APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice May Oung.

LECUN
v.
LECUN.*

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Mar. 11.

Advancement, presumption of—Gift of immoveable property by an Anglo-Indian husband in favour of his Anglo-Indian wife—Subsequent repairs and improvements on the property—Presumption as to documents in solemn form—Relevancy of subsequent acts to prove nature of prior transaction.

Where an Anglo-Indian husband made a gift of immoveable property in favour of his wife, also an Anglo-Indian, by a registered deed, *held*, that the presumption is that it was made by way of advancement.

Held also, that where the husband and wife continued to live on the property, the husband incurring expenditure in the making of improvements to the property, the presumption of advancement applies also to the expenditure so incurred.

Held also, that a document executed in solemn form should be presumed primarily to express the intention of the executant according to the tenor thereof and that strong evidence is necessary to prove a different intention.

Held further, that evidence of the subsequent conduct and acts of the parties is admissible to prove that the transaction entered into is not what it purports to be.

Meyappa Chetty and One v. *Maung Ba Bu*, (1910) 3 B.L.T., 62—*referred to.*

Kerwick v. *Kerwick*, (1920) 48 Cal 260—*followed.*

Gopeekrist Gosain v. *Gungapersaud Gosain*, (1854) 6 Moo., I.A., 53; *Moulvie Sayyad Ushur Ali* v. *Mussamat Beebee Ulfaf Fatima*, (1869) 13 Moo., I.A., 232—*distinguished.*

This was an appeal preferred by the Defendant-Appellant against the judgment and decree of the High Court (Rutledge, J.) passed in its Original Civil Jurisdiction in Civil Regular Suit No. 172 of 1923. The facts connected with the appeal appear for purposes of this report in sufficient detail in the judgment reported below.

Ormiston—for the Appellant.

Higinbotham and *Villa*—for the Respondent.

* Civil First Appeal No. 191 of 1923 from the Original Side of this Court in Civil Regular No. 172 of 1923.

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ROBINSON, C.J., and MAY OUNG, J.—This was a suit brought by the plaintiff-respondent, Mrs. Lecun, against her husband defendant-appellant for possession of a house which had been gifted to her by her husband in 1908. It is necessary for the purposes of our decision to set out the facts in some detail.

Appellant was originally in the Public Works Department, but owing to his superior not approving certain measurements in a contract which he had passed, he was dismissed and set up a business on his own account. He obtained a valuable contract from the Burma Rice and Trading Company to erect for them a mill at Bassein. In 1904 he bought a piece of land in Rangoon and for the purchase price or part of it he executed a mortgage on the land in favour of the vendor. In the year 1906-1907 he built a house on part of this land. In the latter year he paid off the vendor's mortgage borrowing money from one Ma Ma Gyi to do so. To her he gave a mortgage on the house and land. He had a dispute with one of his sub-contractors, and on the 6th April 1907 this man filed a suit against him for Rs. 16,000 odd. Appellant then paid in to Court Rs. 5,749 and joined issue as to the balance. The sub-contractor attached the money due to him by the Burma Rice and Trading Company ; but appellant gave security and got the attachment removed. While that suit was pending he married the respondent on the 3rd of June 1908. He alleges that acting under advice he paid off Ma Ma Gyi's mortgage with money that he had, and fearing that the same sub-contractor in execution of the decree that he was likely to get might attach this house, he decided to put it in his wife's name ; and to that end in order to save his property from the risk of attachment he executed a deed of gift dated the 23rd

of June 1908 in favour of his wife. The parties lived in this house and have done so all along until the disputes arose which led to a separation and to the bringing of the present suit. On the 4th of September 1908 part of the site originally bought was sold to Sir A. Jamal by Exhibit C for Rs. 7,500. The deed of sale was executed by the respondent as vendor. Both parties claimed to have taken the purchase money. Two other bits of this land were sold in the same or the next year to Messrs. Burjorjee and Vertannes; but the deeds of conveyance have not been produced; nor have any certified copies of them. It has not been proved whether these two sales took place before the marriage or after, though it seems more than probable that they were after the marriage. There was in 1911 a boundary dispute between Messrs. Lecun and Burjorjee. Appellant naturally negotiated the sales and gave instructions in respect of the boundary dispute. Judgment was delivered in the sub-contractor's suit on the 8th of March 1909 and and a decree passed for Rs. 595 and costs in his favour in addition to the sum paid into Court by appellant. The decree was confirmed on appeal, and the 20th of March 1911 appellant paid the decretal amount. To do this he raised money from his wife's uncle who had been his counsel in the case. The title deeds of the property were handed over to him and pro-notes executed by both the husband and wife for the amount advanced. Those pro-notes have been renewed from time to time; they were last renewed on the 25th of October 1921 for Rs. 13,500.

After living happily together until 1922 various differences arose between the husband and wife. She found letters of a compromising character written by a lady, who had been living with them, to her

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husband. Appellant had apparently been told by this lady that his wife was misconducting herself with one Lambert and he taxed her with it. She strenuously denied it and brought a counter-charge against him with reference to the other lady. On the 26th of July 1922 she left him and went to her mother's house. On the 27th of July there was a meeting between the husband and wife. There appears to have been some sort of settlement arrived at by which appellant was to take his wife back, and she was to execute a document transferring to her children this house or a document by which she was to be trustee for her children. However, on the next day her husband sent Lambert to the house having heard from him a confession of his misconduct with the respondent. He followed and confronted his wife with Lambert. Lambert admitted the misconduct, but his wife denied it, and there was evidently a stormy interview. On the 29th of July respondent wrote a letter to appellant expressing her disappointment that he had not come the previous day and taken her back as he had promised to do on certain conditions, the chief of which was that the children were to have shares in the house. Appellant had had a document prepared for execution by his wife which sets out that the husband was absolutely entitled to the land and buildings the subject of the gift of the 23rd of June 1908 in favour of the wife, and that the property had been held by her in trust for her husband during his life time and upon his death for the benefit of his children. The document then declares the trust as set out above in favour of the husband and three children who were named . . . . . these three to take the property after the husband's death in such shares as may be directed by the will of her husband. Respondent refused

to execute such a document. She would not apparently agree to the allegation that she had all along held the property in trust for her husband, and she did not approve of the house going to the three children then living as she was in the family way, and that child ought also to share. Apparently appellant was not satisfied that he was the father of that child; but, whatever the reasons may be, all these negotiations fell through. On the 17th of August appellant's counsel wrote to her a letter calling upon her to acknowledge that she was merely a benamidar in respect of the property in suit and requesting her to fix a date when she would execute a reconveyance of the property in favour of her husband. No answer was sent to this letter, and on the 7th of February 1923 respondent wrote through her counsel calling upon appellant to deliver possession of the house to her. The present suit was then filed by the wife for possession by ejectment, if necessary, and for mesne profits. Plaintiff-respondent bases her claim on the deed of gift of the 23rd June 1908. She had been in possession of the house, living there with her husband ever since; and it is urged on her behalf that the parties being Anglo-Indians, the same exception to the general rule as regards resulting trusts applied in this case as it would in the case of Europeans under the law as administered by the Court of Chancery at Home. It is urged that the *primâ facie* presumption is that this property was gifted to her by way of advancement; and that the onus lies on the appellant to establish that that was not his intention at the time the deed was executed.

For the appellant it is urged that the general law in India is the same as the general law in England as regards resulting trusts; and that, having regard to the facts as regards the nationality or race,

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domicile and residence of the parties, the presumption of advancement does not apply; but that, on the contrary, the primary presumption is that the gift was made benami without any intention of transferring the beneficial ownership to the respondent.

Reliance is placed on the facts set out at the beginning of this judgment which occurred at the time the deed was executed. Further, reliance is placed on the facts that throughout appellant has been dealing with the property as owner exercising all those rights that he would exercise if he had never ceased to be the beneficial owner of it. Lastly, reliance is placed on the happening on the 26th of July 1922 and the following days.

There is little doubt as to the law in respect of resulting trusts and the presumption of advancement in India. As regards Hindus, the law has been laid down in the case of *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1); and in respect of Mahomedans in the case of *Moulvie Sayyud Uzhur Ali* v. *Mussumat Beebee Ulfaf Fatima* (2). The same rules have been held to apply in the case of Burmans in *Meeyappa Chetty and one* v. *Maung Ba Bu* (3).

As regards this last case we desire to express no opinion at present. It may be necessary to give this question of law further consideration in the case of Burman Buddhists; but the two former cases are decisions by their Lordships of the Privy Council. In the case of Europeans who had been born and had a permanent residence in India, the law has also been laid down by their Lordships of the Privy Council in *Kerwick* v. *Kerwick* (4). Lord Atkinson in delivering the judgment of their Lordships said: "The general rule and principle of the Indian law as to

(1) (1854) 6 Moo., I.A., 53.
(2) (1869) 13 Moo., I.A., 232.
(3) (1910) 3 B.L.T., 62.
(4) (1920) 48 Cal., 260, 10 L. B.R., 335.

resulting trusts differs but little, if at all, from the general rule of English law upon the same subject, but in their Lordships' view it has been established by the decisions in the case of *Gopeekrist Gosain* v. *Gungapersaud Gosain*, *Uzhur Ali* v. *Ulfaf Fatima*, that owing to the widespread and persistent practice which prevails amongst the natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers of it benami for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase money, such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England. The question which of the two principles of law is to be applied to a transaction such as the present which takes place between two persons, born in India of British parents, and who have resided practically all their lives in India is of general importance." It was further stated: "It is a mistake to suppose that according to the cases already cited the determination which rule of law is in any given case to apply in India entirely depended on race, place of birth, domicile or residence. These were not to be treated as being *per se* decisive. What were treated as infinitely more important were the widespread and

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persistent usages and practices of the native inhabitants." Their Lordships then held that the presumption of advancement did apply in the case with which they were dealing. In that case the parties were of pure European descent, though both had been born in India and had resided in the East ever since. Whether the same presumption arises in the case of Anglo-Indians of the descent of the parties in this suit is the first point we have to decide. It is clear that race, place of birth, domicile or residence are all matters to be taken into consideration ; but they are not the only grounds on which a decision must be based and indeed the more important grounds are widespread and persistent usages and practices of executing documents benami to transfer lands to wives or children without any intention of conferring on them the beneficial ownership. Even if the presumption be held to arise, it would be open to the party against whom that presumption is made to rebut it and show what the intention of the donor or transferor was at the time the transfer was made. In *Kerwick* v. *Kerwick*, after examining the facts which are all of the same character as those we have before us in this case, their Lordships held that the husband had rebutted the presumption, and the decision is of the utmost value in dealing with the facts that arise in the present suit.

Appellant's father was a Frenchman and his mother an Anglo-Indian lady ; her father was an Anglo-Indian and her mother a Burmese lady. Respondent's father was an Englishman ; her mother an Anglo-Indian ; and her maternal grandmother a Shan lady. So far, therefore, as the respondent is concerned, and so far as descent governs the matter there is good reason for holding that the presumption of advancement will arise. Appellant must be described as an Anglo-Indian.

Both appellant and respondent were born in Burma; they have always lived here; they were educated here; and they are by religion Roman Catholic. They follow English customs as regards dress and manner of living. No evidence has been given, and we are not prepared to hold that there is any widespread and persistent usage and practice amongst Anglo-Indians in Burma of transferring lands benami in the way there is amongst Hindus and Mahomedans. Some of them may at times resort to such a practice with a fraudulent attempt to save property from the hands of creditors; but we have no ground for holding that there is any such common practice prevailing as a common rule for all general purposes. The rule, therefore, which in our opinion is to be applied in the present case, is that the presumption of advancement arises in this suit. It is a rule which, having regard, to the status of the parties, would be in our opinion a rule of equity and good conscience.

This being our finding the further question remains whether the appellant has succeeded in establishing that, at the time he made this deed of gift in favour of his wife, he had no intention of parting with the beneficial ownership, and that he intended her to be merely a trustee for himself. His own bare statement that this was his intention advances his case little, if at all. It is a statement which he was bound to make and which so vitally affects his interests that it must be received with the utmost caution, and all the more so, as the appellant has shown that he is not the person whose allegations and motives can be readily accepted. Such a statement was held by their Lordships in *Kerwick* v. *Kerwick* to be of little avail, unless he establishes at the same time with reasonable clearness that he had other and different motives for the action he took.

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At the time this deed of gift was made appellant had but one creditor, the sub-contractor, to whom he had to pay at most Rs. 5,000 over and above the amount he had already paid into Court. He had at that time apparently some Rs. 18,000 in cash. The property was mortgaged for an amount practically equal to that sum, and that, when he had to pay the decretal amount, he was able without difficulty to borrow the money from a relation shows that he could have had but little fear of the attachment and sale of the house, if he had still kept it in his own name. This is further shown by the fact that he preferred to use his ready money in redeeming the mortgage. Appellant was at that time a man of about 35 years of age or so. It is clear that he fell much in love with respondant who was then 18 or 19. He gave her jewellery worth, it is said, Rs. 5,000 or thereabouts, but it is urged, that by this deed of gift he deprived himself of every scrap of property he possessed in the world. He had this contract, and he knew that the use and benefit of the house would still be his even if he transferred the real ownership to his wife. It is necessary that the Courts should regard documents executed in a solemn form as primarily expressing the intention of the executant according to their tenor, and it is therefore clearly necessary that ordinarily speaking, evidence should be forthcoming of a strong motive for acting with an intention contrary to that which the document indicates; and in addition to that there is in this particular case a presumption of advancement. We are unable therefore to hold that any such strong motive has been established in this case, as it must be established, if we are to go against the express terms of the document. Moreover, all fear of any action on the part of the sub-contractor had passed away when his decree was satisfied on the 20th of

March 1911. It is not shown that thereafter appellant was in any fear of creditors, or had any motive in allowing the position created by the deed of gift to continue; and yet he never sought for 11 years to alter that position in the slightest degree; and it was not until the trouble arose between his wife and himself that he ever put forward any claim or contested the validity of the deed of gift. It was not an unnatural act on the part of a man marrying a girl very much younger than himself with whom he was infatuated, and it was a right and proper thing for him to have done to make provision for his wife at an early date in their married life. This, we hold, was the motive which led him to execute the deed of gift.

It has been urged that he sold the various strips of land and took the purchase price for his own use, although the money really belonged to his wife. It is urged that he spent a large sum of money, according to him some Rs. 26,000 on additions, improvements and repairs to the house. It is said that he always paid the rates and taxes; that he installed electrict light at his own expense; and that he has throughout exercised acts of ownership, whereas the wife has never done so. In reply, it is urged that it is only acts and conduct at or about the time of the deed of gift that are relevant, and that evidence of subsequent acts and conduct is inadmissible. That may be so in England, but we do not think that this evidence is inadmissible in India, and similar acts were considered by their Lordships in *Kerwick* v. *Kerwick* but we do not think that any of these acts avail to any extent to establish the proposition, the burden of which is on the appellant. He was living happily with his wife in this house, and he spent large sums in repairs and improvements. The ordinary presumption as to those would be that, if the gift

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had been by way of advancement, these expenditures would also have been by way of advancement. His negotiation of the sales of the lands is referred to, but the transfers were executed by his wife ; and it is to be noted that, when money was borrowed to pay off the decree from her uncle, she also executed the promissory note in his favour. Lastly, the events that occurred after she had left appellant's house are relied on. At that time the feelings of the parties towards each other were very embittered, and we are unable to see in their acts and conduct at that time anything that lends great support to the appellant's case. She was charged with adultery, and the alleged adulterer was admitting misconduct. She was anxious to be reconciled to her husband on this account and for the sake of the children. The parties were Roman Catholics and their religion forbade a divorce. She might well agree to execute a document transferring this property for the benefit of the children without being taken, thereby, to admit that she had never had any ownership in it. When Exhibit 4 was put to her, a document whereby her rights in the property were denied, she strenuously refused to execute it.

On a consideration of all the facts and circumstances in this case we hold that the presumption of advancement arises, and that the appellant has failed to rebut that presumption. The decree of the Court below was correct and will be confirmed , and this appeal will stand dismissed with costs throughout. We certify for two counsels. We further direct that this decree be not executed for one month on the appellant undertaking to vacate the premises within that time and provided further that he pays into Court the Rs. 200 per mensem, he was ordered to pay as rent which he has not yet done, within one week.