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the evidence of these persons is, it is impossible to say that they are entitled to get back all the money they borrowed on this mortgage from the estate, when it is quite possible that they spent the whole proceeds themselves.

For these reasons I consider that the judgment of the lower Court must be supported. I would therefore dismiss this appeal with costs.

MYA BU, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Chari.

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July 18.

MA SA
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MA SEIN NU AND ANOTHER.*

Burden of proof—Transaction on the face of it operative as a transfer of property not intended to be so—Benami *transactions among Burmans—Error of law vitiating a judgment—High Court's power to consider the whole case on second appeal.*

The burden of showing that a transaction which on the face of it is operative as a transfer of property was not intended so to operate is on the person alleging it. Amongst Burmans there is no prevalent usage of purchase of property without any rhyme or reason, as among Hindus and Mohamadans in the name of the wife or child, consequently there is no presumption of *benami* in case of a Burmese husband or father. The latter cannot prove a transaction to be *benami* by showing merely that he advanced the purchase money.

Ma On Pe v. *Ma Nyein Kin*, Civil 1st Appeal No. 36 of 1925. H. C Ran.; *Maung Kyaw Pe* v. *Maung Kyi*, 6 Ran. 203, *Maung Po Kin* v. *Maung Po Shein*, 4 Ran. 203.—*referred to.*

When there is an error of law which vitiates a judgment, the High Court is not confined to a consideration of the particular error which vitiates the judgment but the whole case is open for consideration.

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* Civil Second Appeal No. 99 of 1929, from the judgment of the District Court of Thatôn in Civil Appeal No. 126 of 1928.

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Tun Aung for the appellant.

Ko Ko for the respondents.

CHARI, J.—The plaintiff in this case, who is the respondent in this Court, filed a suit against the defendant Ma Sa for declaration and recovery of possession of a piece of paddy land and for cancellation of a registered deed of sale in the following circumstances.

The plaintiff Ma Sein Nu was the wife of Maung Pan Byu (now deceased). Maung Pan Byu was the son of Ma Sa and U Khe. U Khe is dead. When Maung Pan Byu was 14 or 15 years old, the old couple Ma Sa and her husband U Khe bought a piece of paddy land, which is now in dispute, in the name of their son Maung Pan Byu. They had at the time other children also. The land was being assessed in the name of Maung Pan Byu until 1925-26. In the year 1925, when U Khe was alive, Maung Pan Byu purported to convey the land to his parents for an alleged consideration of Rs. 500. It is admitted that no consideration was paid to Maung Pan Byu and the defendant's case is that the land was originally purchased in the name of Maung Pan Byu without any intention that he should be the beneficial owner of the property and that later he conveyed the property to his parents who were the actual owners.

The question therefore before the lower Court resolved itself mainly into whether the property was purchased by the old couple in Maung Pan Byu's name as an advancement to their son Maung Pan Byu, or whether it was merely put in his name without any intention of conferring upon him the beneficial ownership. The lower Court decided in the plaintiff's favour and gave a decree as prayed.

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The judgment was confirmed by the lower appellate Court and hence this second appeal.

Under section 100 of the Civil Procedure Code, a second appeal lies only on the grounds (*a*) that the decision is contrary to law or to some usage having the force of law ; (*b*) that the decision has failed to determine some material issue of law or usage having the force of law ; (*c*) or a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

It was argued before me that the finding by the trial Court that the original transaction was not a *benami* transaction, but was intended to confer ownership on the son, is a finding of fact and that as both the Courts are clear in their finding, no appeal lies to this Court under section 100, Civil Procedure Code. The learned advocate on both sides cited a number of authorities, in some of which it was held that a question of intention is a question of fact, while in others it was held that a question is one of law. In the case of *Har Parshad* v. *Bhagat Singh* (1), the question arose under section 46 (1) of the Provincial Insolvency Act III of 1907, whether the finding that a person made a transfer of his property with intent to defeat or delay his creditors was a question of law or fact. All the cases are cited therein and some of them are explained. The Punjab Court decided in favour of the proposition that the question of intention is a question of fact. This position, if it were necessary, I would have accepted because the question of a man's state of mind is a question of fact ; but in this case, it is unnecessary to decide this particular

(1) (1916) Punjab Record, Vol. LI, No. 102, p. 313.

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question, because there is an obvious error of law which vitiates the judgment. Both the Courts have held that the transfer by Maung Pan Byu of the property to his parents for an ostensible consideration of Rs. 500 was made with intent to defeat the rights of his wife. There is absolutely no evidence on this point and it was merely an inference from the admitted fact that no consideration was paid.

The Courts assumed that Maung Pan Byu was the absolute owner and since he had transferred the property to his parents and taken no money for it, they came to the conclusion that the transfer was made with intent to defeat the wife's right. They failed to see that even assuming Maung Pan Byu to be the owner of the property, there was nothing to prevent a son making a gift to his parents and that very often gifts are made in the form of conveyance for consideration, but no consideration is paid.

It is true that the finding of the Lower Courts about the validity of the transfer may be supported on the Full Bench ruling in *Ma Paing's* case, because a husband has no power to make a gift of property without his wife's consent, see *U Po U* v. *Ma Tok Kyi* (1). The Lower Courts did not decide the case on this point and on the point on which they did decide, they were wrong and I have jurisdiction to entertain this appeal. When there is an error of law which vitiates the judgment, the High Court is not confined to a consideration of the particular error which vitiates the judgment but the whole case is open for consideration.

Turning to the question as to whether the transaction was *benami* or an advancement, it is necessary to consider a recent ruling by a Bench of

(1) (1929) 7 Ran. 374.

this Court reported as *Maung Kyaw Pe and others* v. *Maung Kyi* (1). The summary of the ruling in the head note that if a Burman had property in the name of his child, a presumption of advancement of the benefit would arise, does not exactly reproduce the effect of that ruling. To consider what that ruling actually decided, a little explanation is necessary.

It was held in *Ma On Pe* v. *Ma Nyein Kin* (2) that the burden of showing that a transaction which on the face of it is operative as a transfer of property was not intended so to operate is on the person alleging it, that is, the plaintiff in this case if he challenges the transaction.

This is the view of the burden of proof which was taken by their Lordships of the Privy Council in the case of *Maung Po Kin and another* v. *Maung Po Shein* (3). This question of burden of proof is not affected by the prevalence or otherwise of *benami* transactions in a country. When once, however, the person who alleged that a transaction is *benami* proves that he paid the purchase money, the law so far as Hindus and Mohamedans are concerned raises a presumption that a purchase in the name of a son or wife is a *benami* transaction. In English law, on the other hand, a purchase made in the name of a child or wife raises a contrary presumption, namely, that it was intended as a provision for the wife or child. These persumptions are not due to any peculiarity of the laws of the country, but are merely a judicial recognition of the well-known usage of the people. In India it is quite common for a person to buy property in the name of his child or wife without any particular object or motive. In England, on the

(1) (1928) 6 Ran. 203. (2) Civil First Appeal No. 36 of 1925.
(3) (1926) 4 Ran. 518.

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other hand, when a person buys property in the name of his child or wife, in the vast majority of cases it is because he intends to make provisions for his wife or child. That this is the ground of the presumption is quite clear from the fact that even in English law property purchased in the name of a stranger raises no such presumption and the person in whose name the property is purchased holds in trust for the person who advanced the purchase money. In Burma, on the other hand, as pointed out in the ruling referred to and certain other rulings, there is no prevalent usage of purchase of property without any rhyme or reason in the name of the wife or child; but there are many occasions where property is purchased in the name of a wife or child with some particular object or motive. When therefore a Burman husband or father who has purchased property in the name of his wife and child produces evidence that he advanced the purchase money, he does not stand in the position of a Hindu or Mohamedan, in whose cases the law raises a presumption of *benami*. He has to show further with what particular object or motive he purchased the land, before the Court can decide whether the property purchased was a *benami* transaction or not. This is all that was intended to be laid down in that ruling. This is clear from the last paragraph of the judgment which appears in page 212 of the report.

Turning to the facts of this case, when the property was purchased the person in whose name it was purchased was a boy at the time. He admittedly did not advance the money which was actually advanced by his parents. A presumption of advancement in his favour is countered by the fact that there were a number of other children for whom no provision was made by the parents. The

question then for consideration is whether the course taken by the parents referred to in the judgment supports any presumption that the purchase in Maung Pan Byu's name was intended as an advancement for him.

The evidence on this point is that Maung Pan Byu was cultivating the land for a long time. This is quite consistent with the ownership of the parents because he is working the paddy fields of his parents. Moreover, he also cultivated paddy fields of his parents other than the one in dispute.

The next point is that tax was being paid in Maung Pan Byu's name right through. This is nothing whatever because since the property is in Maung Pan Byu's name his parents would naturally pay the tax in his name. There is some evidence that at Maung Pan Byu's marriage his parents stated that he (Maung Pan Byu) was the owner of a piece of land. It is unnecessary to discuss this evidence at any length which to my mind is not very convincing, but assuming that Maung Pan Byu's parents made such a statement, namely, that he was the owner of a piece of paddy land, it cannot be read as an implied recognition of Maung Pan Byu's ownership of this piece of land. Such a declaration is too weak to raise any inference that the boy was intended to be a beneficial owner of the piece of land. These are the points against the case of the defendant and she in her evidence states that the property was purchased in the name of Maung Pan Byu because an astrologer told appellant that no paddy land should be accepted in their own name. This strikes me as being a very likely explanation. It must be remembered that the parties are Taungthus, who are very superstitious and if an astrologer tells them what to do, I have not the

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least doubt that they would act upon the advice of the astrologer.

In the judgments of the Lower Courts, this was considered to be an unlikely explanation and it was asked why, then, should the property be put in Maung Pan Byu's name and not in that of any other children, but it has to be put in some child's name.

From a consideration of the whole of the evidence, I have come to the conclusion that the defendant Ma Sa has made out a case that the original transaction was *benami* and that the property was put in Maung Pan Byu's name without any intention of conferring beneficial ownership upon him. If that is so, no question of the validity of the transfer by Maung Pan Byu to his parents arises, because Maung Pan Byu is only putting in his parent's names what already was their own property.

For these reasons, I set aside the judgment and decree of the lower appellate Court and dismiss the plaintiff's suit with costs in favour of the defendant-appellant in all three Courts.