Act VIII. of 1835, and purchased by the defendants who have dispossessed him from this *howla*.

The defendants, among other pleas, contended that this pottah was a false and fabricated document, and that the plaintiff's claim was a false one; that, the sale having been held under Act VIII. of 1835, they acquired the talook free from all incumbrances, and that therefore, the plaintiff has no right to recover possession of this land.

The first Court gave a decree to the plaintiff, finding that the pottah produced by him was genuine, that it was registered, that possession was held under that pottah, and that, the defendants having dispossessed him, the plaintiff was entitled to recover.

On appeal, the Judge, after having required the appellant, defendant, to produce the pottah constituting the original tenure which had been sold, takes up the case on another day and says: "The original *talookee* "*pottah* of 1856 has been filed. It con- "tains no clause the effect of which would "be to render such tenures as might be "created by *howladaree pottahs*, such as "that relied on by the plaintiff, superior to "the result of a sale of the talook for its "own arrears." And he considers that the sale under Act VIII. of 1835 has cancelled the pottah, because it was a sale of the tenure for its own arrears.

We find, however, that the original *talookee pottah* has not been filed.

It has been contended on special appeal before us that the sale of this tenure under Act VIII. of 1835 did not, under the Full Bench Ruling of this Court reported in 7 Weekly Reporter, page 260, confer upon the purchaser any right to hold the tenure free from all incumbrances imposed upon it by the former holder; and that, therefore, it has not the effect of rendering inoperative the pottah created by the defaulting talookdar, but that the purchaser is only entitled to rent.

We find this contention to be good. The sale under Act VIII. of 1835 does not convey to the purchaser the tenure free from all incumbrances, "unless there was a sti- "pulation in the documents by which the "tenure was created providing for the sale "of such tenure for arrears of rent." The pottah of the tenure sold has not been filed in this case, nor is there any contention that the documents contain the stipulation referred to above. The only plea raised by the defendant was that the *howladaree pottah* set up by the plaintiff was false. The *howla pottah* of the plaintiff, therefore, if proved to be genuine, would not fall by the operation of the sale under that Act. The Judge, being of opinion that the mere fact of the sale gets rid of the tenure, considers "that the question of the genu- "ineness of the pottah in question need "not be gone into." As we are of opinion that the view taken by the Judge of the law is not correct, the case must go back to him for an adjudication upon the question of the pottah. The Judge should enquire into the genuineness or otherwise of the pottah, and decide the case according to the result of that enquiry. We, therefore, remand the case to the Judge for a decision on the merits with reference to the above remarks.

Costs to follow the final result.

The 6th January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Parties—Benamee purchases—Beneficial ownership.

Case No. 1130 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 21st March 1870, reversing a decision of the Moonsiff of Soodharam, dated the 31st May 1869.

Akbur Ali (Plaintiff), *Appellant,*

versus

Mahomed Faiz Buksh and others (Defendants), *Respondents.*

Mr. J. S. Rochfort for Appellant.

Baboo Chunder Madhuh Ghose for Respondents.

In a suit by a father against a son to recover the title-deeds of certain property alleged to have been purchased by the plaintiff in the name of the defendant when the latter was about 2 or 3 years old, which title-deeds were said to be fraudulently retained by the son, the defendant did not appear, but two other persons who alleged that they were mortgagees from the son were made parties.

HELD that these parties should not have been allowed to appear as defendants, simply on the allegation that they had lent money to the son on the security of the property.

In cases of benamee purchase in India, the criterion of beneficial ownership is the source from which the purchase-money is derived.

Mookerjee, J.—THE present suit was instituted by one Akbar Ali originally against his own son, defendant, Mahomed Faiz, to have it declared that the property in dispute belongs to him, and not to the defendant Faiz. Plaintiff states that he purchased the property so far back as 1253, B. S., with his own money in the name of the defendant, his son, when that son was 2 or 3 years old; that he remained all along in possession, but that, having occasion to go to Mecca in Pous 1273, he left the title-deeds of the property with the defendant, and entrusted him with the management of his affairs; that the defendant, taking advantage of his absence, has assumed the ownership of the property, and refused to give him back the deeds when the plaintiff asked him so to do on his return from the pilgrimage; that this son had, moreover, sued some ryots on this property for rent in his own name, and that, when the plaintiff intervened, his intervention was disallowed on the objection of the defendant, who got a decree for rent on the 7th February 1868. Plaintiff, therefore, sues for the confirmation of his right to the property.

Mahomed Faiz, the son, does not appear, but two persons of the name of Muddun and Vyrub appeared as third parties, stating that they are mortgagees of the property from the son who, they contended, was the real and beneficial owner of the property. They further alleged that the father and the son have collusively instituted this suit to obtain the required declaration in order to defraud them, the creditors of the latter; and, lastly, they prayed that they may be made parties to this suit under Section 73 of the Civil Procedure Code.

The Court of first instance thereupon made them parties, and in their presence, holding on the evidence that the plaintiff has satisfactorily proved his case, gave a decree to the plaintiff.

Against this decree, there was no appeal on the part of Mahomed Faiz, but the defendants Muddun Mohun and Vyrub Chunder only appealed.

The Subordinate Judge remanded the case for fresh investigation, laying down several issues for the determination of the Court below.

The Moonsiff has again decided the case in favor of the plaintiff. The Subordinate Judge having reversed his decision, the plaintiff has preferred this special appeal.

It is contended before us for the appellant that Muddun Mohun and Vyrub have been unnecessarily made defendants in the cause; that they have no share or interest in the subject-matter of the suit, and are not likely to be affected by the result thereof; that the interest they themselves allege they have in the property is of such a remote and contingent nature that possibly they may have nothing to do with the property in dispute.

We find that these added defendants are not parties in possession of the property; that they are allowed to appear as defendants simply on an allegation that they have lent money to the son on the security of the property, and may have to fall upon it in case they succeed in obtaining a decree on the bond executed in their favor, and in the event of that decree not being satisfied by their debtor. This assuredly is a very remote interest in the subject-matter of the suit. We do not think, therefore, that the Court of first instance has exercised a sound discretion in allowing such parties to be added as defendants in the cause, and thereby complicate the proceedings in this suit; but as the trial in both the Courts has proceeded in the presence of these parties as the only defendants contesting the claim of the plaintiff, and evidence gone through at great length, we do not think it proper at this stage of the case to quash the whole of the proceedings had in the Courts below.

On the merits of the case however, we are not at all satisfied with the decision of the Subordinate Judge. He states in judgment that the "plaintiff, during "minority of the son, might have bou "property for his son, or he mig "bought it for himself in his son's but the contention raised before mortgagee defendants was, that Faiz, the son, got this prope own sister by a hibbanamah money was paid by the fath If the Subordinate Judge was there is ample evidence cluding the testimony of band to support such money was actually paid that the property was

from his daughter on payment of a consideration, we cannot understand why this issue should not be decided in favor of the plaintiff.

The Subordinate Judge likewise remarks that "this point can be best explained by "the kobala or hibba through which the "property was transferred by Mymoona "Bibee. This document is not forthcoming." Now, the plaintiff distinctly alleged that, at the time of his going to Mecca, he made over all the title-deeds of the property to his son, and had actually prayed that the defendants might be called on to produce the documents in Court. This allegation, as far as we have seen, was never traversed by the defendants, and it is no part of their case that plaintiff holds that document in his possession. If the defendants have not chosen to produce that deed in Court, although basing the title of their mortgagor on it, the plaintiff is not to suffer, but was in a position to adduce evidence to show that it was, in fact, a bill of sale executed in his favor for a valuable consideration.

In another part of the Subordinate Judge's judgment occurs the following passage: "Now, for 24 years the land was in the son's name, and it was in his possession likewise for years together after he attained his majority, and the plaintiff, that is, the father, never made any attempt to convince the money-lenders and neighbours that he was the actual owner of the property. He stood by and saw the public deceived by his son, and therefore he cannot, after nearly 24 years, say that the property does not belong to his son." Now, the Subordinate Judge does not find when the son attained his majority, and from what year the son assumed the management of this property on his own account. We find on reference to the record that it is almost an admitted [illegible] hat in 1253, when the property was [illegible] ed, the son Mahomed Faiz was 2 or 3 [illegible] age; he must, therefore, have been [illegible] not until 1268 or 1269. The father [illegible] ecca in 1273, and the mortgage is

[illegible] Court has distinctly found that [illegible] all along been in possession of [illegible] he date of the purchase. If [illegible] Judge was of a different [illegible] point of possession, it was [illegible] to find when that posses- [illegible] and the nature of such [illegible] uredly during the son's [illegible] was in possession, and it remained to be seen when the possession of the father ceased, and that of the son began. Moreover, we do not clearly understand what the Subordinate Judge means by the remark that "the father never made any attempt to convince the money-lenders, &c., that he was the actual owner of the property." The Subordinate Judge could not have been unaware that benamee purchases in the names of children are always made in India, and are in conformity to the general usage and custom of the country prevailing among Hindoos as well as Mahomedans. The criterion in cases of benamee purchases in India is, as held by the Lords of the Privy Council in Gossain *versus* Gossain, in 5 Moore's Indian Appeals,* to see from what source the money required for the purchase came. If a father has thought fit, following the custom of the country, to make such a purchase in the name of his infant son, we do not know what measures, if any, he is to resort to, to convince money-lenders that he, the father, was the owner of the property. The presumption in these cases, especially where the son was an infant of 2 or 3 years of age at the time of the purchase, and there is no suggestion that he had any separate funds of his own, is always in favor of the father; and it is on the defendant to rebut that presumption, and show, accordin[illegible] to his allegation in this case, that the acq[illegible]ition of the property was not by purcha[illegible] but by a gift to the defendant Faiz by hi[illegible] sister Mymoona Bibee, and therefore an acquisition of the son.

As regards the last remark of the Subordinate Judge that "the plaintiff stood by and saw the public deceived by his son," the pleader for the respondent admitted before us that there is no [illegible]nce in the record to support such a finding. We also find, on a reference to the evidence in the case, that not only is that finding wholly unsupported by evidence, but the contrary appears to be the case, namely, that the mortgages to the defendants were executed at a time the plaintiff was absent on a pilgrimage to Mecca.

We are, therefore, of opinion that the decision of the Subordinate Judge ought to be reversed, and the case sent back to him to pass a fresh decision, keeping in view the law and tests by which cases of this nature are to be governed, and with reference to the remarks made above. Costs to abide the final result.

Jackson, J.—I quite concur.

* 4 W. R., P. C., p. 46.