APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

MUSSAMMAT NAWAB BEGUM AND OTHERS (DEFENDANTS) Appellants

versus

HUSSAIN ALI KHAN (PLAINTIFF)
MOHAMMAD LATIF (DEFENDANT) } Respondents.

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Oct. 20.

Civil Appeal No. 47 of 1936

Muhammadan Law — Dower — whether a first charge on deceased husband's property — Purchase of property by husband in name of wife — whether benami *transaction or gift to wife — strict proof of gift required.*

Held, that in the absence of any other outstanding debt at the time of the death of the husband, the dower due to the wife is a first charge on the property of the deceased husband, and that so long as this debt is not paid off, the wife has a lien on the property which is found to have belonged to the husband.

Held also, that in determining the question whether a property purchased by a husband in the name of his wife is a mere *benami* transaction or a gift, the main consideration besides the source of the purchase money is to find out the intention of the husband. And if it is found that the money emanated from the husband and the wife avers that an absolute gift to her was intended; clear, cogent and preferably documentary evidence should be produced in support of that allegation.

Bilas Kunwar v. Desraj Ranjit Singh (1), *Gur Narayan v. Sheolal Singh* (2), and *Lakshmiah Chetty v. Kothandarama Pillai* (3), relied upon.

First appeal from the preliminary decree of Lala *Chhajju Ram, Additional Subordinate Judge, 1st*

(1) I.L.R. (1915) 37 All. 557 (P.C.). (2) I.L.R. (1919) 46 Cal. 566 (P.C.).
(3) I.L.R. (1925) 48 Mad. 605 (P.C.).

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Class, Lahore, dated 11th December, 1935, granting the plaintiff a preliminary decree.

MOHAMMAD ALAM and MOHAMMAD MUNIR, for Appellants.

DIWAN MEHR CHAND, for (Plaintiff) Respondent.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—*Khan Sahib* Mohammad Khair Din Khan, M.B.E., died on the 20th March, 1931, leaving him surviving a widow, *Mussammat* Nawab Begum, a son, Hussain Ali Khan and three daughters, Ejaz Begum, Akhtar Begum and Jamila Begum. On the 30th May, 1933, Hussain Ali Khan instituted a suit, out of which the present appeal has arisen, for possession by partition of 14/40ths share of two houses described in the plaint. He alleged that one of the two houses was ancestral and that the other was purchased by his father in the name of his wife, *Mussammat* Nawab Begum, and as the purchase was *benami*, he was entitled to treat it as his father's property and to claim a share of it, to which he was entitled under Muhammadan Law. The ancestral house appears to have been mortgaged by Khair Din Khan to Mohammad Latif on the 2nd January, 1931, and the mortgagee was also impleaded as a defendant in the case. The mortgagee had no real interest in the matter and he consequently put in a written statement praying that so long as his charge was protected, the Court might make any decision it considered just. *Mussammat* Nawab Begum, however, resisted the suit on the ground that the house alleged to have been purchased *benami* in her name was, in fact, purchased by her with her own money and that neither Khair Din Khan during his life time nor his heirs after him had any concern with it. She further pleaded that

Hussain Ali Khan himself had in a previous suit, which had been brought by her for recovery of her dower, admitted that the house belonged to her and that he was consequently estopped from denying her ownership in the present suit. She also claimed a lien for her dower debt on the ancestral house and Rs.5,000 for improvements and Rs.1,000 on account of expenses incurred by her on the funeral of Khair Din Khan. After examining the parties on the matters on which they joined issue, the Subordinate Judge framed the following issues :—

1. Was house A purchased by the plaintiff's father in the name of defendant 1 ?

2. Did the father of the plaintiff leave any debts; if so, what ?

3. Whether such debts are the first charge upon the property in dispute ?

4. Is the plaintiff estopped from claiming the house A by his admission and conduct ?

The Subordinate Judge came to the conclusion that the sale-deed in favour of *Mussammat* Nawab Begum was *benami*, that the only debt that was outstanding against Khair Din Khan at the time of his death was the dower debt of Rs.5,000, that this debt could not be treated preferentially and consequently could not form a first charge on the property of the deceased and that the plaintiff's admission relied on by *Mussammat* Nawab Begum did not constitute an estoppel in law. On these grounds the plaintiff's suit was decreed as prayed for. From this decision *Mussammat* Nawab Begum and her daughters have preferred the appeal now before us.

Counsel for the appellants has raised substantially the same points here as were raised in the Court below

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and has advanced the same arguments as have been discussed in the judgment under appeal. In addition, he has particularly laid great stress on the point that, even if it were held that the money required for the purchase of the house was advanced by Khair Din Khan, the transaction could not be treated as a mere *benami* transaction but amounted to an absolute gift by Khair Din Khan in favour of his wife, which under Muhammadan Law he was quite competent to make.

We may say at once that we are not prepared to uphold the decision of the Court below against the lien claimed by *Mussammat* Nawab Begum for her dower. It is true that she is an unsecured creditor but in face of the finding recorded by the Subordinate Judge himself that there was no other outstanding debt at the time of Khair Din Khan's death, it cannot be denied that this dower is a first charge on the property of the deceased and that so long as this debt is not paid off, *Mussammat* Nawab Begum has a lien on the property which is found to belong to Khair Din Khan.

The so-called admission of Hussain Ali Khan, however, is of no avail to the appellants. It is clear that the written statement which contained the said admission was neither signed nor verified by him. It is further evident on the record that within a month of the so-called admission he put in an application to the Court withdrawing the admission and disclaiming all responsibility for it.

We are also not satisfied that the money for the purchase of the house was paid by *Mussammat* Nawab Begum. The Subordinate Judge has very rightly rejected the evidence of *Mussammat* Nawab Begum on

this point and we find no reason to differ from his conclusion. It is not even denied by counsel appearing for *Mussammat* Nawab Begum that the mortgage effected on the house on the date of the sale was redeemed by Khair Din Khan out of the bonus that he received on his retirement from the railway service. It is further clear on the record that shortly before the sale-deed of the house in question was executed, Khair Din Khan sold his mortgagee rights in another property to Siraj Din for Rs.8,000. These circumstances undeniably point to the conclusion that it was Khair Din Khan who had supplied the money to *Mussammat* Nawab Begum for the purchase of this house. This being so, the only question that falls to be determined now is whether the transaction was *benami* in the popular sense of the term or was a gift as is contended in the alternative by *Mussammat* Nawab Begum's counsel. It is true that in one or two decided cases it has been held that in determining this question relevant circumstances other than the source of the money should also be considered; but the authorities are unanimous on the point that the main consideration in such cases is to determine the source of the money.

On behalf of the appellants reliance is placed on *Thulasi Ammal v. Official Receiver, Coimbatore* (1), *Maung Ba v. Ma Nyein* (2) and *Ismail Mussajee Mookerdam v. Hafiz Boo* (3). In *Thulasi Ammal v. Official Receiver, Coimbatore* (1), a Single Judge of the Madras High Court in a case where a sale deed had been executed in favour of a married woman, despite the finding that the money was supplied by her husband, decided on the authority of

(1) 1934 A. I. R. (Mad.) 671. (2) 1935 A. I. R. (Rang.) 24.
(3) I. L. R. (1906) 33 Cal. 773 (P. C.).

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Ismail Mussajee Mookerdam v. Hafiz Boo (1) that the source of money not being the sole criterion in the case, the advance of money by the husband should be treated as a gift to his young wife with a view to exclude his son from inheritance.

In *Ismail Mussajee Mookerdam v. Hafiz Boo* (1), their Lordships of the Privy Council observed as follows :—

"The fact, therefore, remains that the properties purchased by the sale proceeds were purchased no doubt in Hafiz Boo's name, but were purchased out of funds emanating from her mother's estate. This circumstance no doubt, if taken alone, affords evidence that the transaction was *benami*, but there is, in their Lordships' opinion, enough in the facts of the case to negative any such inference. It seems clear that what was done in 1889 was prompted by hostility to the son and was with the purpose of excluding him from inheritance, an object which could not have been attained by any *benami* transaction. And the strong words of gift contained in the power of attorney are in accordance with this intention and calculated to give full effect to it. The question being purely one of intention, their Lordships think that the evidence points to an absolute gift, not to a *benami* transaction."

In *Maung Ba v. Ma Nyein* (2) a Single Judge of the Rangoon High Court held that where a person advanced money on a mortgage, but the names of his children were mentioned in the mortgage deeds and his name was omitted therefrom, the presumption arose that he intended these mortgages as advancements for

(1) I. L. R. (1906) 33 Cal. 773 (P. C.). (2) 1935 A. I. R. (Rang.) 24.

the benefit of his children who were respectively named in the deed.

As against these decisions counsel for the contesting respondent has drawn our attention to *Bilas Kunwar v. Des Raj Ranjit Singh* (1), *Maqsudan Lal v. Ram Chander* (2) and *Mrs. N. Johnstone v. Gopal Singh* (3). In *Bilas Kunwar v. Des Raj Ranjit Singh* (1) a Hindu Taluqdar of Oudh had purchased a house in favour of his Mohammadan mistress by whom he had two children. On a question arising whether the transaction was *benami* or otherwise, their Lordships of the Privy Council remarked :—

" The exception in our law by way of advancement in favour of wife or child does not apply in India, but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in *Dhurm Das Pandey v. Shama Soondri Dibiah* (4) :— ' The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid '."

On the facts in that case their Lordships came to the conclusion that the transaction was and remained throughout *benami*.

In *Maqsudan Lal v. Ram Chander* (2) a Single Judge of this Court held : " Where one person pays the price and the instrument of sale is obtained in the name of another, the presumption is that the person paying the price is the owner and the person in whose

(1) I. L. R. (1915) 37 All. 557 (P.C.).
(2) 1925) A. I. R. (Lah.) 511.
(3) 1931 A. I. R. (Lah.) 419.
(4) (1843) 3 Moo. I. A. 229.

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name the sale is obtained occupies the position of a trustee only." In that case the shop in suit had been purchased in favour of a nephew of the purchaser. In *Mrs. N. Johnstone v. Gopal Singh* (1) a Division Bench of this Court reaffirmed the principle enunciated above.

Besides the cases cited at the Bar, there are, among others, two important decisions of their Lordships of the Privy Council, which we have considered in the determination of the case before us. They are *Gur Narayan v. Sheo Lal Singh* (2) and *Lakshmiah Chetty v. Kothandarama Pillai* (3). In *Gur Narayan v. Sheo Lal Singh* (2), their Lordships of the Privy Council lent a judicial recognition to the *benami* system prevalent in India and remarked that there was nothing inherently wrong in it and that it accorded within its legitimate scope with the ideas and habits of the people.

In *Lakshmiah Chetty v. Kothandarama Pillai* (3), the judgment of their Lordships deals with a matter which is identical with the present case. In that case, too, a husband had purchased property out of his own money in the name of his wife and it was contended that the transaction was intended to be a marriage settlement. In the course of their judgment a few observations were made by their Lordships, which may with advantage be reproduced here, as they appear to us to apply exactly to the present case. At page 608 their Lordships observed :—

"There can be no doubt now that a purchase in India by a native of India of property in India in the

(1) 1931 A. I. R. (Lah.) 419. (2) I. L. R. (1919) 46 Cal. 566 (P. C.).
(3) I. L. R. (1925) 48 Mad. 605 (P. C.).

name of his wife unexplained by other proved or admitted facts is to be regarded as a *benami* transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India."

This observation of their Lordships was based on three previous decisions of the Privy Council. At page 612 it is remarked :—

" The property in question was purchased in May 1909 and L. lived until 1912 and if C. had agreed to settle the property in question there was plenty of time in which he could have executed a proper deed of settlement upon her."

At page 613 the following remarks are very pertinent :—

" Their Lordships do not decide that an ante-nuptial agreement may not be orally proved in an Indian case, but they consider that it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an ante-nuptial agreement which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate the oral evidence."

The main principle deducible from the cases cited by either side appears to us to be this, that it is the intention of the husband that mainly counts in the determination of the question whether he intended to make an absolute gift in favour of his wife or whether the transaction was merely intended to be a *benami*

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transaction, and that if a party avers that an absolute gift was intended, clear and cogent.....and preferably documentary.....evidence should be produced in support of that allegation. In the case before us, not only no attempt has been made to bring on the record any evidence to the effect that Khair Din Khan intended to make an absolute gift in favour of his wife *Mussammat* Nawab Begum by purchasing the house in suit in her name, but there are clear indications to the contrary. The last cheque which was paid to redeem the mortgage was issued by him in his own name in favour of the mortgagee on the Imperial Bank where his personal account was lying. Moreover, it is significant that this aspect of the case was not even pressed in the Court below. Had there been any grain of truth in the allegation now made, *Mussammat* Nawab Begum would never have withheld this defence in the trial Court. As the case was put forward by her in the Court below, the sole issue to be determined was whether it was she or her husband who had advanced the sale price, and as it has been clearly found that the money came from the coffers of her husband, her alternative plea carries no weight. In any circumstances, there is no material on the record to justify an inference that he had any intention to make an absolute gift of the house purchased in *Mussammat* Nawab Begum's name and on this ground alone this appeal must fail.

We accordingly affirm the decree of the Court below subject, however, to this modification that *Mussammat* Nawab Begum shall have a lien on the entire property of the deceased for an amount of Rs.5,000 which is admittedly due to her on account of her dower. With this modification we dismiss the appeal.

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The appellants having partially succeeded, we make no order as to costs of this appeal.

P. S.

Decree affirmed with modification.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

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Nov. 3.

FATEH DIN AND OTHERS (PLAINTIFFS) Appellants

versus

MST. HAKIM BIBI AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 132 of 1936.

Custom — Succession — Arains *of village Sodhra, Tahsil Wazirabad, District Gujranwala — Daughter and* Khana damad*—whether succeed in preference to collaterals— written gift — whether necessary —* Riwaj-i-am, *Answer 48.*

Held, that by custom among *Arains* of village Sodhra, Tahsil Wazirabad, District Gujranwala, a daughter and a resident son-in-law, who has been made a *khana damad,* are entitled to succeed on the death of the daughter's sonless father in preference to the collaterals.

Held also, that the provision about a deed of gift or written will in Answer 48 of the Code of Tribal Custom of the Gujranwala District is only recommendatory and not mandatory, and, therefore, though no definite act of donation was proved, it was a fair inference from the established facts that the sonless proprietor settled his daughter and her husband in his house with a view to their succeeding him as his heirs to the exclusion of his collaterals.

Mussammat Baggi v. Mamun (1), relied upon.

Basant Singh v. Brij Raj Saran Singh (2), referred to.

Second appeal from the decree of Mr. M. R. Kayani, District Judge, Gujranwala, dated 4th

(1) 31 P. R. 1895. (2) I. L. R. (1935) 57 All. 494.