disability in him to bid, we deem it our duty to observe that such leave should be very cautiously given. It should, in our opinion, be given only when it is found, after proceeding with the sale, that no purchaser at an adequate price can be found, and even then it should be given only after some enquiry, that the sale proclamation has been duly published. And if, after all, the mortgagor, judgment-debtor, is in any way injured, he has ample remedy provided for him in the Code. He can, under s. 294, question the propriety of the leave to bid, by showing, either that it was obtained by misrepresentation, or that it was granted through inadvertence and without the exercise of judicial discretion by the Court, and he can have the sale set aside under s. 311, or obtain compensation under s. 298 of the Code, according to the nature of the property sold.

The present may be a hard case; but if there was any real hardship, the respondent was not without remedy; and for aught we know he may still have his remedy. All we say at present is, that the decision of the Court below, so far as it goes, is incorrect, and that the application of the decree-holder for further execution should be granted, subject, of course, to any objections or proceedings that it may still be open to the judgment-debtor to take. The appeal must be decreed with costs.

T. A. P. *Appeal decreed.*

Before Mr. Justice Pigot and Mr. Justice Macpherson.

CHUNDER COOMAR (ONE OF THE DEFENDANTS) *v.* HURBUNS SAHAI (PLAINTIFF) AND ANOTHER (DEFENDANTS).*

1888 *June* 15.

Benami transaction—Estoppel—Misrepresentation—Heir, when bound by the acts of ancestor—Mitakshara Law—Sale by a co-parcener, Effect of.

B purchased some property from *D* (a member of a joint Mitakshara family) in the name of his wife *K* with the object of concealing from certain persons that he was the real purchaser, and further lest, in the event of a dispute arising in respect of such property, which was heavily encumbered, his exclusive property might be prejudiced and attached with debt. After the death of her husband, *K* obtained a certificate of guardianship of her infant son *S*, in which she did not include this property, and in

* Appeal from Original Decree No. 247 of 1886, against the decree of Baboo Koilas Chunder Mookerji, Subordinate Judge of Shahabad, dated the 11th of September 1886.

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fact continued to treat the property as her own. During S's minority, C the nephew of D, who was now of age, brought a suit for pre-emption against K in respect of this property, and obtained a consent decree under which he took possession. S, then, on attaining majority, instituted a suit against C for the recovery of the property, as the heir and representative of his father, on the ground that K was a mere benamidar. The defence taken by C, amongst others, was that K was the real owner he believed her to be.

Held, that on the authority of *Luchman Chunder Geer Gossain* v. *Kally Churn Singh* (1) it was a good defence, for, even on the assumption that the purchase was benami, S as heir of B was bound by the misrepresentation of the latter.

Held, also, that the sale by D as against C was bad under the Mitakshara law, inasmuch as it was an appropriation by him, without any partition, of part of joint family property.

THIS was an appeal from a decree in favour of the plaintiff by the Subordinate Judge of Shahabad. Hurbuns Sahai, the plaintiff, brought this suit as son and heir of Lala Bhugwandut, who died on the 14th Kartick 1276 (15th October 1868), leaving the plaintiff, then an infant, and Ruttonjote Koer (defendant No. 2), his widow and mother of the plaintiff. The plaintiff alleged that Lala Bhugwandut, on 28th September 1866, purchased some property from Juneswar Das, the defendant Chunder Coomar's uncle, of which property, though by the deed of sale it was conveyed to Ruttonjote Koer, Lala Bhugwandut was the real owner. He further alleged that after his father's death, and while he was an infant, in 1875, the defendant Chunder Coomar brought an unfounded suit of pre-emption against Ruttonjote; and by compromise with her obtained a decree for the property on the 15th June 1875, and took possession of it. The plaintiff also alleged that he was the real owner; that his mother Ruttonjote Koer had no right to compromise the suit; that undue influence, threats and coercion had been used to induce her to enter into the compromise; and that the decree was obtained fraudulently and illegally. He prayed for a declaration to that effect; that the deed of compromise of 12th May 1875, and the decree of 15th June 1875, be set aside; that he be put in possession of the property; and for mesne profits. He offered to repay to Chunder Coomar the sum of Rs. 7,080-2-0, the amount alleged to have

(1) 19 W. R., 292.

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been paid by him to Ruttonjote Koer under the consent decree in the pre-emption suit. The defendant Ruttonjote Koer did not put in an appearance, although duly summoned. Chunder Coomar alleged that he and his paternal uncle Juneswar Das were members of a joint undivided Hindu family governed by the Mitakshara law; that no division of any description had ever taken place between them; and that the property in dispute covered by the sale of 28th September 1866 was part of property acquired with joint family funds. He denied coercion, undue influence and fraud. His defence shortly was, that Ruttonjote Koer was the real owner whom he believed her to be, under the deed of 28th September 1866; that the decree of the 15th June 1875, as between the plaintiff and the defendant, was binding on the plaintiff; that, even if Ruttonjote Koer was no more than a mere manager for the plaintiff, her compromise was the act of a prudent manager and therefore binding on the plaintiff; that under no circumstances could the plaintiff recover inasmuch as the deed of sale of 28th September 1866 from Juneswar Das was a conveyance of part of the property of a joint Mitakshara family by one member of the family asserting it to be his own separate and distinct property; and that the sale was void as against him.

The Subordinate Judge found that neither undue influence nor coercion had been used, and that the case of fraud was false; that when Ruttonjote Koer applied for a certificate of guardianship to her son, the plaintiff, under Act XL of 1858, she excluded the property in suit from the list of properties which she had filed; that Lala Bhugwandut purchased the property in dispute in the name of his wife Ruttonjote Koer with the object of concealing the fact that he was the purchaser from the Maharajah of Dumraon, in whose service the Lala was, and whose relatives were the former owners, and further lest, in the event of any dispute arising out of this property, his exclusive property might be prejudiced and attached with debt. The Judge also found that Chunder Coomar, Purbhu Das, his father, and Juneswar Das were members of a joint Mitakshara family; and that Purbhu Das did not, as was alleged, retire from the world, but continued in the family and managed the business of the house. He held that

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the sale of 28th September 1866 by Juneswar was valid; that Ruttonjote was a mere benamidar; and that everything that passed under the sale passed to Bhugwandut. He also found that the compromise of 12th May 1875 was, so far as Ruttonjote was concerned, *bonâ fide* for the benefit of her son, but held that the compromise could not bind the plaintiff.

The Judge partially decreed the suit. He set aside the compromise and consent decree, and gave the plaintiff possession, but disallowed mesne profits.

Against this decree Chunder Coomar appealed to the High Court.

The *Advocate-General* (*Sir G. C. Paul*) and Baboos *Unnoda Prosad Banerji*, *Mohesh Chunder Chowdhry*, and *Tarapodo Chowdhry* for the appellant.

Mr. *C. Gregory* and Baboos *Guru Das Banerjee* and *Oukhil Chunder Sen* for the respondents.

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

This is an appeal from a decree in favour of the plaintiff by the Subordinate Judge of Shahabad. The plaintiff brings this suit as son and heir of Lala Bhugwandut, who died on the 14th Kartick 1276, leaving the plaintiff, then an infant, and Ruttonjote, his widow, and mother of the plaintiff. The plaintiff says that Lala Bhugwandut, on 28th September 1866, purchased some property from Juneswar Das, the defendant's uncle, of which property, though by the deed of sale it was conveyed to Ruttonjote, Lala Bhugwandut was the real owner in the name of Ruttonjote. The plaintiff says that after his father's death, and while he was an infant, the defendant brought an unfounded suit of pre-emption against Ruttonjote in respect of this property, and by compromise with her obtained a decree for the property and took possession of it. He says that he was the real owner, that Ruttonjote had no right to compromise the suit, that the decree was obtained fraudulently and illegally; and he asks for a declaration to that effect, that he be put into possession of the property and for mesne profits; offering, if this Court thinks fit, to repay to defendant the sum of Rs. 7,080-2-0, being the amount said to have been paid

by defendant to Ruttonjote under the consent decree in the pre-emption suit. The defence is shortly this: (*a*) Ruttonjote was the real owner defendant believed her to be. (*b*) The decree is as between plaintiff and defendant binding on plaintiff. (*c*) Even if Ruttonjote was no more than a manager for the plaintiff, her compromise was the act of a prudent manager and was binding on the plaintiff. (*d*) Under no circumstances can the plaintiff recover, inasmuch as the deed of sale from Juneswar was a conveyance of part of the property of a Mitakshara family, by one member of the family, under pretence that it was his own, and that the sale was void as against the defendant. These are the substantial points made by defendant in his written statement, though stated in a different order. He of course denies fraud, &c., in the decree. A description of the property claimed in this suit and of the manner and the dates of its acquisition is given in the plaint as follows:

1. That Baboo Dyal Singh, deceased, was the proprietor of the entire 16 annas of mehal Athur, pergunnah Bhojepur, to which the undermentioned mouzahs appertain.

2. That in accordance with the conditions specified in the taksimnamah executed by Baboo Dyal Singh, in the mehal aforesaid, 6 annas came into the possession of Baboo Rip Bhunjun Singh, 5 annas into that of Baboo Goman Bhunjun Singh, and 5 annas into that of Baboo Ari Bhunjun Singh, sons of Baboo Dyal Singh.

3. That the entire 16 annas of the aforesaid mehal was mortgaged on behalf of Baboo Rip Bhunjun and Baboo Goman Bhunjun Singh for selves and as guardians of Baboo Rip Bhunjun Singh, minor, to Juneswar Das for self and as guardian of Baboo Chunder Coomar, and out of the mouzahs aforesaid appertaining to the mehal aforementioned, mouzah Athur, mouzah Kunhuan and mouzah Runbirpore were under two zurpeshgi leases, severally dated 17th February 1862 and 21st September 1860, in the possession of Baboo Juneswar Das for self and as guardian of Baboo Chunder Coomar.

4. That Juneswar Das, for self and as guardian of Chunder Coomar, obtained a decree on the basis of his mortgage bond, and caused the shares of Baboo Rip Bhunjun Singh and Baboo Goman

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Bhunjun Singh in mehal Athur aforesaid to be sold at auction, and purchased them himself on the 4th March 1865.

5. That after the purchase made at auction Juneswar Das, for self and as guardian for Chunder Coomar, held the entire 16 annas of mouzah Athur, mouzah Kunhuan and mouzah Runbirpore in possession under zurpeshgi lease, and entered into possession of 11 annas of the entire mehal by virtue of purchase at auction, and out of this one-half was the share of Juneswar Das, and the other half that of Chunder Coomar.

6. That out of half of the share which belonged to Juneswar Das under the zurpeshgi deed and the auction purchase one-fourth was sold by Juneswar Das to Lala Bhugwandut, father of the plaintiff, under the deed of sale dated 28th September 1866, and possession made over, and that Lala Bhugwandut got that deed of sale executed in the fictitious name of Mussummat Ruttonjote Koer, his wife.

7. That under the deed of sale above adverted to Lala Bhugwandut became proprietor and holder of 1 anna 4 pie 10 krants in the entire mehal Athur as auction-purchaser, and in that mehal in mouzah Athur, mouzah Kunhuan and mouzah Runbirpore he came to hold possession of 2 annas share under a zurpeshgi lease.

The Judge in the Court below held that the case of fraud, (which consisted of a charge of intimidating Ruttonjote by threatening her to kill her son by sorcery), was false. He held that the purchase in Ruttonjote's name was a benami purchase, and that everything that passed under the deed of sale passed to Lala Bhugwandut. He found that Purbhu Das, defendant's father, Juneswar Das, his uncle, and the defendant were members of a joint Mitakshara family, and that Purbhu Das did not, as was alleged, retire from the world, but continued in the family.

We accept these findings as correct.

The Judge further held: (*a*) that the compromise and consent decree could not bind the plaintiff; (*b*) that, although the defendant's family were joint, Juneswar was, as to the property of which that in dispute was one-fourth, separate owner, and capable of giving a good title to it by sale; and (*c*) that even if he were not, defendant could not now insist on the defect of title, as he had

not made it a ground of claim when he instituted the pre-emption suit.

As to the first point, the Judge expresses no opinion upon the question whether defendant had, at the time he entered into the compromise, notice that Ruttonjote was a benamidar. The defendant wholly denies that he had; and we find, upon the evidence that there is no ground for finding that he had, and that the facts of the case are not such as to justify a Court in fixing him with constructive notice of the plaintiff's rights such as they were. Not merely was the purchase made in Ruttonjote's name, but the reasons for the use of her name by Lala Bhugwandut are given by the Judge. It was desired to conceal from the Maharajah of Dumraon, in whose service Lala was, that he had purchased property of persons who were the Maharajah's relatives; and there was the further very substantial reason that the disputed properties were heavily encumbered, as Sheo Gholam, witness No. 7, says: "He made the purchase in the name of Ruttonjote with a view that in case of dispute arising his exclusive property might not be prejudiced, and no liability in consequence of debt might attach to it," and then mentions also the consideration about the Maharajah.

It is plain that the concealment (assuming the purchase to have been a benami one) was intended to be effectual. There seems no reason to doubt that it was effectual. It is plain that after Lala's death the property continued to be treated as Ruttonjote's. She obtained a certificate of guardianship of her son under Act XL of 1858, but this property was not included in it. A number of exhibits have been put in showing that for years, and down to near the time of the pre-emption suit, the property was managed and proceedings relating to it conducted in her name. There is not a fact in evidence such as could be calculated to put a purchaser from her (supposing for the moment that the defendant was such) upon enquiry, save the fact that plaintiff was her son; and the fact that she had excluded the properties from the certificate of guardianship is probably a sufficient indication of the answer that might have been expected from her to an enquiry as to the ownership of the property.

Further, had the defendant known or suspected the ownership

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of the plaintiff, there seems no reason why he should not have made him a party to the suit. His mother was his guardian. She might have been enabled to defend the suit in respect of this property as his guardian. The Judge finds that the compromise was, so far as Ruttonjote was concerned, a *bonâ fide* compromise for the benefit of her son in respect of property which was then heavily encumbered; and this would have justified her as his guardian in what she did. On the whole, we see no reason to doubt that were the defendant in this case simply a purchaser for valuable consideration, he would be entitled to whatever defence *bona fides*, and absence of notice of plaintiffs' claim, would entitle him to. That such a defence would be, in such a case as this, complete is decided by the case in the Privy Council of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1), where it was held, overruling the decision of this Court, that such a defence is good against an heir of the person who created the benami, even although an infant at the time, when, after the death of the ancestor, a sale is made by the benamidar, in breach of his trust, to a *bonâ fide* purchaser without notice, there being a continuing misrepresentation by the ancestor by which the heir is bound.

We can see no distinction in favour of the plaintiff between the present case and the case of a purchaser. If Ruttonjote was by the act of Lala Bhugwandut held out as the real owner, and so competent to make a good title on sale, she was at least as much so held out as such, as being competent to defend the title obtained by the sale—at any rate, as against a member of the vendor's family claiming that the sale was in derogation of that member's rights, and so was capable of entering into a compromise with him should she honestly think the title defective. No doubt the compromise may very possibly have been arranged before the suit was filed. There is nothing to suggest that this was the case with the preliminary *mowasibut* and *istashad* which long preceded the actual filing of the pre-emption suit. Nor should it be omitted from consideration that pre-emption is in fact a sale enforced by law, and that the price paid by Lala Bhugwandut was actually paid back to Ruttonjote.

(1) 19 W. R., 292.

The Subordinate Judge has said that the performance by Chunder Coomar of the preliminaries required by the Mahomedan law in a case of pre-emption do not appear to have been properly performed. That question was not before him save so far as it might bear on the question of fraud, which he has negatived; for he has found that the compromise was *bonâ fide* made by Ruttonjote so far as she was concerned, for the benefit of her son. If she had power to defend the suit, the decree is binding; if not, it is quite immaterial whether the preliminaries were performed or not in compliance with the strict Mahomedan law of pre-emption or whatever modification of it, if any, may apply amongst Hindus in this part of the country, where, by custom, the right of pre-emption exists amongst them. For these reasons we are of opinion that upon this point the Judge was in error, that the plaintiff is bound by the compromise and the decree in pursuance of it, and that on this ground alone the suit ought to have been dismissed.

We may observe that the case of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1) was not cited before us, nor is it referred to in Mr. Mayne's chapter on benami, nor in Mr. Woodman's Digest under that title (2); nor, so far as the reports show, does it appear to have been cited in any case in this Court. It is a decision of great importance, as showing that, in some cases, the heir of one who purchases benami may be bound as between him and a purchaser from the benamidar by that act of his ancestor, irrespective of any act or omission of his own whatever, and even although a minor when his ancestor's conduct was acted on by such purchaser.

Although our decision upon this point is decisive on the appeal, we think we should also decide the other question argued before us. Purbhu Das, Juneswar Das, and the defendant, who is the son of Purbhu Das, were members of a joint family living under the Mitakshara law. Juneswar Das died in October 1874. The date of the death of Purbhu Das does not appear, but from a deposition of Juneswar Das, made on the 19th August 1872 before the Subordinate Judge of Shahabad, put in in this case and marked

(1) 19 W. R., 292.

(2) It appears under title Estoppel—Estoppel by Conduct, case 168.—ED.

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Exhibit 22, it does appear that at that date Purbhu Das was alive—a fact which appears to have escaped the attention of the lower Court and of learned counsel in this. Purbhu Das had nominally renounced the world. The lower Court finds that, though it was given out that he had done so, he had not really done so, but managed the business of his house. The brothers appear to have become possessed of considerable means, to have bought a good deal of zemindari property, and to have been much engaged in law suits, which latter pursuit is referred to in the deposition above mentioned as though it were part of their business, as it possibly was.

But, while holding that the status of the family was joint, the Subordinate Judge holds that the kobala of September 1866 was valid under the Mitakshara law. He does so chiefly on the ground that Juneswar in that kobala recites that the original purchase at auction was made half for himself and half for Chunder Coomar, and in reliance on certain expressions used by Chunder Coomar in his evidence in this case, in his plaint in the pre-emption case, and in an objection filed by him on December 13th, 1877, all of which, he appears to think, bar Chunder Coomar from now disputing that the property was joint. We think the construction put upon these expressions by the Subordinate Judge is erroneous; but, were it otherwise, they could not have the effect he attributes to them. Chunder Coomar's evidence in this case, in which he explicitly sets up the joint character of the property, cannot on the face of it be taken as an admission of a fact which he comes into Court to deny, while the language used by him in proceedings to which plaintiff was not a party could not bind him towards the plaintiff, even if it contained, as we do not think it does, admissions on his part that the property was not joint; nor can the language of the kobala have the effect attributed to it, for Juneswar, if he was selling property which he had no right to sell, could not confer that right upon himself by asserting that he had it. It is not suggested that the money advanced on the zurpeshgi leases, or the money which was the consideration for the auction sale, were not joint family funds; and the property which passed under those transactions became clearly joint family property.

Then the fact that Purbhu Das was an active member, as the Judge found, of the joint family, and was so at the time of the kobala, which latter fact was not mentioned in argument before us, is conclusive. The family did not consist of two persons jointly interested in the family property, but of three persons so interested. We take the Judge's finding to negative the supposition that Juneswar was the manager of the family. But even if he was, this sale did not pretend to be made by him in that capacity; nor was there any family object to be gained by it. It was simply an appropriation by him, without any partition, of part of the family property. Nor does the doctrine lately introduced, that sons are bound by force of a pious obligation incumbent on them to make good the acts of their father, extend to nephews in respect of the acts of their uncle, or to brothers of the acts of brothers. No doubt the Mitakshara law has been a good deal worn away by the decisions of recent years, which it is our duty to follow. But we are not aware of any authority according to which the sale by Juneswar in the present case could be sustained.

We think that the plaintiff has failed to show a good title to the property claimed, and that on this ground also the suit should have been dismissed.

As to the view taken by the Subordinate Judge, that having regard to s. 13 of the Code of Civil Procedure and the case of *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1), the defendant is not entitled to rely on this ground, as he did not put it forward when he brought his suit for pre-emption; we think it enough to point out that this suit is not between the same parties as the former suit. We should hesitate before holding that the bar arising from the acts of his father which, as we have decided, precludes the plaintiff from disputing Ruttonjote's right to compromise the pre-emption suit, had such an operation as to entitle him to treat it as if, for all purposes, it had been brought against him, and so to avail himself, against the defendant, of s. 13, Explanation 2 of the Civil Procedure Code. Were it necessary to deal with this question we should have to consider the bearing upon it of the recent decision of the Privy Council in *Amanut Bibee* v. *Imdad Hossein* (2), decided

(1) I. L. R., 2 Calc., 152. (2) L. R., 15 I. Ap., 106.

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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.

1888. *September* 4.

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.