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and the brothers of his father. Having regard to the general scheme of the Mitakshara, their Lordships think that the preference of the whole blood to the half blood is confined to members of the same class, or, to use the language of the judges of the High Court in *Suba Singh* v. *Sarfaraz Kunwar* (1), to "sapindas of the same degrees of descent from the common ancestor," and that, therefore, on the death of Lachman Kunwar, Raja Ram, as uncle of the half blood, became entitled to the inheritance of Bahadur Singh to the exclusion of his cousins.

In the result all the appeals will be dismissed. Kesri and the other respondents in appeal 83 of 1912 will have all their costs from the appellant Ganga Sahai. There will be no order as to costs with regard to the other parties.

And their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitors for Ganga Sahai: *T. L. Wilson & Co.*

Solicitors for Munshi Lal and others: *Douglas Grant.*

Solicitors for Kesri, Rohan, Kallu and Ram Narain: *Barrow, Rogers and Nevill.*

J. V. W.

BILAS KUNWAR (PLAINTIFF) *v.* DESRAJ RANJIT SINGH AND OTHERS (DEFENDANTS.)

*P.C.** 1915, *June* 11, 14, 15, 16. *July*, 13.

[On appeal from the High Court of Judicature at Allahabad.]

Benami *transaction—Hindu with wives and a Muhammadan mistress—Purchase with his own funds in name of mistress and registration of deed in her name—Property treated as his own, and no possession or use of it by mistress—Landlord and tenant—Estoppel as to denial of title by tenant—Act No. I of 1872 (Indian Evidence Act), section 116—No inference against litigant as to contents of documents he considers irrelevant—Omission of opposing litigant to put them in evidence in proper way.*

A Hindu taluqdar who had two wives and a Muhammadan mistress and had already made substantial provision for the latter, purchased a house with his own money in the name of the mistress, and registered the deed also in her name He treated the house, however, as his own during his life-time, living in it, paying for repairs and taxes, and receiving rent for it when let, as did his senior widow after his death; and the mistress had no possession or use

*Present:—Viscount HALDANE, Lord SHAW, Sir GEORGE FARWELL, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1896) I. L. R., 19 All., 215.

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of the house. In a suit by the senior widow to eject, after due notice to quit, a tenant to whom she had let the house, whose defence was a denial of the plaintiff's title, and an assertion that he held under the Muhammadan mistress, who claimed title under the deed of sale in her name, of which she had obtained possession.

Held (reversing the decision of the High Court, and restoring that of the Subordinate Judge) that on the evidence in, and under the circumstances of the case the deed of sale was, and had remained throughout, a *benami* transaction.

The general rule in India, in the absence of all other relevant circumstances, laid down in *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (1), that "the criterion in these cases is to consider from what source the money comes with which the purchase money is paid" followed.

It is open to a litigant to refrain from producing any documents which he considers irrelevant; and if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails to do so, neither he, nor the court at his suggestion, is entitled to draw any inference as to the contents of any such documents. It is for the litigant who desires to rely in the contents of documents to put them in evidence in the usual and proper way; if he fails to do so, no inference in his favour can be drawn as to the contents of them.

A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.

APPEAL No. 32 of 1912, from a judgement and decree (10th of May, 1910) of the High Court at Allahabad which reversed a judgement and decree (26th of August, 1908) of the Judge of the Small Cause Court, Allahabad, exercising the powers of a Subordinate Judge.

The suit out of which this appeal arose was brought by Musammat Thakurain Balraj Kunwar, the predecessor in title of the appellant, to recover possession of a house with its appurtenances and for other relief.

The plaintiff's case was that she was the owner of the house in suit, which was situated in Allahabad; that on the 15th of September, 1900, Dr. Desraj Ranjit Singh, the first defendant, hired the house from her at a rent of Rs. 63 a month which was afterwards raised to Rs. 65; that he occupied the house as her tenant, together with the other defendants who were his relatives; that on the 11th of October, 1905, the plaintiff gave the first defendant

(1) (1843) 3 Moo. I. A., 229.

notice to quit; that two days after on the 13th of October, the first defendant obtained a deed of sale from one Musammat Jagmag Bibi and her two sons who professed to be owners of the house, but had not, in fact, any right thereto; that, denying the plaintiff's right of ownership, the first defendant turned out the plaintiff's servants, and took possession of movable property in the house which belonged to the plaintiff, who consequently brought the present suit on the 1st of December, 1905, to obtain possession of the house.

The defence was in effect a denial by the defendants of the plaintiff's title, and a denial that they were her tenants; and they contended that as they had purchased the house from its true owner the plaintiff could not maintain a suit to eject them from it.

On the first day of the hearing of the suit, when issues were settled for trial, the Subordinate Judge had recorded that the pleader for the plaintiff in reply to the court stated that "the real owner of the property in dispute was Rai Bisheshar Singh, deceased husband of the plaintiff, and that the name of Musammat Jagmag Bibi was fictitiously entered in the sale-deed; that Musammat Jagmag Bibi never held possession by virtue of the sale-deed, and the plaintiff's husband and the plaintiff were in possession."

Of the issues settled the following only were now material, "(5) whether the plaintiff or Musammat Jagmag Bibi is the real owner of the house, and the movables in dispute? (6) Whether the house in dispute was let out to defendant No. 1 by the plaintiff, and if so when? (8) What movables out of those claimed belonged to the plaintiff, and what is their value? (10) Whether the defendants Nos. 2 to 4 are bound by the acts and omissions of the defendant No. 1? (11) Whether the defendants can now deny the plaintiff's title to the house? (12) Whether the rent and mesne profits claimed are due to the plaintiff, and if so, by which of the defendants, and what is the correct amount thereof?"

After the oral and documentary evidence on behalf of the parties had been adduced, on the 9th of September, 1906, Balraj Kunwar the original plaintiff died, and Bilas Kunwar, the present appellant, on the 5th of March, 1907, applied to be brought on the record

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in place "of her deceased co-widow." Objection was taken to her application by the defendants, on the ground, *inter alia*, that she was not the legal representative of Balraj Kunwar; and that the suit abated on the death of the latter. The Subordinate Judge, however, on the 14th of May, 1907, dismissed those objections, and ordered that the suit should proceed in the name of Bilas Kunwar as plaintiff, mainly on the ground that there was a right of survivorship between them, and that on the plaintiff's death her co-widow Bilas Kunwar was the person entitled to get possession of the house in dispute if it were the property of Rai Bisheshar Bakhsh Singh, and was entitled, therefore, to take her place as plaintiff.

The Subordinate Judge summed up the evidence thus in his judgement.

"On this evidence (and in the absence of any other evidence to show that the defendant paid rent for Jagmag Bibi and recognized her as his landlady), I am unable to find that the defendant was let into possession of this house by anyone other than the plaintiff or her servant. The rent was all along admittedly paid to the plaintiff and never to Jagmag Bibi or her sons, and it was the plaintiff to whom he applied for repairs.

"This house was purchased by Thakur Bisheshar Bakhsh Singh, plaintiff's husband, from his own money (vide Lala Sheombar Lal Vakil's deposition) which he had borrowed from Lala Manohar Das, deceased.

"After the purchase Rai Bisheshar Bakhsh Singh remained in possession. He used to live in it. His wife Balraj Kunwar used to live in it and he used to let it out on rent and realize the rent. After his death this house was always in the possession of his widow Balraj Kunwar, and after Balraj Kunwar her co-widow Bilas Kunwar, the present plaintiff. The whole of the evidence on the record without a single exception goes to show that Rai Bisheshar Bakhsh Singh and after his death his widows were in possession of this house to the exclusion of Musammat Jagmag Bibi, mistress of Rai Bisheshar Bakhsh Singh. The house was always let out by them. They repaired it and paid the taxes and enjoyed a good part of the surplus rent. There is nothing to show that Jagmag Bibi ever got rent of this house from Rai Bisheshar Bakhsh Singh or from his widows."

He found in the result on the 6th, 10th and 11th issues that the house was let to the first defendant as alleged by the plaintiff, and that neither the first defendant, nor the other defendants could in the circumstances of the case, deny her title to it; and as, having regard to these findings, the plaintiff was entitled to possession of the house, he held it was unnecessary for him to give a decision on the 5th issue as to the ownership of it. On issues 8 and 12 his findings were in favour of the plaintiff.

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His decree accordingly substantially decreed the plaintiff's claim.

From that decision the defendants appealed to the High Court, and the appeal came before RICHARDS and TUDBALL, JJ., who reversed the decree of the Subordinate Judge, and dismissed the suit with costs. They said in their judgement as to estoppel :—

"Even assuming that Dr. Ranjit Singh took the property as tenant from Musammat Balraj Kunwar, estoppel could only arise between Dr. Ranjit Singh and Balraj Kunwar during her life-time and her heirs after her death."

Then they observed as to the ownership of the house :—

"The real issue which we have to decide, and on which we have heard counsel of both sides at considerable length, is the question, did Bisheshar Bakhsh Singh make the purchase of the bungalow in dispute for the benefit of Jagmag Bibi, or was it a purchase for his own benefit ?

"We have come to the conclusion that it was a very natural thing for Bisheshar Bakhsh Singh to make this purchase for the benefit of Jagmag Bibi. In our opinion it would have been improbable under the circumstances that he should have purchased the bungalow in her name if he wished the property to form part of his estate. In the first place it was bound to lead to trouble after his death between Jagmag Bibi and his wives. We do not think that we should treat a purchase of this kind made by a Thakur *taluqdar*, in favour of his Muhammadan mistress in the same way as we would treat a purchase made by a Hindu in the name of a complete stranger, or in the name of one member of a joint undivided Hindu family. In our opinion the probabilities of the case are much in favour of it being the intention of Bisheshar Bakhsh Singh to benefit his mistress.

"Furthermore, the plaintiffs produced none of their books, a matter to which we attach great significance, to show that any rent was received in respect of this bungalow. It may be that if those books were produced, they would have shown that in some way the rent was credited to Musammat Jagmag Bibi or set off against some claim they had against her. We have already mentioned that the name of Musammat Jagmag Bibi remained recorded in respect of this property. This fact is perhaps not very conclusive. But there is one matter which is certainly not without great significance, namely, that when the defendants purchased the property in suit from Musammat Jagmag Bibi they were able to obtain from her the sale-deed in her favour and the lease under which the site of the bungalow was held. Taking all the facts into consideration, we have not the slightest hesitation in finding that when Bisheshar Bakhsh Singh purchased the property he did so with the intention that the beneficial ownership in it should rest in Musammat Jagmag Bibi. Having arrived at this finding, no other question arises. It is not disputed that any interest which Musammat Jagmag Bibi had has been acquired by the defendants. The present plaintiff Musammat Bilas Kunwar is not the heir of Musammat Balraj Kunwar, and, therefore, even if it could be held that Balraj Kunwar had then,

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as she strongly asserted, an absolute title, her estate did not vest in the present plaintiff."

On this appeal—

Sir *H. Erle Richards, K.C.*, and *Ross, K.C.*, for the appellant contended that the High Court was wrong in finding that when Bisheshar Bakhsh Singh purchased the property in suit, he did so with the intention that the beneficial ownership of it should vest in Jagmag Bibi. Balraj Kunwar's case was that the name of Jagmag Bibi was merely entered in the deed of sale *benami*, and that the real owner of the house was Bisheshar Bakhsh Singh, her deceased husband: and it was submitted that on the evidence this case had been established. On his death the property passed to his two widows, with a right of survivorship between them, but possession and the right of management on behalf of them both, was given to Balraj Kunwar. Jagmag Bibi never held possession by virtue of the sale-deed, but her husband and after his death Balraj Kunwar herself, was in possession of the property. The house was purchased with Bisheshar Bakhsh Singh's money; he received the rent of it when it was let; he paid for repairs and for the taxes, and this was done by Balraj Kunwar after his death. There was no evidence that Jagmag Bibi ever received rent of the house from Bisheshar Bakhsh Singh or his widows. Substantial provision had, previously to the purchase of this house, been made by Bisheshar Bakhsh Singh for Jagmag Bibi, of which she was in possession. It was also contended that the High Court should have held on the evidence that the first defendant took the house as a tenant of Balraj Kunwar and that he, and the other defendants, were, therefore, estopped from denying her title. Reference was made to the Evidence Act (I of 1872); Ameer Ali and Woodroffe's notes on section 116; Smith's L. C. (11th edition 1903) Vol. II, 831; *Doe d. Knight* v. *Smythe* (1); and *Bayley* v. *Bradley* (2); the principle laid down in all the cases was that the tenant must restore possession to the landlord before he could dispute his title. There was no distinction between the case of a tenant and a licensee: See *Doe d. Johnson* v. *Bagtup* (3). The defendants were also estopped from denying the title of the appellant as the surviving widow of Bisheshar Bakhsh Singh.

(1) (1815) 4 M. & S., 347.
(2) (1848) 5 C. B., 396 (400).
(3) (1835) 3 Ad. & E., 188.

Section 41 of the Transfer of Property Act (IV of 1882) was also referred to.

De Gruyther, K.C., and *B. Dube*, for the respondents contended that the appellant had failed to prove that the title to the property in dispute was in Balraj Kunwar. As to the *benami* character of the purchase, it was submitted that it was made by Bisheshar Bakhsh Singh, as the High Court had found, with the intention that Jagmag Bibi should have the beneficial ownership of it. Such a transaction had no *benami* character. [Sir JOHN EDGE. Did Bisheshar Bakhsh Singh buy it for himself or for Jagmag Bibi? If he bought it for himself it was a *benami* transaction; if for Jagmag Bibi it was not.] Reference was made to parts of the evidence to show that it was purchased for Jagmag Bibi; and it was submitted that the transaction was not *benami*. All the cases as to whether a transaction is *benami* or not, turn on questions of fact, and fact only: none of them therefore can be of any authority in deciding another case. If the test is who pays the purchase money that is only a question of fact. This was a case, it was submitted, where all the evidence pointed to the probability that the house was a gift to Jagmag Bibi; and there was no evidence of any other disposition of it. She had the deed of sale in her own possession. The presumption that it was hers was mostly, if not wholly, all one way. [Mr. AMEER ALI, as to *benami* transactions, referred to *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1), and Sir GEORGE FARWELL to *Naginbhai* v. *Abdulla* (2).] *Uzhur Ali* v. *Ultaf Fatima* (3); *Uman Parshad* v. *Gandharp* (4); *Raja Chandranath Roy* v. *Ramjai Mazumdar* (5); and *Thakro* v. *Ganga Prasad* (6) were cited. The High Court had rightly held that there was no estoppel on the respondents to deny Balraj Kunwar's title.

Sir *H. Erle Richards, K. C.*, replied.

1915 July 13th:—The judgement of their Lordships was delivered by Sir GEORGE FARWELL:—

This is an appeal from a judgement and decree, dated the 10th of May, 1910, of the High Court at Allahabad, which reversed a

(1) (1854) 6 Moo. I. A., 53.
(2) (1882) I. L. R., 6 Bom., 717.
(3) (1869) 13 Moo. I. A., 232.
(4) (1887) I. L. R. 15 Calc., 20 (23) : L.R., 14 I.A., 127 (130).
(5) (1870) 6 B. L. R., 303 : 15 W.R., P.C., 7.
(6) (1887) I.L.R., 10 All., 197 (206) : L. R., 15 I.A., 29 (35).

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judgement and decree, dated the 26th of August, 1908, of the Judge of the Small Cause Court of Allahabad exercising the powers of a Subordinate Judge.

Rai Bisheshar Bakhsh Singh was a taluqdar of Oudh; he was a man of some wealth, a Rajput of good position; he had two Rajput wives but no son; he had, however, one daughter by one of the wives. He had also a Muhammadan mistress named Jagmag Bibi, by whom he had two sons, and for whom he had made provision on a fairly liberal scale, and had given full possession thereof in 1876 and in 1888. On the 9th of June, 1887, the taluqdar purchased for Rs. 9,000 the bungalow in dispute in this action; he raised the purchase money by a mortgage on his own property and paid for it, and had the sole use and enjoyment of it for himself and his wives during his own life, but the deed of sale was made out and registered in Jagmag's name. The taluqdar spent money on the house, built a well and walls and kept a gardener in occupation, he and his wives lived there, and the mother of one of his wives lived and died there. His wives used the bungalow by his permission for "Kalabbas"—i.e. to live at the bank of the Ganges for religious purposes for a month at a time; the purchase seems to have been made for the purpose of the Kalabbas. Jagmag Bibi was never in the bungalow during this period; she would of course, as a Muhammadan mistress, have no part or lot in the Hindu religious observances of Rajput wives, and it is inconceivable that she could have associated in any way in the bungalow with them.

The bungalow was useless to her for any personal use, and it was wholly inappropriate as a provision for her if the taluqdar ever had any intention or idea of making a further provision for her; the net income was very small—in some years the out-goings exceeded the income. There is no evidence of any intention to give the bungalow to Jagmag as a provision for her or otherwise beyond the bare fact of the registration in her name; it is not clear how or when she got possession of the title deed; it may be that it was in the taluqdar's possession at his death, and she obtained possession of it at some subsequent period. As the deed was made out in her name there is no importance in this. Down to the taluqdar's death the natural inference is that the purchase

was a *benami* transaction; a dealing common to Hindus and Muhammadans alike, and much in use in India; it is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our Common Law, that where a feoffment is made without consideration the use results to the feoffor. The exception in our law by way of advancement in favour of wife or child does not apply in India [*Gopeekrist Gosain* v. *Gungapersaud Gosain* (1)] but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (2):—"The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid."

On the 31st of August, 1890, the taluqdar died, and by an agreement of the 21st of March, 1894, between his two widows the possession and management on behalf of both was given to one of them, viz., Thakurain Balraj Kunwar, and she has throughout managed the property in question. Whether any acts or omissions by any of the parties after the death of the taluqdar could affect the nature of the *benami* transaction as it stood at his death it is unnecessary to consider, for their Lordships are of opinion that nothing has been given in evidence which could have any effect at all on the transactions as *benami*. The evidence given by Jagmag is quite untrustworthy, and she has not even called her sons whom she purports to vouch as actors on her behalf: the Trial Judge does not place any confidence in Roshan Lal's evidence, and his conduct certainly is open to comment. On the facts as accepted by their Lordships as the result of the evidence, all rates, rents and taxes and repairs and the ground rent of the bungalow have been paid by the Thakurain. She has had possession of the premises by her servant Bhairon, and has let them to various tenants from 1891 down to the commencement of this action, the last tenant being Dr. Ranjit Singh, to whom the plaintiff let and gave

(1) (1854) 6 Moo. I. A., 53.

(2) (1843) 3 Moo. I. A., 229.

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possession in 1900, and to whom also she gave notice to quit on the 13th of October, 1905.

On these facts their Lordships are of opinion that the transaction was and remains throughout *benami*. They are unable to agree with the opinion expressed by the High Court; they find no ground on which to treat a purchase by the taluqdar of such a property as this bungalow in the name of his Muhammmdan mistress in a manner differing from that on which a similar purchase by a Hindu in the name of a complete stranger would be treated, nor is there any ground for asserting that the probabilities of the case are in favour of an intention by the taluqdar to benefit his mistress; for the reasons stated above the exact contrary appears to their Lordships to be the case. The High Court Judges "attach great significance" to the non-production of the books showing the accounts of the general estate, and appear to draw an inference therefrom adverse to plaintiff's claim; any such inference is, in their Lordships' opinion, unwarranted. These books do not necessarily form any part of the plaintiff's case; it is of course possible that some entries might have appeared therein relating to the bungalow. But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents. There is no ground for any inference such as is made in the High Court that the books, if produced, would have shown rent credited to Jagmag or set off against some claim against her. They related to a different property, and the possibility of entries relating to the bungalow therein is very remote, but even if it had been greater, the court was not entitled to draw any such inferences. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so no inference in his favour can be drawn as to the contents thereof.

The other point in the case is one of estoppel. The property was let by the plaintiff to the defendant Ranjit Singh; he was

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let into possession by the plaintiff's gardener Bhairon, on her behalf and by her direction, and he regularly paid rent to her and applied to her to do all the necessary repairs ; he has never given up possession to her although he duly received notice to quit, and he has denied her title. Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. The Subordinate Judge was clearly right on this point. The High Court appears to have been under some misapprehension, and counsel for the respondents have not attempted to support their judgement on this point. Their Lordships are of opinion, and will humbly advise His Majesty, that the decree of the High Court should be reversed and that of the Trial Judge should be restored, and that the respondents should pay all the costs here and below.

Appeal allowed.

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitors for the respondents : *Ranken Ford, Ford & Chester.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott

DAMODAR DAS AND OTHERS (JUDGEMENT DEBTORS) v. BIRJ LAL (DECREE HOLDER)*

1915 *May*, 27.

Civil Procedure Code (1908), *order XLV, rule* 15—*Privy Council—Restoration of property alienated pending appeal to the Privy Council—Procedure.*

The word 'execution' as used in order XLV, rule 15, was intended to cover a case of restitution as well as a case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council, and a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply in the first instance to the court indicated by rule 15.

A decree was passed by the High Court against B, who appealed to the Privy Council. During the pendency of the appeal D and others obtained possession of the property in suit from B. The Privy Council reversed the decree and B applied to the Subordinate Judge to restore him to possession of the property and filed a copy of the printed judgement of their Lordships of the

* First Appeal No. 135 of 1914, from a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 9th of April, 1914.