FULL BENCH (CIVIL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Baguley, Mr. Justice Mosely, Mr. Justice Ba U, and Mr. Justice Dunkley.

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Mar. 11.

MAUNG TUN PE
v.
B. K. HALDAR AND OTHERS.*

"Intended Advancement"—Conveyance in the name of one person, consideration paid by another—Presumption of law—English rule of equity—Purchase by a father in the name of his child—Practice of purchasing in the name of a child in India and Burma—Doctrine of advancement opposed to Burmese ideas—Benami *transactions—Resulting trust.*

Where property is conveyed to *A* in his own name by an appropriate legal transfer, and no further information is available in connection with the transaction, the title to the property will be treated as having passed to *A*. On the other hand where property is conveyed to *A*, but the purchase price is paid by *B*, alike in India and in England the *primâ facie* inference is that there is a resulting trust in favour of *B* and that he and not *A* is the real owner of the property. The presumption, however, is rebuttable.

In England so seldom would a father purchase property in the name of his child with any other motive or intention than that of benefiting the child that a rule of equity has been evolved that where a father has purchased property in the name of his child a *primâ facie* presumption arises that in so doing the father intended that the conveyance should be for the benefit of the child. This is known as the doctrine of "intended advancement."

The social conditions prevailing in Burma would not justify the Court in holding that this doctrine forms part of the law that runs in Burma. The practice of purchasing property in the name of a person other than the real purchaser is not common in Burma as it is in India, although transactions of this nature are sometimes carried out in Burma. There may be many motives for doing so, but the idea of advancement is not in consonance with either the sentiments or the practice of Burmans, and would affect their law of inheritance. Rarely would a Burmese parent take a conveyance of property in the name of his child with a view to making a gift of it to the child. *Gopeekrist Gosain* v. *Gungapersaud Gosain*, 6 Moo. I.A. 53—*followed.*

To speak of a *benami* gift is a contradiction in terms; either there is a gift in which case the donee obtains a good title, or there is no valid gift in which case the property does not pass from the donor to the donee. The term "benami" is not equivalent to "not genuine." A *benami* transaction is a genuine transaction legally enforceable, and gives rise to a resulting trust.

Observations in *Ma Gyi* v. *Ma Me*, I.L.R. 4 Ran. 522; *Maung Kyaw Pe* v. *Maung Kyi*, I.L.R. 6 Ran. 203; *Ma Sa* v. *Ma Sein Nu*, I.L.R. 7 Ran. 751 dissented from.

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* Letters Patent Appeals Nos. 2 and 3 of 1935 arising out of Special Civil Second Appeals Nos. 28 and 29 of 1934 of this Court.

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Chowdhury for the appellant. The presumption of intended advancement in favour of a son or daughter by the father who purchases property in their names is not opposed to the spirit of Burmese customary law. S. 77 of U Gaung's Digest lends support to the view that a father can provide for his children in his life-time. The doctrine is based upon equitable considerations, and there is no reason why it should not be applied in Burma. The law relating to *benami* transactions has not been extended to Burma, but this is no reason why the doctrine of advancement should not be extended to this country. The fact that the latter doctrine has not been applied in India is immaterial because each country has its own customs.

Meeyappa Chetty v. *Maung Ba Bu* (1); *Nga Tin Gyi* v. *Nga Twe Aung* (2); *Kerwick* v. *Kerwick* (3); *Leeun* v. *Leeun* (4); *Maung Po Kin* v. *Maung Po Shein* (5); *Ma Gyi* v. *Ma Me* (6); *Maung Kyaw Pe* v. *Maung Kyi* (7); *Ma Sa* v. *Ma Sein Nu* (8).

Hay (with him *P. K. Basu*) for the respondents. The cases of *Maung Kyaw Pe* v. *Maung Kyi* and *Ma Gyi* v. *Ma Me* had nothing to do with the presumption of advancement; they were cases of gift.

The general rule of law is that where a person purchases property in the name of another there is a resulting trust in favour of the purchaser. This is what is known as a *benami* transaction in India. Where a father or husband purchased property in the name of a child or wife English law went further and raised a presumption of advancement in favour of the child or wife, a presumption which could be rebutted.

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(1) 3 B.L.T. 62.
(2) 9 B.L.T. 35.
(3) 47 I.A. 275.
(4) I.L.R. 2 Ran. 253.
(5) I.L.R. 4 Ran. 518.
(6) I.L.R. 4 Ran. 522.
(7) I.L.R. 6 Ran. 751.
(8) I.L.R. 7 Ran. 751.

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In *Gopeekrist* v. *Gungapersaud* (1) the Privy Council animadverted on this doctrine as not being based upon natural justice, and refused to extend it to Hindus. See also *Moulvie Sayyud* v. *Mussumat Fatima* (2); *Guran Ditta* v. *Ram Ditta* (3).

To apply the doctrine of advancement to Burmese Buddhist society would be to upset their laws of inheritance and the distribution of property. In Burma the husband and wife own property as tenants in common, and have equal rights in certain properties. If the Court were to apply this doctrine to them the couple will have to be regarded as one person in the eye of the law because there is no presumption of advancement in the case of a mother purchasing property in the name of her son. Further, where there is an "advancement" to the wife of property purchased by the husband she will hold part of the property in her own right and the other part under this presumption. On the wife's death, if the husband survives, the property of the wife will come back to him though in a diminished proportion. This illustrates the difficulty of applying the doctrine in Burma. Further, children according to Burmese customary law normally share alike. This presumption, if applied, would have the effect of preferring one child to another.

The presumption is based upon custom. The question therefore resolves itself into this, namely, whether the practice of providing for children in this manner is so common amongst Burmán Buddhists that the presumption should be drawn in this country also. The evidence is all the other way. Even *benami* transactions are not so common here as they are in India.

(1) 6 M.I.A. 53, 76. (2) 13 M.I.A. 232.
(3) 55 I.A. 235.

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PAGE, C.J.—The two cases out of which the present appeals arise were heard in the Subdivisional Court of Pyinmana. In the first case the plaintiff claimed a declaration that he was the owner of the property in suit, and that certain transfers by way of mortgage and conveyance to the 1st defendant which were made by his father did not affect his interest in the property. The plaintiff is the eldest son of U Po Ka and Ma Mya We. In the second case a daughter of U Po Ka and Ma Mya We and a younger son claimed similar relief in respect of other property that had also been mortgaged and afterwards sold to the 1st defendant.

In each case the suit was dismissed, and the appeal from the decree passed in favour of the defendant was dismissed by the District Court of Pyinmana and by my brother Mackney J. on second appeal to this Court. The cases now come before this Bench because a certificate granting leave to appeal in each case was granted by Mackney J.

Now, the plaintiffs respectively claimed that in 1919 and in 1920 U Po Ka and Ma Mya We had purchased the property in suit with their own money, but had taken the conveyance in the first case in their own names and also in the name of their eldest son Tun Pe, and in the second case also in the name of their daughter and younger son who are the plaintiffs in that case. In these circumstances the plaintiffs pray in aid what is known as the doctrine of intended advancement, and the question that arises is whether that doctrine operates in Burma in connection with transactions in which property is purchased by a father, or a father and mother, and in the conveyance the name or names of their children are inserted as transferees.

The law upon the subject, in my opinion, may be enunciated as follows. Where property is conveyed to *A* in his own name by an appropriate legal transfer,

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and no further information is available in connection with the transaction, the title to the property will be treated as having passed to *A* who is stated in the conveyance to be the transferee. On the other hand if it is ascertained that, although the property was conveyed to *A* in his own name, the purchase price was paid by *B* different considerations arise; and, in my opinion, alike in India and in England the natural and reasonable *primâ facie* inference to be drawn is that the real owner of the property is *B* and not *A*; for it is to be presumed in such circumstances, although of course the presumption is rebuttable, that *B* when he paid the purchase price intended to buy the property for himself. In legal *parlance* the effect of such a transaction is that a resulting trust is created in favour of *B*.

Now, in England it so seldom happens that a father purchases property in the name of his child with any other motive or intention than that of benefiting the child that a rule of equity was evolved whereby in a case in which a father has purchased property in the name of his child a *primâ facie* presumption arises that in so doing the father intended that the conveyance should be for the benefit of the child. That is what is known as the doctrine of "intended advancement." The question that falls for determination in the present appeals is whether in similar circumstances in Burma where the parties concerned are Burmans the doctrine of advancement is to be applied as forming part of the law of the land. In this connection the following observations of Knight Bruce L.J. as long ago as 1854 in *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1) appear to me to be apposite:

"In the present instance there is no question but that all the money was provided by Rogoram Gosain; that is indisput-

(1) (1854) 6 Moo. I.A. 53, at p. 74.

able. I do not allude now to whether the money was the joint property of Rogeram Gosain and his brother. It is clear it was not the money of the individual in whose name the purchase was effected. If then the person in whose name the purchase was effected had been a stranger in blood, or only a distant relative, no question could have arisen ; he would have been *primâ facie* a trustee, and if he desired to contend that the *primâ facie* character of the transaction was not its real character, the burthen would have rested on him ; but the individual in whose name the present purchase was effected was the son, and at that time the only son, of the person who made the purchase, and whose money it was, and it has been contended that that circumstance changes the presumption, and that what would be the presumption in the case of a stranger does not exist between father and son ; that the presumption is advancement, and that, therefore, the burthen of proof is shifted. Now, on this, as far as their Lordships can learn, there is no authority in Indian law, no distinct case, or *dictum*, establishing or recognising such a principle, or such a rule. It is clear that in the case of a stranger the presumption is in favour of its being a *benamee* transaction, that is a trust ; but it is clear also that in this country, where the person in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different ; and it is said that that ought to be deemed the law of India also, not because it is the law of England, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of India. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris*. Probable as it may be that a man may wish to provide for his son to a certain extent, and though it may be his duty to do so, yet there are other considerations belonging to the subject ; among others, a man may object to making his child independent of him in his lifetime, placing him in such a position as to enable him to leave his father's house and to die, leaving infant heirs, thus putting the property out of the control of the father. Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the

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name of another, to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances; but in India there is what would make it particularly objectionable, namely, the impropriety or immorality of making an unequal division of property among children. This might be more striking where there were more sons than one; but if the objection exists, it does not become less where there is only one son, for the father may have others, and in such a case the same objectionable consequences would follow as where several sons were in being."

These cases, therefore, depend upon whether we are prepared to hold, having regard to the practice and customs of Burmans, that the doctrine of intended advancement is to be treated in justice, equity and good conscience as being part of the law in Burma. I have the advantage on this appeal of sitting with colleagues who have had long experience of the ways and customs of Burmans, and I am indebted to them for information which perforce is not open to me. We are all firmly of opinion that the social conditions prevailing in Burma would not justify the Court in holding that the doctrine of intended advancement forms part of the law of the land. In our opinion the practice of purchasing property in the name of a person other than the real purchaser is not common in Burma as it is in India. But of course transactions of this nature are sometimes carried through in Burma. There are many motives, however, which may operate on the mind of the real purchaser in having recourse to this device. It is sometimes stated, with all respect without any justification as I understand the matter, that persons in India and in Burma purchase property in the name of some other person for no reason. If I may speak from my limited experience of India and Burma that is not so. There is always

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some underlying motive which induces the purchaser to resort to this practice. It often happens that an Indian, whether he is a Hindu or a Mohamedan, may desire to purchase property in the name of a third person, whether it be a stranger or his own wife or child, merely because he does not want it to be mooted abroad how much property he possesses. For that reason he is prepared, although a wealthy man, to see his property standing in the name of some person other than himself. Or he may act in this way for some sinister motive. He may wish to defeat or delay his creditors, or to hoodwink the Income-tax authorities. Again, he may be advised by some spiritual *mentor* that it would be expedient to adopt this method of taking a transfer of property. Or he may wish to make a gift, which is to operate either at once or at his death by way of testamentary disposition. These are some, but by no means all, of the motives which may operate upon the mind of the real purchaser of the property. We respectfully agree with the difficulties that would attend the inclusion of the doctrine of intended advancement in the law of India to which Knight Bruce L.J. referred in *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1), and we think that there are special reasons in Burma why such a principle should not be held to be part of the law of the land. The doctrine, in our opinion, is not in consonance with either the sentiments or the practice of Burmans. A Burmese Buddhist is entitled, with or without the collaboration of his wife as the case may be, to dispose of his property during his lifetime as seems best to him by way of gift or otherwise. And we think that, according to the practice

(1) (1854) 6 Moo. I.A. 53.

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and sentiments of Burmans, a father does not normally during his life-time take a conveyance in the name of one of his children for the purpose of giving that child a beneficial interest in the property which is the subject matter of the conveyance. No doubt a father may sometimes wish to make a gift in this way to one of his children, but speaking generally a Burmese father is not disposed, we think, to discriminate between his children whether they are boys or girls by handing over property during his life-time to one of them, and thus to alter the rights which in the event of his re-marriage or death would accrue to his children. Of course he may wish to do so in certain circumstances, but in order that the appellants should succeed in these appeals it is necessary for them to satisfy us that in cases where a father purchases property in the name of his child the proportion of such cases in which it is the intention of the father thereby to benefit the child is so great that the Court ought to presume in all such cases an intention to advance the child. The learned advocate for the respondents pointed out that in Burma, having regard to the law that governs the relations between a husband and his wife, special difficulties would arise if the doctrine of intended advancement was applied in its full rigour as it is in England. We are satisfied and hold that according to the customs and practice of the Burmans it would not be justifiable or legitimate for the Court to lay down that the doctrine of intended advancement forms part of the law that runs in Burma.

Certain authorities to the contrary have been brought to our notice. In particular *Ma Gyi* v. *Ma Me and five others* (1), *Maung Kyaw Pe and others*

(1) (1926) I.L.R. 4 Ran. 522.

v. *Maung Kyi* (1) and *Ma Sa* v. *Ma Sein Nu and another* (2). If we may, with great respect, comment upon the view expressed by the learned Judges who took part in these decisions it appears to us that in those cases the term *benami* was not always used in its strict sense ; for instance, it seems to me that to speak of a *benami* gift is a contradiction in terms ; for either there was a gift in which case the donee obtained the title to the property, or there was not a genuine or valid gift, and if that was the case the property never passed from the donor to the donee. We respectfully think that care should be taken not to regard the term "*benami*" as being equivalent to "not genuine." A *benami* transaction is a perfectly genuine transaction which is legally enforceable, and we think that if the real meaning of *benami*, which for the purpose in hand has the same effect as a resulting trust, had steadily been borne in mind the view expressed by the learned Judges in those cases that the doctrine of intended advancement applies to transactions between Burmans might not have been taken. In our opinion, in so far as the observations of the learned Judges in those cases conflict with the view that we are now expressing upon this subject, they must be taken as not correctly stating the law, and cannot be relied on as authorities in future.

Now, applying the law that we have enunciated to the present case, in our opinion the appeals cannot be sustained. The learned advocate for the appellants contended that the cases ought to be re-tried because the learned trial Judge and the learned Judges who heard the appeals had misdirected

(1) (1927) I.L.R. 6 Ran. 203. (2) (1929) I.L.R. 7 Ran. 751

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themselves as to where the burden of proof lay. The learned Subdivisional Judge of Pyinmana at the trial took the view, with which we respectfully agree, that the doctrine of intended advancement was not applicable in the circumstances of the case, and he held that the burden was upon the plaintiffs in each case to prove that the conveyances, which *primâ facie* must be presumed to have been made for the benefit of the real purchaser, was in fact intended to operate solely for his or their benefit. For the reasons that we have given we think that such a direction was correct, and that in each case it was a question of fact whether the property was bought by the real purchaser for the benefit of the ostensible transferee or not. The learned trial Judge further held that, even assuming that the doctrine of intended advancement applied, upon the facts it was rebutted. This finding of the learned trial Judge was affirmed both by the District Court of Pyinmana and by my brother Mackney on second appeal to this Court. In so far as the appeals turn upon the question of law, whether at the trial the burden had not wrongly been placed upon the plaintiff when it ought to have been put upon the 1st defendant, in our opinion the contention of the learned advocate on behalf of the appellants cannot be accepted. In so far as the appeals depend upon issues of fact those issues have been determined by three Courts in a manner adverse to the appellants. It is common ground that there was evidence to justify the findings of the trial Court and the District Court upon these issues of fact, and in our opinion neither in second appeal nor upon the further appeal to this Bench was it open to this Court to permit these issues of fact to be reagitated.

These appeals, therefore, fail both upon law and upon the facts, and must be dismissed with costs. There will be one set of costs which must be paid by the appellants in each case.

BAGULEY, J.—I agree.

MOSELY, J.—I agree.

BA U, J.—I agree.

DUNKLEY, J.—I have had the advantage of reading the judgment of my Lord the Chief Justice, and I am in agreement with his decision and the grounds on which it is based. With all due respect, in *Maung Kyaw Pe and others* v. *Maung Kyi* (1) and *Ma Sa* v. *Ma Sein Nu and another* (2) the unfortunate use of the word "*benami*" to describe the creation of a resulting trust appears to have obscured the fact that it merely lays down what is the ordinary law. A *benami* transaction is on the face of it a valid and proper transaction, but in the course of long usage a stigma of fraud has become attached to the use of the word. The consequence in the above cases was that the learned Judges assumed that both the principle of *benami* and the doctrine of advancement stood on the same footing, namely, as exceptions to an ordinary principle of law. When a conveyance is taken in the name of one person and the consideration therefor is provided by another it is the general rule of law that there is a resulting trust in favour of the latter who is the beneficial owner of the property, and the question now for consideration is whether there is sufficient reason, in regard to such transactions among Burmese

(1) (1927) I.L.R. 6 Ran. 203. (2) (1929) I.L.R. 7 Ran. 751.

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Buddhists, to superimpose upon this rule of law, as an exception thereto, the English doctrine of intended advancement. There are many reasons which actuate Burmans in taking conveyances of property in the names of their children, or in including the names of their children with their own as purchasers, and the intended benefit of the children is only one of these, and in my experience is by no means the preponderant reason. Consequently there is no ground for engrafting this exception on to the ordinary law in Burma.

FULL BENCH (CIVIL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Ba U.

1936

Mar. 23.

IN RE ANNAMALAY CHETTIAR

v.

R. K. BANNERJEE (RECEIVER).*

Insolvency—Effect of order of annulment—Provincial Insolvency Act (V of 1920), s. 37 (1), Object of—Opportunity for creditors to attach debtor's property—Property vesting in an appointee—Property belongs to debtor—Possession by appointee on behalf of debtor—Creditors' remedy—Appointee, no power to distribute assets among creditors.

Except where there is an express provision in that behalf the effect of an order annulling an order of adjudication is that there is no longer an insolvent before the Court, and the Court, subject to s. 37 of the Provincial Insolvency Act, is no longer entitled to pass orders in respect of the debtor's estate in its insolvency jurisdiction. Apart from the Insolvency Act the Court has no jurisdiction, nor has a receiver or any other person the right to dispose of the debtor's property except in accordance with the ordinary civil law.

The object of the legislature in enacting s. 37 was to put a brake upon the ex-insolvent's activities by giving the Court a discretion, if it thought fit to do so, not to hand back to the debtor his property unconditionally or at once, but either to do so after imposing a condition upon him in a proper case which would give the creditors an opportunity to make good their claims in the ordi-

* Civil Reference No. 5 of 1936 arising out of Civil Misc. Appeal No. 92 of 1935 of this Court.