APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Cunliffe.

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Apl. 8.

MAUNG KYAW PE AND OTHERS
v.
MAUNG KYI.*

Benami *transactions among Burmans—Presumption of advancement if property purchased in the name of wife or child*—Benami *transactions of Burmans different in practice and purpose from those in India.*

After the death of his first wife, a Burman took a mortgage of the land in suit in the names of himself and his two minor children, a son and a daughter. He married again but divorced very soon his second wife and then married the third time. He then took a conveyance of the mortgaged property in the names of himself and his said children by his first wife. Mutation of names followed in the revenue register. After about three years, the father's name disappeared from the register. About four years later the daughter died and the property then stood solely in the name of the son. Six years later the father tried to restore his name in the register, but was opposed by his son. The father brought a suit for a declaration that he was the sole owner of the property and contended that, as in India, there should be no presumption of advancement in favour of his children. The son's defence was that his father put the land in the names of the children in satisfaction of their claim against him, as heirs of their mother, by reason of his remarriages.

Held, that among Hindus and Mohamedans the practice of *benami* transactions was so common and frequent and for no particular reason, without any intention of vesting in the transferee or donee any beneficial interest in the property, that it was a rule of law in India that the person who supplied the purchase-money would ordinarily be regarded the owner; and that no presumption of advancement arose, as in England, if the transfer was in the name of a wife or child. But *benami* transactions among Burmans were neither of indigenous origin nor common and were only resorted to among them either to save a property from imminent risk of attachment and sale by creditors or to hide the real owner's name from Government, if he happened to be a Government servant prohibited from acquiring land within his jurisdiction. Consequently if a Burman bought property in the name of his children, a presumption of advancement for their benefit would arise.

Held on the facts of the case that the father failed to rebut the presumption and to prove his sole ownership.

Gopeekrist v. *Gungapersaud*, 6 Moore's Ind. Ap. 53; *Lecun* v. *Lecun*, 2 Ran. 253; *Ma Gyi* v. *Ma Me*, 4 Ran. 522; *Ma Le* v. *Po Taik*, 3 L.B.R. 245; *Ma On Me* v. *Ma Nyein Kin*, Civil 1st Ap. 36 of 1925, H. C. Ran.; *Maung Tin* v. *Ma Mai Myint*, 11 L.B.R. 83; *Meeyappa Chetty* v. *Ba Bu*, Sp. Civil

* Civil First Appeal No. 109 of 1926 against the judgment of the District Court of Insein in Civil Regular No. 7 of 1925.

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2nd Ap. 208 of 1909, Ch. Ct. L.B. ; *Po Kin* v. *Po Shein*, 4 Ran. 518 ; *Ushur Ali* v. *Mussumat*, 13 M. Ind. Ap. 232—*referred to*.

Ormiston for the appellants.

Keith for the respondent.

HEALD, J.—The respondent Maung Kyi sued his son the appellant Kyaw Pe for a declaration that he is owner of a piece of land which Kyaw Pe has sold or purported to sell to the appellants Maung Kyaw and Ma Hla Gyi, who are husband and wife, the latter being the sister of Kyaw Pe's mother Ma Tok.

Ma Tok was Maung Kyi's first wife and she died about 1901. By her Maung Kyi had two children, namely, Kyaw Pe and a daughter Ma Thein Nyun. After Ma Tok's death Maung Kyi and the two children lived for some years with Ma Tok's mother Ma Hman who was a lady of some wealth and position. While he was living with Ma Hman he took a mortgage of the land in suit in the names of himself and his two small children. That was in 1905. Subsequently he married a second wife, Ma Ngwe, and went to live with her in Rangoon, the children staying on with Ma Hman at Kemmendine. The marriage with Ma Ngwe did not last long and ended, according to Maung Kyi, in a divorce. Maung Kyi then married a third wife Ma Hnin Yi, and apparently went to live at Wataya. Soon after his marriage with Ma Hnin Yi he took from Ma Thin and Maung Sein, who were husband and wife and who were the mortgagors of the land in suit, two conveyances of that land, one being a transfer of the wife's interest in the land and the other a transfer of the husband's interest. Both these conveyances which were made in 1910 and 1911 respectively were taken, like the mortgage, which preceded them, in the names of Maung Kyi and his two children, and the only cash

consideration which purported to be given for them was a sum of Rs. 350 said to be paid to the husband Maung Sein for such interest as he might have in the land. The conveyances were registered and under the Registration Rules would in the ordinary course of official business be reported by the Registration Officer to the Revenue Officer with a view to mutation of names in the revenue registers in accordance with the terms of the conveyances, and under the Revenue Rules mutation would be effected by the Revenue Officer on the Registration Officer's report. Mutation was effected and from 1910-11 to 1913-14 the land stood in the official registers in the names of Maung Kyi, Kyaw Pe and Ma Thein Nyun. In 1913-14 Maung Kyi's name disappeared from the register, and until 1916-17 the land stood in the names of the two children. In 1917-18 Ma Thein Nyun died and thereafter until 1923-24 the land stood in Kyaw Pe's sole name. In 1923-24 Maung Kyi's name was added along with Kyaw Pe's but Kyaw Pe objected to the mutation with the result that his name was restored by order of the Deputy Commissioner who found that the mutation was made without Kyaw Pe's knowledge and consent and was unauthorised.

Maung Kyi's case was that he was sole owner of the land from the time when it was bought, that he took the conveyances in the names of himself and his children for the purposes of excluding his new wife Ma Hnin Yi from any interest in the land so that the two children might inherit it on his death, and that his name was omitted from the registers in 1913-14 without his knowledge or consent and by a mistake on the part of the Revenue Surveyor. He admitted that he knew that the land had been standing in Kyaw Pe's since 1917 and that he took no steps to have mutation of names effected until 1923.

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The defence was of course that Maung Kyi put the land into the names of the two children in satisfaction of their claim to partition of inheritance, which arose by reason of his remarriages, and that the land actually belonged to the children, Ma Thein Nyun's interest in it passing to her brother Kyaw Pe by inheritance on her death.

The Trial Court found that Kyaw Pe failed to prove that the names of the children were inserted in the conveyances as the result of an intention on Maung Kyi's part that the children should be owners of the land, and held that the land belonged to Maung Kyi.

Kyaw Pe and the other two appellants, in whose favour he has recently executed a conveyance of the land, allege in appeal that it was proved that the land was bought by Maung Kyi for the children and that Kyaw Pe was owner of it.

The appeal has been argued mainly on the question whether or not certain rulings, which say in effect that in India no presumption of advancement arises in the case of a purchase of land in the name of a child, are applicable to the conditions existing in Burma. Those rulings proceed on the ground that *benami* transactions in the name of children are so common in India that it would be unsafe to presume advancement from the mere fact that property was put into the name of a child. It is argued on the basis of two recent judgments of this Court that *benami* transactions are not common in Burma, and that therefore in this country a presumption of advancement may be made.

In the case of *Gopeekrist* v. *Gungapersaud* (1), which was decided by their Lordships of the Privy Council in 1854, and in which a Hindu father had taken a

(1) (1854) 6 Moore's Ind. Ap. 53.

conveyance of certain properties which were bought by himself with his own money, in the name of his son, their Lordships observed that *benami* purchases in the names of children, without any intention of advancement, are frequent in India. They, said "it is very much the habit in India to make purchases in the names of others, and, from whatever cause the practice may have arisen, it has existed for a series of years and these transactions are known as '*benamee* transactions.' They are noticed, at least as early as the year 1778."

In 1869 in the case of *Uzhur Ali* v. *Mussumat* (1), where the parties were Mahomedans and the defendant alleged that the property was purchased by him from his own funds *benami* in the names of his wife and son, their Lordships said. "It is not a novel thing in India that that state of things should exist. It has been repeatedly brought before this Committee, and the law relating to it was reviewed in the case of *Gopeekrist Gosain* v. *Gungapersaud Gosain*. Of course we cannot apply to the decision of this case, which is one between Mahommedans, any of the reasons, which in the judgment delivered at this Board in that case are exclusively from Hindoo Law. It is however perfectly clear that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in India as much among Mahommedans as among Hindoos and the judgment in *Gopeekrist Gosain* v. *Gungapersaud Gosain*, and the cases therein referred to are, at all events, authority for the proposition that the criterion of these cases in India is to consider from what source the purchase-money comes, that the presumption is that purchase made with the money of **A** in the name of **B** is for the benefit of **A**; and

(1) (1869) 13 Moore's Ind. Ap. 232.

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that from the purchase by a father, whether Mahommedan or Hindoo, in the name of the son, you are not at liberty to draw the presumption, which the English law would draw, of an advancement in favour of that son."

In 1910 a Bench of the Chief Court of Lower Burma in the case of *Meeyappa Chetty* v. *Ba Bu* (1), in which property had been purchased by a Burmese father with his own money and the conveyance had been taken in the name of the son, who was about five years of age, referred to the long line of decisions as to the presumption to be made in India when a person purchases property and takes a conveyance in the name of a relation, and said "as far back as 1854 it was decided by the Privy Council that the presumption made in English law that the purchase in such a case was for the benefit and advancement of the person to whom the conveyance is made does not apply in India, and that the presumption in India is that the purchase is *benami* and that the burden lies on the person to whom the conveyance has been made of proving that he is entitled to and beneficially interested in the property." Applying that rule the Bench dismissed the son's claim to the property.

That decision was mentioned in this Court in 1924 in the case of *Lecun* v. *Lecun* (2), which was a case arising between Anglo-Indians, born and domiciled in Burma, and in which the husband had conveyed certain property to the wife. The learned Judges said : "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* ; and in respect of Mohamedans in the case of

(1) Special Civil 2nd Appeal No. 268 of 1909. (2) (1924) 2 Rau. 253.

Moulvie Sayyud Uzhur Ali v. *Musstumat Bee Bee Ulfaf Fatima*. The same rules have been held to apply in the case of Burmans in *Meeyappa Chetty and one* v. *Maung Ba Bu*.

"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*. Lord Atkinson in delivering the judgment of their Lordships said: "The general rule and principle of the Indian law as to 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 Mahommedan 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

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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 persistent usages and practices of the native inhabitants." The learned Judges went on to say: "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 Mohammedans. 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 case."

Early in 1926 in the case of *Ma On Me* v. *Ma Nyein Kin* (1), a Bench of this Court in dealing with a case in which the parties were Burmans and where it was alleged that a transaction was *benami* said: "The burden of proving that the transaction was not what

(1) Civil 1st Appeal No. 36 of 1925.

it purported to be lies on the person alleging it. The prevalence of *benami* transactions, if they do prevail in Burma to the same extent as in India, does not relieve the person who challenges the plain effect of a transaction, from establishing his allegation by satisfactory proof." It may be noted that the same view as to the burden of proof has since been taken by their Lordships of the Privy Council in the case of *Po Kin* v. *Po Shein* (1).

In a later case in the same year (1926) namely the case of *Ma Gyi* v. *Ma Me* (2), another Bench of this Court considered the prevalence of *benami* transactions in Burma independently, and said : " It has been urged that in cases such as this there is a presumption that the gift was *benami* and numerous authorities have been cited on this subject and also on the subject of advancement. The question of advancement does not arise, and the decisions as to *benami* transaction give us comparatively little help because all relate to transactions between Hindus and Mahommedans. Among Burmans the practice of *benami* is not indigenous, and though it has to some considerable extent taken root it is yet not so common as among natives of India proper. The device is very seldom employed except as a means of defeating or delaying the immediately impending claim of some creditor or other person. In view of these considerations we think that there is no presumption that the gift now in question was *benami*. We think, moreover, that more proof of its *benami* nature is required than would be necessary were the parties concerned Hindus or Mahommedans."

With the statement that the practice of *benami* is not indigenous and is comparatively uncommon among Burmans I entirely agree. To the best of my

(1) (1926) 4 Ran. 518. (2) (1926) 4 Ran. 522.

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knowledge and belief resort is had to *benami* transactions among Burmans in two classes of cases only (1) where there is an imminent risk of the attachment and sale of the property at the instance of a creditor or creditors, and (2) where Subordinate Government servants who are prohibited or think that they are prohibited by the rules of their service from holding lands within the territorial limits of their jurisdiction put the lands into the names of their relatives in order to hide from Government the fact that they are acquiring property. The cases of *Maung Tin* v. *Ma Mai Myint* (1) and *Ma Le* v. *Po Taik* (2), are instances of the first class of cases and the transaction set up in the case of *Po Kin* v. *Po Shein* belonged to the second class. So far as I am aware *benami* transactions are never made among Burmans except for purposes of fraud, and I have no doubt at all that they are much less common in this country than they are in India proper, where they are supposed to be customary for other reasons.

If the practice of *benami* is not common in Burma it would seem to follow from the judgments of their Lordships of the Privy Council which have been cited above, that even in cases where the money with which the property was bought was provided by the person who claims the beneficial ownership the presumption that the purchase taken in the name of the ostensible owner of the legal title, was a *benami* transaction is weaker in Burma than in other parts of India and that in Burma it may in particular cases be too weak to displace the presumption of advancement which would arise in the absence of a presumption that the transaction was *benami*.

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(1) (1921) 11 L.B.R. 83. (2) (1906) 3 L.B.R. 245.

His Lordship held that circumstances raised the presumption that the mortgage money belonged jointly to Maung Kyi and his two children by Ma Tok and the subsequent conveyances of the property made it the property of the marriage of Maung Kyi and Ma Tok, and this presumption Maung Kyi never rebutted. The mutation of names in the revenue register could not have been made by mistake or without the knowledge of Maung Kyi. The revenue surveyor's evidence was that Maung Kyi himself asked for the mutation of names. Ma Tok left jewellery and money and her mother may well have induced Maung Kyi to make provision for the children ere he married again. The inference was that Maung Kyi put the land in the names of his two children in 1913-14 in satisfaction of the claim they had against him, as heirs of their mother, by reason of his remarriages, and that he intended that they should be owners of it. His Lordship reversed the judgment and decree of the lower Court and dismissed the respondent's suit with costs.

Mr. Justice Cunliffe concurred.