

emption, but on appeal the District Judge has dismissed it, holding that having regard to the recital in the *wajib-ul-arz* there is no right of pre-emption in *muafi* lands. We are unable to concur in this view. When a right of pre-emption is recorded in a *wajib-ul-arz* of the mahal, a right must be deemed to exist in view of the provisions of section 5 of the Act. The question as to what persons are entitled to exercise this right is to be determined by reference to section 12 of the Act and not to the recitals in the *wajib-ul-arz*. Under the last-mentioned section when a petty proprietary interest is sold, coparceners in that interest have the first right of pre-emption. The holders of these resumed *muafis* are holders of specific plots in the mahal and are obviously not entitled to take part in the administration of its affairs and do not own any land in the mahal jointly with the co-sharers. They are accordingly petty proprietors within the meaning of section 4, sub-clause (7). The plaintiff therefore has the first right of pre-emption. We accordingly allow this appeal and setting aside the decree of the lower appellate court restore that of the first court with costs in all courts.

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Before Mr. Justice Banerji and Mr. Justice King.

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MUSTAFA-UN-NISSA BIBI (PLAINTIFF).\*

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Act No. IV of 1882 (*Transfer of Property Act*), section 53—  
*Fraudulent transfer—Principle applicable to transfer under a fraudulent and collusive decree on award.*

The principles embodied in section 53 of the *Transfer of Property Act* are in accordance with the general principles of justice, equity and good conscience and as such should be taken as a guide by the courts even in cases where the provisions of section 53 do not in terms apply, e.g. because the

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\* First Appeal No. 78 of 1926, from a decree of Girish Prasad Mathur, Additional Subordinate Judge of Budaun, dated the 18th of November, 1925.

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transfer is by virtue of a decree on an award. Where, ostensibly, a dispute between a Muhammadan husband and wife regarding dower was referred to arbitration, and the husband transferred his property to the wife in accordance with the decree passed on the award, but the circumstances showed that there was no real dispute regarding the dower, and the appointment of an arbitrator was a mere trick for the purpose of obtaining a colourable award and a decree upon which to base the collusive and nominal transfer, with the object of saving the property from the impending claim of certain creditors, it was held that the principle of section 53 was applicable and the transfer was voidable by the creditors. *Champo v. Shankar Das* (1), *Ibrahim v. Jivan Das* (2) and *Bhagwant Appaji v. Kedari Kasinath* (3), referred to.

THE facts of the case are fully stated in the judgement of the Court.

Maulvi *Iqbal Ahmad* and Mr. *Akhtar Husain Khan*, for the appellants.

Hafiz *Mushtaq Ahmad*, for the respondent.

BANERJI and KING, JJ. :—This appeal arises out of a suit for a declaration that certain zamindari property and a house belonged to the plaintiff, Musammât Mustafa-un-nissa, and are not liable to attachment and sale in execution of a decree obtained by the contesting defendants against Shaukat Ali, the plaintiff's husband.

Shaukat Ali had two wives, namely, Qutub-un-nissa, the first wife, and Mustafa-un-nissa, the plaintiff, the second wife, Shaukat Ali had practically no property of his own and was maintained by his father, Qudrat Ali. On the 15th of April, 1924, Qudrat Ali died and the bulk of his property passed to Shaukat Ali by inheritance. The first wife, Qutub-un-nissa, had died some time before Shaukat Ali inherited the property, and soon after Qudrat Ali's death the heirs of Musammât Qutub-un-nissa demanded her dower debt from

(1) (1912) 14 Indian Cases, 232. (2) [1924] A. I. R., (Lah.), 707.  
(3) (1900) I. L. R., 25 Bom., 202.

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Shaukat Ali. They filed a suit on the 3rd of July, 1924, claiming Rs. 23,000 as the dower debt and obtained a decree against Shaukat Ali for Rs. 18,750 on the 17th of September, 1924. The decree-holders sought to attach the property in suit in execution of their decree but were resisted by the plaintiff, who claimed that the property had been transferred to her by a decree dated the 8th of July, 1924, which had been passed on the basis of an award in lieu of her dower debt. The decree-holders maintained that the transfer of the property by Shaukat Ali to Musammat Mustafa-un-nissa was a colourable transaction. The execution court gave effect to their contention and dismissed the plaintiff's objection. Hence the present suit for the establishment of the plaintiff's title to the property in dispute.

The plaintiff's case was that her dower was fixed at Rs. 51,000 at the time of her marriage, about 27 years before the suit. Soon after Qudrat Ali's death she demanded her prompt dower from her husband and the matter was referred to an arbitrator who delivered an award on the 28th of May, 1924, deciding that Rs. 17,000 of the dower was prompt dower and that the plaintiff should be owner of the property in suit in lieu of her claim for dower. Mutation was effected in the plaintiff's name and she claims to have been in proprietary possession. The defence was that the amount of dower was much less than Rs. 51,000 and that the award and decree upon which the plaintiff bases her title are collusive and fraudulent and were obtained with a view to defeat the defendants' claim for the dower debt of the deceased wife, Qutub-un-nissa.

The trial court found that the plaintiff's dower was Rs. 51,000 and held that there was a real transfer of the property in suit in accordance with the decree passed on the basis of the award. The court took the view that

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Shaukat Ali was merely preferring one creditor to another and that the transfer was not vitiated by collusion or fraud. The trial court accordingly decreed the plaintiff's suit.

The first question for our determination is whether the plaintiff's dower was fixed at Rs. 51,000 as alleged.

[The judgement then discussed the evidence and continued.]

We decide this point in the plaintiff's favour.

The next question is whether the award and decree passed upon its basis are vitiated by fraud and collusion with a view to defeating the claims of the heirs of Qutub-un-nissa. On this point we are unable to agree with the view of the trial court. The provisions of section 53 of the Transfer of Property Act do not in terms apply to this case since the plaintiff bases her title on a transfer by a decree of a court and under section 2 (d) of the Transfer of Property Act such a transfer is not affected by the provisions of section 53. It has been frequently held, however, that the principles embodied in section 53 of the Transfer of Property Act are in accordance with the general principles of justice, equity and good conscience and as such should be taken as a guide by the courts even in cases where the provisions of section 53 do not apply. These principles have, for instance, been held to be of general application and have been applied in the Punjab where the Transfer of Property Act itself is not in force: *Champo v. Shankar Das* (1) and *Ibrahim v. Jivan Das* (2). The same view was also taken by the Bombay High Court in *Bhagwant Appaji v. Kedari Kashinath* (3). If we come to the conclusion, therefore, that the decree upon which the plaintiff bases her title is fraudulent and intended to defeat creditors the plaintiff cannot succeed.

(1) (1912) 14 Indian Cases, 232. (2) (1924) A. I. R., (Lah.), 707.  
(3) (1900) I. L. R., 25 Bom., 202 (209).

There are several indications of fraud and collusion in this case.

In the first place it is not shown that there was any dispute between the husband and wife which led to the appointment of an arbitrator for deciding the dispute. The husband and wife had lived together, apparently in perfect amity, for about 27 years and there is nothing to show why the wife should suddenly demand her prompt dower. Moreover, it is admitted that there was no dispute, either regarding the amount of dower or regarding the property which should be awarded to the plaintiff in lieu of dower, in the proceedings before the arbitrator. The husband admitted all along that the dower was Rs. 51,000 and made no objection to the transfer of the property which he had inherited, in lieu of his wife's claim.

The arbitrator himself was summoned as a witness by the plaintiff and was present in court, but was not produced for examination. This suggests that the plaintiff was afraid of producing him lest the true nature of the collusive proceedings should come to light. The plaintiff has not even produced a copy of the agreement to submit the alleged dispute to arbitration. Moreover, the plaintiff herself did not venture into the witness box. We draw an adverse inference from her reluctance to face cross-examination.

Another significant point is that the transferor and transferee stood in the relation of husband and wife and *this fact of itself tends to throw some suspicion upon the proceedings.*

Another important point is that the husband retained to himself the benefit of the property transferred. It is expressly laid down in the decree that the husband should have the right of residence in the dwelling house and there is a very important provision that the wife

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should have no power to transfer the property during the lifetime of her husband without his consent. The trial court remarks that it was a matter between husband and wife, so the husband was justified in imposing restrictions, but in our view these provisions show that the husband was careful to protect his own interests in the property and that he never intended to surrender the beneficial ownership.

We note the fact that the husband had mutation effected in his wife's name although the wife did not apply for execution of the decree. This shows that everything was done with the husband's consent.

Moreover, it is shown that the husband actually remained in possession of the zamindari property by realizing rent. The husband's position is clearly shown by the lease dated the 10th of July, 1924, by which the husband and wife jointly leased the property for a period of 20 years to one Niaz Ali upon receipt of Rs. 1,000 as premium together with a covenant for annual rent. The lessee was evidently not willing to accept a lease from the wife alone although she was the nominal owner. The lease recites that the wife is the owner in possession but, as the husband realizes rents and is also the lambardar, and as under the award the husband has a right to remain in possession during his lifetime along with the wife, therefore, the lessee desires that both husband and wife should join in executing the lease. The respondent contends that under the decree the husband was only entitled to possession of the *house*, but the fact remains that in the lease he is spoken of as entitled to remain in possession of the zamindari property also, and we have no doubt that this was in accordance with the reality. To all intents and purposes, therefore, the husband remained in possession and enjoyment of the property which he purported to have transferred to his wife.

it is worth noting that after the defendants obtained their decree in the dower suit the lessee considered his position to be precarious and gave up his lease upon recovering the premium of a thousand rupees which he had paid. This money was paid by the husband and the lessee certified in his petition of compromise dated the 18th of November, 1924, that nothing was due from Shaukat Ali. This clearly shows that the lessee at least regarded Shaukat Ali as the real lessor.

Another indication of fraud and collusion is that under the decree the *whole* of the property inherited by the husband was transferred to the wife, the husband retaining nothing for himself. It is most unlikely that the husband would have meekly consented to such an arrangement in the absence of collusion.

There is a passage in Dr. Gour's Commentary on the Law of Transfer, 5th edition, vol. I, page 631, which is very applicable to the facts of the present case. The learned commentator remarks: "Indeed it is too well known that *benami* or fraudulent transfers are only too often made by Muhammadan debtors in favour of their spouses ostensibly in consideration of *mehar* but really with the object of withholding the property from their creditors. In such cases it would be pertinent to inquire as to what were the circumstances of the husband when the *mehar* was fixed; what was its nature, and if prompt, why it had remained unpaid and what circumstances had precipitated the transfer and how was it effectually carried out. Nor should it be forgotten that a debtor having many debts to pay can rightly place his property beyond the reach of his creditors by alienating to his wife and it cannot therefore be free from the taint of suspicion, which is all the more enhanced if after the transfer he is shown to have continued in its possession and to have participated in its benefit."

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In the present case, as we have shown, there are many circumstances throwing suspicion upon the *bona fides* of the award and decree in the plaintiff's favour. In our opinion there was no dispute between husband and wife regarding the dower, and the appointment of an arbitrator was a mere trick for the purpose of obtaining a colourable award and a decree upon its basis. The object of these fictitious proceedings was to save the property from the impending claim from the heirs of Musammat Qutub-un-nissa, and the husband and wife colluded so as to pass a nominal title to the wife, while the husband remained in possession and enjoyment of the property. On these findings the nominal transfer will not save the property from attachment and sale in execution of the defendants' decree.

There is one small point remaining for determination. The plaintiff claimed a decree that 14 out of 20 *sihams* of a house was not liable to attachment and sale. The defendants admitted that Shaukat Ali had a one-third share in this house and a one-third share had been attached in execution of their decree. They denied that the plaintiff was entitled to any larger share, such as 14 out of 24, which she claimed. The plaintiff did not produce any evidence to prove that she was entitled to anything more than the one-third share which had been admitted. Moreover she had no cause of action in respect of more than the one-third share which had been attached. So upon any view of the case she was not entitled to any declaration in respect of more than one-third share in the house and we hold that the court below was wrong in decreeing the whole claim in respect of the house.

In accordance with our findings above we allow the appeal and dismiss the plaintiff's suit with costs throughout.