A further point has been raised regarding the finding of the Court below on the issue No. 5. The Nawab got some mortgage deeds executed in the name of his daughter Wazir-un-nisa and it is alleged by the defendant No. 1 that these deeds are *benami* in the name of defendant No. 5 for the Nawab himself. On this point we do not think that the defendant-appellant has been able to make out any good case. It appears that the money which was advanced on the basis of these mortgage deeds was given by the Nawab to the plaintiff No. 1 and was saved by her for the purpose of these loans. Nothing has been shown to us which could make us dissent from the finding of the Court below.

King, C. J. and Nanavutty, J.

The result is that we allow the appeal of the plaintiff No. 1 and decree her suit against all the defendants with costs throughout against defendant No. 1. We dismiss the appeal of defendant No. 1 with costs, but in view of our finding that Faiz Ali Khan was a legitimate son the decree in favour of plaintiff No. 2 will be modified by substituting a 1/9th share instead of a 1/7th share.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice G. H. Thomas

MUSAMMAT GAYA DEI AND OTHERS (DEFENDANTS-APPELLANTS) *v.* MUSAMMAT TULSHA DEI AND OTHERS, PLAINTIFFS AND ANOTHER (DEFENDANT-RESPONDENTS)*

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Suits Valuation Act (VII of 1887), *section* 8—*Plaintiff valuing suit at below Rs.*5,000—*Defendant pleading valuation to be over Rs.*5,000—*Court deciding in favour of plaintiff*—*Appeal by defendant*—*Valuation for purposes of determining forum is plaintiff's valuation*—*Hindu Law*—*Widow's estate*—*Partition between co-widows*—*Survivorship*—*Relinquishment of right of survivorship, if valid*—*Co-widows*—*Aliena-*

*First Civil Appeal No. 58 of 1933, against the decree of Pandit Dwarka Prasad Shukla, Additional Subordinate Judge of Gonda, dated the 23rd of December, 1932.

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tion—One widow cannot transfer estate even for legal necessity without applying for concurrence of the other.

It is a general rule that the value fixed by the plaintiff in his plaint must, *prima facie*, be the basis for determination of the forum of the suit or appeal arising out of it, though the position is different if it is found that the plaintiff has deliberately undervalued or overvalued his claim with the object of having the suit tried or the appeal heard by the Court which would not have jurisdiction to try the suit or hear the appeal in case the plaint is properly valued. Hence where the defendant pleads that the plaintiff has undervalued the suit but the trial court overrules the plea and decrees the suit, the valuation for the purposes of determining the forum for an appeal by the defendant is the valuation fixed by the plaintiff, even though the defendant repeats in his memorandum of appeal the plea that the plaintiff has undervalued the suit. In such a case it does not lie in the mouth of the plaintiff to plead that he deliberately undervalued his suit. *Pitam Singh* v. *Bishun Narain* (1), followed. *Nilmony Singh* v. *Jagabandhu Roy* (2), distinguished.

The mere fact of partition between two co-widows, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime. *Gauri Nath Kakaji* v. *Gaya Kuar* (3), followed. *Valluru Appalasuri* v. *Sasapu Kannamma Nayuralu* (4), referred to.

After a partition between co-widows each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden a reversioner with any debts contracted owing to legal necessity, but one of them cannot, even for legal necessity, transfer the estate in her hands without at least applying for the concurrence of the other. *Gauri Nath Kakaji* v. *Kaya Kuar* (3), followed.

Messrs. *H. D. Chandra* and *P. N. Bhatt*, for the appellants.

Messrs. *L. S. Misra* and *Suraj Narain*, for the respondents.

(1) (1930) I.L.R., 6 Luck., 426.
(2) (1896) I.L.R., 23 Cal., 536.
(3) (1928) 5 O.W.N., 661.
(4) (1926) A.I.R., Mad., 6.

SRIVASTAVA and THOMAS, JJ.:—This is a defendants' appeal against the judgment and decree, dated the 23rd of December, 1932, of the learned Additional Subordinate Judge of Gonda decreeing the plaintiffs' suit for a declaration that certain transfers of the properties in suit made by defendant No. 1 will not be binding upon them after her death.

The facts of the case are that one Pandit Badri Narain Misra, who was a Deputy Collector in these provinces, died some time ago leaving considerable property. He left two widows, Musammat Tulsha Dei, plaintiff No. 1, and Musammat Gaya Dei, defendant No. 1. He also left two daughters, Musammat Kalapraji, defendant No. 2, born of his senior wife Musammat Gaya Dei and Musammat Sundar Kuar, plaintiff No. 2, born of his junior wife Musammat Tulsha Dei. Plaintiff No. 3 is a minor son of Musammat Sundar Kuar. After the death of Badri Narain there was a partition suit between the two widows, and the property was divided between them In this partition suit some Government Promissory Notes were allotted to the share of defendant No. 1 who has made certain transfers in respect of them. There is also one shop situate in Balrampur which was not included in the previous partition. Defendant No. 1 has made a gift of it in favour of her daughter defendant No. 2. The plaintiffs claim that the said shop belonged to the late Badri Narain and was inadvertently omitted from the partition suit. Their case is that the transfers of the Promissory Notes and the shop in suit are invalid and cannot be binding upon them after the death of Musammat Gaya Dei.

The suit was resisted on various grounds, but we are concerned with only three of them which have been urged in appeal before us. The learned Additional Subordinate Judge rejected all the pleas raised in defence, and decreed the plaintiffs' claim.

A preliminary objection was raised on behalf of the plaintiffs on the ground that the appeal filed in this

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Court was barred by limitation. The facts on which this objection is based are that the plaintiffs valued their suit for the purpose of jurisdiction at Rs.2,100. The defendants disputed the correctness of this valuation. The learned Additional Subordinate Judge framed issues 1 to 3 on this point and his finding was that having regard to the nature of the declaration claimed the subject-matter of the suit cannot be said to have been under-valued. He further observed that the value fixed by the plaintiffs in their plaint must be taken to be the value for the purpose of jurisdiction of the trial Court and of the Court of appeal. When the plaintiffs were successful in the trial Court the defendants filed an appeal in the Court of the District Judge of Gonda on the 26th of January, 1933, valuing the appeal at Rs.2,100. When the appeal came up for hearing before the learned District Judge he disagreed with the finding of the trial Court in respect of issues 1 to 3 and held that the trial Court was wrong in holding the value of the suit to be Rs.2,100. He found that the property involved in the suit was not less than Rs.8,300 in value. Having arrived at this finding he returned the memorandum of appeal to the appellants on the 29th of July for presentation to this Court. 30th of July being a Sunday, the memorandum of appeal was presented to this Court on the 31st of July, 1933. In view of the facts stated above the office reported that the appeal was presented within time, and it was admitted.

It has been strongly contended on behalf of the plaintiffs-respondents that the defendants were wrong in filing the appeal in the Court of the District Judge of Gonda, and that in view of the pleas raised by them in their defence about the suit being under-valued, which were repeated by them in their memorandum of appeal, they should have filed the appeal in this Court. We are of opinion that this contention is not correct. In *Pitam Singh* v. *Bishun Narain* (1), to which one of us

(1) (1930) I.L.R., 6 Luck., 426.

was a party, it was laid down that the general rule is that the value fixed by the plaintiff in his plaint must, *prima facie,* be the basis for determination of the forum of the suit or appeal arising out of it, though the position is different if it is found that the plaintiff has deliberately under-valued or over-valued his claim with the object of having the suit tried or the appeal heard by a Court which would not have jurisdiction to try the suit or hear the appeal in case the claim is properly valued. It can hardly lie in the mouth of the plaintiffs-respondents to say that they had deliberately under-valued or over-valued their claim, and no such suggestion has been made on their behalf. The case was therefore governed by the general rule laid down in the abovementioned case, and no fault can be found with the defendants for filing an appeal in the Court of the District Judge. Reliance was placed on the decision of the Calcutta High Court in *Nilmony Singh* v. *Jagabandhu Roy* (1), which has also been referred to in the decision of this Court in *Pitam Singh* v. *Bishun Narain* (2). In the Calcutta case the plaintiff valued the suit at Rs.7,500. The defendants objected that on a proper valuation of the property the value of the suit should be below Rs.5,000. Upon the question of valuation the trial Court found in favour of the defendants, but dismissed the plaintiff's suit upon the ground of limitation. The plaintiff appealed to the High Court valuing the appeal at the same amount at which the suit was valued. On an objection raised that the appeal did not lie to the High Court, it was held with reference to the provisions of the Bengal, N.-W. P. and Assam Civil Courts Act that the words "value of the original suit" did not mean the value as found by the original Court and the appeal was rightly preferred to the High Court. In order to emphasize their argument their Lordships also remarked that questioning, as the plaintiff-appellant did, the correctness of the finding as to value, and contending

(1) (1896) I.L.R., 23 Cal., 536. (2) (1930) I.L.R., 6 Luck., 426.

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that his valuation was a correct one, he could not but have preferred the appeal to this Court as he has done. We are of opinion that this case does not help the respondents. Our conclusion is that in the circumstances of the case the defendants were right in preferring the appeal in the Court of the District Judge.

Srivastava and Thomas, JJ.

It was also argued on behalf of the plaintiffs that in any case the appeal in this Court having been filed long after the period of limitation had expired and no application under section 5 of the Limitation Act having been made, the appeal must be held to be time-barred. The appellants in order to remove this objection have now made an application under section 5 of the Indian Limitation Act. It is supported by an affidavit in which it is also stated that the application was not made earlier because at the time of the presentation of the appeal in this Court the Hon'ble the Chief Judge accepted it as within time. We have already mentioned that the appeal was presented in this Court at the earliest opportunity after the memorandum had been returned by the District Judge. In the circumstances stated above and set forth in the application, we are satisfied that there was sufficient cause for the memorandum of appeal not being presented to this Court earlier. We accordingly extend the period of limitation under section 5 of the Limitation Act and overrule the objection.

Turning to the merits of the case, the first contention urged on behalf of the appellants is that the present suit was not maintainable as at the time of the partition between the co-widows they had agreed to relinquish the right of survivorship in favour of each other. It is not denied that according to the decision of their Lordships of the Judicial Committee on an appeal from this Court in *Gauri Nath Kakaji* v. *Gaya Kuar* (1), the mere fact of partition between two co-widows, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of

(1) (1928) 5 O.W.N., 661.

the survivors to enjoy the full fruits of the property during her lifetime. But it has been argued on the authority of the decision of the Madras High Court in *Valluru Appalasuri* v. *Sasapu Kannamma Nayuralu* (1), that such a partition can be of two kinds, (1) in which the co-widows have a right to succeed to the other if the latter predeceases and (2) in which there is no such right left to the surviving widow or to the reversioners of their husband. The argument is that the partition which took place between the two widows of Pandit Badri Narain was one of the latter class. Assuming that an arrangement between co-widows under which each of them relinquishes her right to survivorship in favour of the other is possible, the learned counsel for the appellants has failed to refer us to any evidence showing that any such agreement had been arrived at between Musammat Tulsha Dei and Musammat Gaya Dei at the time of the partition. In the absence of such evidence the contention must fail.

Next it was argued that the transfer of the Government Promissory Notes in suit was made for legal necessity for the payment of debts incurred by the widow in connection with certain litigations to which she was a party. In *Gauri Nath Kakaji* v. *Gaya Kuar* (2), referred to above their Lordships of the Judicial Committee also held that after a partition between co-widows each can deal as she pleases with her own lifetime interest, but she cannot alienate any part of the corpus of the estate so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the rights of survivorship by burdening or alienating any part of the estate. In considering the question whether a mortgage made by a co-widow could be binding or not on the other co-widow

(1) (1926) A.I.R., Mad., 6. (2) (1928) 5 O.W.N., 561.

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to the extent that it was made for legal necessity their Lordships observed as follows:

"This was not expressly decided by the case in 11 Moore's I. A., which dealt with a gratuitous alienation by one widow to the prejudice of the other, but it was made the subject of decision in the well-known case of *Gajapati Radhamani* v. *Pusapati Alakarajeswari* (1). There it was held as expressed in the head-note, that a mortgage by a Hindu widow, even for necessary purposes, without the concurrence of her co-widow is not binding upon the joint estate which has descended from their deceased husband so as to affect the interest of the co-widow, but the question was left open whether a 'case for borrowing without the co-widow's consent could be established so as to empower one widow so to bind the estate', and the only thing that was definitely decided was that it could not do so where the concurrence of the co-widow was not even applied for.

Their Lordships can conceive of cases where the concurrence of the co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused, a mortgage for such a debt granted only by the one widow might be held binding on what may be termed the corpus of the estate. That case does not arise here. Umrao Kunwar never asked the respondent to consent to the granting of the mortgages in dispute. What attitude the respondent might have taken up had such a request been made can only be matter for conjecture."

In the present case it is admitted that the defendant No. 1 when she made the transfers in question never consulted her co-widow and never asked for her concurrence in the making of them. No mention of the alleged debts was made during the partition, and there

(1) (1892) L.R., 19 I.A., 184.

was no reason why Musammat Tulsha Dei plaintiff No. 1 was not asked to join the defendant No. 1 in the making of the transfers, if they were really justified by legal necessity. In this view of the matter, we think it unnecessary to enter into the question whether the transfers in question were supported or not by legal necessity. This plea of the defendants-appellants also must therefore fail.

Lastly it was argued that the shop in dispute was the property of Musammat Gaya Dei herself by purchase and not the property of her deceased husband. The learned Additional Subordinate Judge has held that Musammat Gaya Dei was only a benami purchaser of the shop in suit and that the real owner was her husband, Badri Narain. We find ourselves unable to accept this finding of the learned Additional Subordinate Judge and think that the appeal must succeed on this point.

It is admitted that the shop in suit was purchased on the 28th of October, 1919, under the sale deed, exhibit A-1, for a consideration of Rs.2,500. This sale-deed is in the name of Musammat Gaya Dei. It has also been produced by her from her own custody. There is no evidence that the said sale-deed was ever in the custody of Badri Narain. As regards the source of the purchase money it should be mentioned that the sale consideration of Rs.2,500 is made up of two items, (1) a sum of Rs.1,954 paid to the vendor in cash at the time of registration, and (2) a sum of Rs.546 which was deducted in respect of the amount due in respect of a previous mortgage held by Pandit Badri Narain. As regards the first item, the endorsement of the Registrar shows that the money was paid in cash in his presence, but it does not mention the name of the person who actually handed over the money. The plaintiffs have examined Bachchu, P. W. 2, who was a general agent of Badri Narain. He deposed that the money was given to him by Badri Narain in currency notes which he took to the Registrar's office. His presence at the registration office is denied

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by D. W. 7, Bahadur, who is an attesting witness to the deed. On the other hand the defendants have examined D. W. 9, Kedar Nath, who is a near collateral of Badri Narain, as the person who actually paid the money to the vendor. He has deposed that the money had been given to him by Gaya Dei and that it belonged to her. It has been pointed out that the witness is a partisan of the lady and is the father of defendant No. 3, who has been impleaded as a transferee of part of the property in suit. In view of the other circumstances bearing on the question of *benami* to which we would presently refer, we are inclined to believe D. W. 9, Kedar Nath in preference to P. W. 2 Bachchu. As a near relation of Badri Narain it is quite likely that he should have been entrusted by Gaya Dei with the money to get the transaction of sale completed on her behalf. It is the common case of both parties that Badri Narain was possessed of considerable properties and had from time to time paid sums of money to his wives which were deposited in banks in their names or invested in Government securities. At the time when Badri Narain died, sums of Rs.11,000 or Rs.12,000 were standing in the name of each of his two widows. We find therefore nothing improbable in Musammat Gaya Dei being possessed of sufficient funds to enable her to pay this sum of Rs.1,954 out of her own purse, even if the story told by her of receiving sums of money from the Ranis of Ajudhia and Avagarh be not accepted. In any case we are satisfied that there is no reliable evidence to establish that this sum of money belonged to Badri Narain and was paid by him.

As regards the other item of Rs.546, we have the statement of the defendant No. 1, who was examined on commission, that when she expressed the desire to buy the shop out of her savings her husband allowed her to appropriate the amount which was due to him from the vendor under a previous mortgage. Her statement is corroborated by the statement of D. W. 2,

Kalapraji, and D. W. 9, Kedar Nath, who were the other persons present at the time. The plaintiffs have given no evidence in rebuttal on this point. Musammat Tulsha Dei plaintiff No. 1 has not dared to go into the witness-box to contradict Musammat Gaya Dei. The defendant No. 1's statement on this point is also borne out by the terms of the sale deed, exhibit A-1. It shows that the amount due on the mortgage was set off towards the consideration of the sale. When the sale deed was being executed in favour of Musammat Gaya Dei no such set off was possible unless there had been an assignment of the mortgage money in Musammat Gaya Dei's favour.

The learned Additional Subordinate Judge seems also to have been influenced by the consideration that subsequent to the purchase the municipal taxes in respect of the shop were paid by Badri Narain. This view of the learned Additional Subordinate Judge does not appear to be borne out by the documents on the record. Exhibits 16 to 19 are copies of extracts from Demand and Collection Register of the municipality showing that Badri Narain was paying the taxes in respect of certain premises within the municipality. There is nothing to connect the premises referred to in these documents with the shop in suit. Reliance has been placed upon exhibit 30, which is a copy of an application of Musammat Gaya Dei and of certain resolutions passed by the tax committee and the Municipal Board. If there is anything in this document which can be of help to the plaintiffs it is a note thereon under the signature of one Ram Lautan. There is no evidence to prove this note, and we are unable to treat it as part of the tax committee's resolution. Thus in our opinion the plaintiffs have failed to prove that Badri Narain used to pay the taxes in respect of this shop. It was also pointed out on behalf of the plaintiffs that there was no entry of the name of Musammat Gaya Dei in the Demand and Collection Register. It is not denied that the

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municipal taxes are payable either by the owner or by the occupier. This shop was admittedly let out on rent, and there is nothing to show that the taxes were not paid by the occupier.

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The plaintiffs have also relied on exhibit 24, which is an extract from the Census Register in which the name of Badri Narain is recorded as owner of a house No. 73 occupied by Chunni Lal, tenant. There is no evidence to show the number of the shop in suit. It is no doubt true that Chunni Lal was a tenant of the shop in dispute, but no question was put to him while he was in the witness-box, and no evidence has been given to show that he was not a tenant of any other property belonging to Badri Narain.

Reliance has also been placed on exhibit A-3 which is a *sarkhat* executed by one Anande in respect of the shop in suit in favour of Musammat Gaya Dei. It is pointed out that the name of Gaya Dei in this *sarkhat* appears in different ink from the rest of the document. The inference drawn from this by the lower court is that the space where the name has been written was left blank at the time when the rest of the deed was written out in order to decide later on whether the name of Gaya Dei or of Badri Narain should be entered there. The whole argument is based on conjectures. In any case Gaya Dei being a *pardanashin* lady, and Badri Narain being her husband, even if at any time an idea was entertained of getting the *sarkhat* in the name of Badri Narain, as suggested by the learned Additional Subordinate Judge, though as a matter of fact the idea was never given effect to, it would not in our opinion necessarily make out the transaction to be *benami*.

Lastly there are two circumstances which seem to us to be almost conclusive against the plaintiffs' case. The first of them is that when the plaintiff No. 1 instituted the suit for partition of the property belonging to her husband, she did not include the shop in dispute in that partition (see exhibit A-55, plaint in the partition suit),

As already mentioned the plaintiff No. 1 did not enter the witness-box and no explanation has been given on her behalf for this omission. If the shop really belonged to her husband, a fact which she was in the best position to know, it was to be expected that it should also have been included in her claim for partition with the rest of the properties. The fact of its not being so included strongly supports the defendants' case that the shop did not belong to Badri Narain. Further after the partition suit was decided the plaintiff No. 1, Musammat Tulsha Dei made an application for execution to enforce payment of the costs which had been decreed to her in the partition suit. In her application, exhibit A-39, she applied to get the said costs realized by attachment and sale of the shop in suit. She described it as a shop "owned by the judgment-debtor". This conduct of Musammat Tulsha Dei treating the shop as the property of Musammat Gaya Dei has also been left entirely unexplained. The learned Additional Subordinate Judge has brushed aside this evidence merely with the remark that any admission of Tulsha Dei could not be binding on her daughter and grandson, plaintiffs 2 and 3, who claimed independently of her as reversioners of Badri Narain. Apart from its being an admission it is also relevant as evidence of her conduct and as such affords very important evidence on the question whether Gaya Dei or Badri Narain was the owner of the shop. One more piece of evidence which has not been referred to by the lower court is exhibit A-2, a receipt of the bazar tax. It appears that when any sale transactions in Balrampur take place one-tenth of the sale price has to be paid to the Balrampur estate. Exhibit A-2 shows that Rs.250 were paid on this account by Musammat Gaya Dei. This is also supported by the register of the Balrampur estate, exhibit D. W. 1/1. It is also significant to note that the plaint in the partition suit exhibit A-55 shows that there are no less than thirty items of immovable property which were purchased by Pandit

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Badri Narain between the years 1908 and 1919. All these purchases were made by him in his own name. In the circumstances it is difficult to understand why Badri Narain should have thought of getting this small item of a shop in the name of Gaya Dei and not in his own name. We are therefore unable to accept the suggestion made by the learned Additional Subordinate Judge that the reason why Badri Narain obtained this sale deed in the name of Gaya Dei was that he had the reputation of being corrupt.

The result therefore is that having given our careful consideration to all the evidence and circumstances bearing on this question the plaintiffs have in our opinion failed to establish any sufficient grounds for holding the sale-deed exhibit A-1 to be a *benami* transaction. We accordingly allow the appeal in part, modify the decree of the Court below and dismiss the plaintiffs' claim in respect of the shop in suit. The rest of the decree in respect of the Promissory Notes will stand. The plaintiffs will get their proportionate costs in the lower Court and defendants their proportionate costs in this Court.

Appeal partly allowed.