sought.

Luchmun Chunder Geer Gossain v. *Kally Churn Singh* (1) explained.

SUIT for declaration of title and partition.

Umed Ali Ostagar died on the 6th August 1879, possessed of considerable property, and leaving him surviving his widow Azru Bibi, Ahmed Hossein, Rohimunnessa and Bunnijan, his children by Azru, and a son Palkjan by a second wife who predeceased him. Some time before his death, on the 4th January 1878, Umed Ali by a deed, which purported to be a *hiba-bil-ewaz*, or a deed of gift in consideration of a sum of Rs. 11,361 due to his wife Azru in respect of her fixed dower, conveyed, amongst other properties, the property in dispute in this suit to Azru Bibi absolutely. There was no mutation of names; but Azru executed a general power-of-attorney in favor of her husband Umed Ali, who, under color of such authority, managed the properties as her am-muktar.

On the strength of this deed Azru Bibi, on the 22nd April 1880, mortgaged the properties covered by it to one Kalimuddin to secure the repayment to him of an advance of Rs. 2,000. The mortgage-deed was attested by Ahmed Hossein, who held a power-of-attorney from her sister Rohimunnessa, dated the 17th December 1879. The mortgage debt was not repaid, and Kalimuddin, in 1881, brought a suit against Azru Bibi on the mortgage in the Court of the Second Subordinate Judge of the 24-Pergunnahs, and obtained a decree on the 7th December of the same year. At an auction sale on the 15th May 1882 in execution of this decree, Khetter Mohun Dey and Grish Chunder Dey, the predecessors in title of the defendants Nos. 1 to 5, purchased the mortgaged properties, and obtained possession. Prior to the decree in the year 1881, Palkjan instituted a suit in the original side of the High Court for the administration of the estate of his father Umed Ali Ostagar. The sale in execution of the mortgage decree took place before the written statements, in which Ahmed Hossein and Rohimunnessa supported the *hiba*, were filed by them in Palkjan's suit.

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On the 4th May 1884 Azru died; and, on the 28th July 1885, Ahmed Hossein and Rohimunnessa, the son and daughter of Azru, sold their respective shares in the property in this suit, which they had inherited from their father Umed Ali Ostagar, to the plaintiff Gopal Chunder Laha, who took a conveyance of the same in the name of his servant Janoki Nath Chatterjee, defendant No. 10. On the strength of his purchase the plaintiff Gopal Chunder Laha, in December 1885, instituted a suit in the Court of the Munsiff of Sealdah for a declaration of his right to the said shares of Ahmed Hossein and Rohimunnessa in the property in suit, and for partition. He also prayed for the removal of a pucca wall erected by the defendants Nos. 1 to 5.

The material issues tried by the Court of first instance were:—Did Umed Ali make a valid gift of the property to his wife? Even if the gift be not valid, is not the plaintiff estopped from disputing its validity by the conduct of his vendors and their predecessors in title. There was no dispute as to the share the plaintiff would be entitled to if the *hiba* was declared invalid.

It was contended, on behalf of the plaintiff, that the deed of 4th January 1879 was a benami transaction; that it did not convey any estate in the property; and that, as against the defendants Nos. 1 to 5, the plaintiff was entitled to the shares of Ahmed Hossein and Rohimunnessa. It was also contended that the mortgage of the 22nd April 1880, to enforce which the suit of 1881 was brought, did not pass any interest in the property, and that, therefore, the defendants Nos. 1 to 5 did not acquire any interest in it under the sale of the 15th May 1882 in execution of the mortgage decree.

The defendants Nos. 1 to 5 contended *inter alia* that the *hiba* was a valid document, possession having been given under it to Azru Bibi, that the plaintiff was estopped by the conduct of his vendors and their predecessors in title from questioning the validity of the *hiba*, and that they were *bonâ fide* purchasers for value without notice.

The Munsiff found that there was no consideration for the *hiba*; that Umed Ali had proclaimed to the world that he had made a valid *hiba* of his property in favor of his wife Azru Bibi; that he had given effect to it by putting her into possession; that he had

allowed his wife to use her own seal in respect of the property; and that, as his wife's am-muktar, he led the world to believe that she was the real owner of the property. He also found that, after Umed Ali's death, Azru Bibi dealt with the property as her own. He further found that the defendants Nos. 1 to 5 were *bonâ fide* purchasers for value without notice, and the plaintiff's purchase was only an unconscionable bargain.

He held that the *hiba* as a deed of dower was invalid, but that it was valid and binding as a deed of gift, seisin having been given in accordance with the requirements of the Mahomedan Law. He also held that the plaintiff was estopped from questioning the validity of the *hiba* by the conduct of his vendors and their predecessors in title. Accordingly the Munsiff dismissed the suit.

The plaintiff appealed to the Additional Judge of the 24-Pergunnahs. The Judge agreed with the Munsiff in holding that the *hiba* was invalid as a deed of dower and as being without consideration; but, as he was of opinion that there was no evidence that Azru Bibi did get possession until after the death of her husband, he held that the *hiba* was also invalid as a deed of gift. Upon the question of estoppel, he found that Umed Ali did nothing beyond execute and register the deed of gift; that there was no evidence that Umed Ali had held out Azru Bibi to the world as the owner of the property, or that he had parted with possession of it. He, therefore, held that the conduct of Umed Ali fell far short of what was required to constitute an estoppel. He also held that neither Ahmed Hossein nor Rohimunnessa was estopped from disputing the *hiba*, and consequently the plaintiff was not. The Judge further held that the existence of the suit in the High Court, in which the validity of the *hiba* was in question, went far to disprove the plea that the defendants were *bonâ fide* purchasers for value and without notice. He accordingly allowed the appeal, and ordered the removal of the wall erected by the defendants.

Defendants Nos. 1 to 5 appealed to the High Court.

Mr. *Woodroffe*, Baboo *Nil Madhub Bose* and Baboo *Shib Chund Paul* for the appellants.

Mr. *Evans*, Baboo *Pran Nuth Pundit* and Baboo *Okhoy Coomar Banerjee* for the respondents.

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The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

The plaintiff sues as purchaser of the shares in certain property of Ahmed Hossein and Rohimunnessa, the son and daughter of one Umed Ali Ostagar, of whose estate the property in question formed part, and who died in the year 1879, leaving him surviving his widow Azru, Ahmed Hossein, Rohimunnessa, and Bunnijan, his children by Azru, and a son Palkjan, by a second wife. The defendants purchased the property, in which the plaintiff claims the shares of Ahmed and Rohimunnessa, at an execution sale, which took place on the 15th May 1882. The sale at which the defendant purchased this property was in execution of a decree in a mortgage suit brought by one Kalimuddin, the mortgagee, in 1881, and the decree in which was made in December 1881. The plaintiff says that the mortgage, to enforce which the suit of 1881 was brought, was ineffectual to pass any interest in the property, and that no interest in the property passed to the defendant under the sale on the 15th May 1882 in execution of the mortgage decree. The mortgage was entered into between Azru Bibi, the widow of the deceased Umed Ali Ostagar, and Kalimuddin. Azru claimed to be entitled to the property mortgaged under a *hiba* executed by her husband on the 4th January 1878, by which *hiba*, in consideration of the sum of Rs. 11,361, due to her in respect of her fixed dower, Umed Ali conveyed the property in question amongst other properties to her absolutely. On the part of the plaintiff, it is said that this *hiba* was a mere benami transaction, and conveyed no estate in the property, and that as against the defendants he is entitled to the shares of Ahmed and Rohimunnessa, inherited by them from their father. It has been held as a matter of fact by the lower Court that the *hiba* was a benami transaction. But it is contended by the defendants that the plaintiff cannot recover, claiming as he does under Ahmed and Rohimunnessa, on the ground that they, his assignors, were estopped from disputing the validity of the *hiba*, and that he in this case cannot dispute it. The case of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1) has been cited on behalf of the defendants. And apart from the principles laid down in that decision, which was a

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decision of the Privy Council, the circumstance of Ahmed Hosseiu having attested the deed of mortgage to Kalimuddin is relied on as estopping him from questioning his mother's power to execute the document, and a power-of-attorney executed by Rohimunnessa, amongst others, in favor of Ahmed, on the 17th December 1879, is relied upon as having a similar effect as regards her.

As to Ahmed we are unable to hold that the mere witnessing by him of that document, *i.e.*, the mortgage, or his assent to the execution of it, can create an estoppel binding on him, unless it were apparent that when he witnessed the deed and assented to it, he did so with knowledge of the invalidity of the *hiba* to confer upon Azru, and the fact that Azru had no power to create, a good title as against him, of which knowledge on his part there is no proof. As regards Rohimunnessa, we need say no more than that we cannot consider the execution by her of the power-of-attorney above alluded to as having the effect attributed to it by the defendants. As to any other ground of estoppel affecting Ahmed and Rohimunnessa, it is true that in the proceedings on the Original Side of this Court in suit No. 601 of 1881, filed by Palkjan, for administration of Umed Ali Ostagar's estate, both Ahmed and Rohimunnessa did support the validity of the *hiba*, but there is nothing to show that their having done so, or their being about to do so, was ever communicated to the defendants by any one—certainly not by them. Indeed the defendant's purchase at the execution-sale took place before the written statements filed by them in the suit in this Court were presented by them.

Upon the whole, therefore, we do not find any circumstance in this case such as to justify us in holding (assuming it to be material) that Ahmed Hossein and Rohimunnessa were, by acts of their own, estopped from disputing as between them and the defendants the validity of the *hiba*, which is the source of their title.

The next question is whether in this case the decision of their Lordships of the Privy Council in *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1) is an authority which we can apply in this case, so as to hold that Ahmed and Rohimunnessa, as heirs of Umed Ali Ostagar, became estopped as to

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the *hiba*. Now in that case, there were circumstances which do not exist in the present: there had been a long course of public acts and declarations by Ubotar Singh, the grantor of the deed of sale to his wife Ulpa, which in that case was held to have been a benami transaction; and, further, Ubotar Singh, during his lifetime, as far as possible, by transfer of possession and otherwise, did all that he could to cause his wife to bear towards the public the character of owner. In the present case there was nothing save, *first*, the execution of the deed; *secondly*, the registration of it; *thirdly*, the execution of a general power-of-attorney by Azru in favor of her husband; and, *fourthly*, the fact that a seal was made for her, to constitute acts of the kind relied on in the case before their Lordships. And of none of them, save the execution of the deed itself, is it shown that the mortgagee or the present defendants were informed and aware. Again, before the sale on the 15th May 1882, in the suit in which that sale took place, the validity of the *hiba* was impeached by Palkjan, the plaintiff in the original suit in the High Court. It is true that Palkjan's claim was dismissed: still the fact that that claim was made was one that we understand the Additional District Judge to hold ought to have put the defendants upon enquiry. And although it is true that at that time the proceedings in the suit in the High Court did not contain an express denial by Palkjan of the validity of the *hiba*, the fact that he at least contested its validity, and that in the schedule to his plaint in that suit he included the properties in the estate left by his father, the administration of which he sought, must have appeared to the defendant had he made enquiry. Further, it is to be noted that there was no mutation of name in respect of this property to that of Azru Bibi, and there is nothing in the case to show that up to the time of the death of Azru's husband, she had (save in having executed that purely formal document, the power-of-attorney, under color of which affected authority the property was managed, *i. e.*, really enjoyed by her husband) anything to do with the possession of the property or the enjoyment of any of its profits. Under these circumstances, we cannot hold that the Additional District Judge—either in determining, as he has done, that no estoppel was created, or in holding, as he has done, that the defendants do not occupy the position of *bonâ fide*

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chasers without notice—was wrong; and this absolves us from considering the further question, which we might, perhaps, have otherwise found it necessary to determine, *viz.*, whether, if Ahmed and Rohimunnessa were estopped from disputing the *hiba*, that estoppel would have been one binding on the plaintiff in the absence of proof of knowledge on his part of the circumstances that gave rise to it.

We may add that we share the regret expressed by the Additional District Judge in coming to this conclusion in such a case. We would further say that we are sensible of the great importance of carrying out to the full the principle of the decision of the Privy Council in the case above cited, but that case does not go so far as to decide that the mere fact of a benami transfer in itself constitutes such a misrepresentation as to bind all persons claiming under the person who creates the benami, and, however salutary it might be that such should be the rule of law, we cannot hold that such a rule exists.

We, therefore, affirm the decree of the Additional District Judge, save as to that portion of it which orders the defendant to remove the wall built by him, for which we can see no warrant. As to that we must reverse the decree of the Court below. The respondent is entitled to remove the wall if it is on his land, but he is not entitled to a decree compelling the defendant to remove it. In other respects the appeal is dismissed with costs.

C. D. P. *Decree varied.*

Before Mr. Justice Mitter and Mr. Justice Macpherson.

AUBHOY CHURN MAJI (ONE OF THE DEFENDANTS) *v.* SHOSHI BHUSAN BOSE AND OTHERS (PLAINTIFFS.)*

1888 *December* 12.

Appeal—Suit for Rent—Question as to amount of Rent—Sub-division of Tenancy—Rent receipts signed by one of several co-sharers—Bengal Tenancy Act (VIII of 1885), ss. 88, 153.

Several plaintiffs, co-sharers, sued two defendants to recover the sum of Rs. 78 odd for arrears of rent in respect of a tenure, the annual amount of rent payable being alleged to be Rs. 15. One of the defendants appeared

* Appeal from Appellate Decree No. 506 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 5th of January 1888, modifying the decree of Baboo Dukhina Churn Mozumdar, Munsiff of Diamond Harbour, dated the 20th of July 1887.