*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Syed Asghur Reza and another* v. *Syed Mehdi Hossein and others, from the High Court of Judicature at Fort William in Bengal; delivered 30th January* 1893.

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Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD HANNEN.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

This suit relates to certain interests in the pergunnah of Surjapore, which appears to be an estate of great value. It was formerly in the sole ownership of a Mahomedan gentleman named Raja Fakruddin. After his death, and after much litigation, it became divided into moieties, one known as Kishengunge and the other as Khagra. These moieties have in their turn been the subject of numerous lawsuits and arrangements, and have been split up into a great variety of interests. The history of the property is very complicated, and it has taken up a great deal of attention in the Courts below, and swells the bulk of the record. But for the present purpose it is not necessary to go further back than the purchase by one Ahmed Reza of the interests now in dispute. They are called the 11 gundas, and the putni mahal, and each of them is a part of the Kishengunge moiety.

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Ahmed Reza had two wives. In the year 1854 he married Afzulunnissa, then a very young girl, though capable of bearing children. She brought him two sons named Hyder and Sufdar, and one daughter Munni Bibi. All are living, and are Defendants in this suit. In the year 1859 Ahmed married Rowshun Jehan, a lady who was entitled to valuable interests in the Khagra division of pergunnah Surjapore. She brought him four sons, of whom two are dead; the other two are Plaintiffs in the suit, and the eldest, Asghur, is the present Appellant.

Afzulunnissa died in April 1860, Ahmed in April 1870, and Rowshun in the year 1874. The suit was brought in April 1885. In it the sons of Rowshun claim that the properties in dispute were part of the inheritance of Ahmed, in which they are entitled to share. The children of Afzulunnissa are Defendants on the record; but the person who is really resisting the claim is the Defendant Lutf Ali Khan. He states that in or about the year 1883 he purchased the properties of Hyder and Sufdar, who were then recorded as proprietors in the Collector's books, and were in possession. And he maintains that they were the true and lawful, as well as the ostensible, owners thereof; and that the Plaintiffs have no title. The plaint charges collusion between Lutf Ali and the sons of Afzulunnissa, but the view of both Courts is that the whole family are in combination against Lutf Ali.

On the 11th February 1851 one Kasim Ali was declared the purchaser of the 11 gundas at an execution sale. On the 8th April 1854 Kasim Ali effected the registration of an ikrarnama, executed by himself under date of the 21st August 1852, in which he declared that the purchase money was provided by Afzulunnissa, and that she was the real owner of the property. It has

been found that the date assigned to the deed is false, and that the true date is that of the registration. This was about the time of Ahmed's marriage with Afzulunnissa; whether before or after is not clearly shown, nor does it seem to be important. The statement as to the source of the money is also false. Kasim was the agent of Ahmed, who found the money. Afzulunnissa was very young, "a mere child" the High Court says, and wholly without property. Lutf Ali naturally enough has striven to support the statements of the ikrarnama, but both Courts have found that issue against him. It must be taken that Kasim was benamidar and Ahmed the real owner of the property before the 8th April 1854. On that day the formal and ostensible ownership was transferred by Ahmed's orders from Kasim to Afzulunnissa. Whether that transfer merely changed one benamidar for another, or gave a beneficial title to the property, is the first question on this part of the case.

It does not appear that Afzulunnissa ever had any separate possession or enjoyment of this property, which was managed by Ahmed along with his own larger shares till long after his wife's death. She died in 1860, being still quite a young woman. Her heirs were her mother, her husband, and her children. If the dispute had arisen then, and if it had appeared that Ahmed's intention in effecting the transfer to her was to benefit her, the Court would have had to consider the question discussed at the bar, viz., how far the Mahomedan law requires change of possession to perfect a gift by a husband to a wife of very tender years. But the dispute did not arise till after Ahmed's death, and the Courts have been guided to their conclusions mainly by the events which took place between the death of Afzulunnissa and that of Ahmed.

In May 1860 a suit was instituted in the name of Ahmed's second wife, Rowshun, to

recover interests claimed by her in pergunnah Surjapore. This suit was really promoted by Ahmed himself, and conducted at his cost. It related to the Khagra Division of the pergunnah. But the amount and details of the Plaintiff's share are described by way of subtracting other shares and interests from the 16 annas of the pergunnah. In this way there is deducted, "Share of Raja Syed Ahmed Reza, 6 annas "1 gunda, and the right purchased by Syed "Hyder Reza and Sufdar Reza, minor sons of "Afzulunnissa, deceased, purchaser of 11 gundas, "in all 6 annas 12 gundas." The 6 annas 1 gunda belonged to Ahmed prior to 1851. To speak of Afzulunnissa and her sons as both being purchasers of the 11 gundas was inaccurate, but that does not affect the value, whatever it may be, of the recognition of their title. On this and other documents, the High Court observe that there was no reason why on Afzulunnissa's death her name should not have been dropped altogether, if the property really belonged to Ahmed, and if he wished to treat it as his own. The property he held in his own name was many times larger than the largest amount of the claims against him.

On the 10th January 1863, Lala Kali Sahai, another agent of Ahmed, executed a deed purporting to sell to Hyder and Sufdar a share of the 11 gundas, and of other interests in pergunnah Surjapore, acquired and left by Afzulunnissa. The share is described as "the entire "share of Bibi Mehrunnissa, mother of the late "Rani Afzulunnissa aforesaid, as mother's share." This share, it is stated, was purchased by Lala Kali Sahai, at an execution sale, in pursuance of a decree passed against Mehrunnissa. How the money was provided does not appear. Nobody doubts that the whole transaction, whether substantial or only formal, proceeded from Ahmed. But the High Court decided that the proceedings

recited in the deed were real proceedings, there being no evidence to the contrary. If so, Ahmed recognized title in Mehrunnissa as heir of Afzulunnissa, and, if money was paid, it was paid for getting that title in.

In the year 1867 came the transaction of the putni. That estate had been granted by Ahmed and his brother Mahomed to two persons, against whose representatives decrees were executed, one in February and one in June 1867. The purchases were made ostensibly in the name of Mehrunnissa, guardian and executrix of Hyder and Sufdar, minor sons of Ahmed, and the sale deed was in favour of Hyder and Sufdar. With respect to this purchase also it has been disputed who found the purchase money, and the dispute has been decided the same way as in the case of the 11 gundas. It must be taken that Ahmed found it. Still remains the question whether he intended his sons to be benamidars or beneficial owners. If the latter, possession is not as between father and infant son necessary to perfect the gift. But the possession of the property is important as evidence, and is one of the points much disputed in the case.

On the 1st November 1869, Ahmed being ill, but quite competent for business, handed to Mr. Campbell, who is termed by the Subordinate Judge Joint Magistrate and Divisional Officer of the place, a petition relating to his property. Mr. Campbell received it, signed it, and had it recorded in the Collector's office. He commences thus :—

"This is a petition filed in person by Raja Syed Ahmed Reza, zemindar of pergunnah Surjapore.

"Sir,—For more than a month I have been suffering from a sore in the mouth. Every one living is subject to death, and hence it is proper to make the under-mentioned representations to the Collector of Bheriadangi.

"The facts are as follows :—That foresightedness and prudence require that the paternal and ancestral property should

be looked after, and the name and prestige of the family should be preserved during my lifetime. Whereas in pergunnah Surjapore a 6 annas 1 gundah share of the zemindari, besides resumed and unresumed milik lands, exclusively belongs to me, and an 11 gundahs share of the zemindari of pergunnah Surjapore and the putni mehals, and the resumed and unresumed milik lands is the purchased right of the minor sons, Syed Hyder Reza and Syed Sufdar Reza, and [out of] a 1 anna 13 gundahs 3 cowris 1 krants 2½ dunts share of the zemindari out of 16 annas, 8 gundahs, have been decreed te Rani Rowshun Jehan, it seems proper that proper management and settlement of those properties should be made in the manner following."

He then goes on to give directions for management after his death by the Court of Wards through a surburakar or manager. As regards the properties "exclusively belonging to me," his design is that each of his six minor sons shall have an equal share with the others and that his daughter shall have an allowance. As regards the properties now in dispute, his directions are that the services of Kishen Chunder Chowdhry and another shall be retained, and that the profits shall be remitted to Mehrunnissa, the guardian and executrix of the minors Hyder and Sufdar, and applied for their benefit.

It is not contended that this document was intended to operate, or can operate, as a gift *inter vivos* or as a will. But the Court received it as a declaration by Ahmed against his own interest, and used it as throwing a strong light on his intentions in his prior dealings with the properties.

Ahmed made no further disposition of his property, but died intestate, leaving his widow Rowshun and his seven children surviving him. Soon after his death disputes arose between the two branches of the family, and Rowshun and her sons left the family house at Kishengunge to reside elsewhere in the neighbourhood. The Plaintiffs allege that they were dispossessed of the properties in dispute by their elder brothers in July or August 1870, but the Courts have

concurred in rejecting that allegation as unproved. There were disputes between Mehrunnissa on one side and Rowshun on the other as to the true ownership, but they were not brought into litigation. It is common ground that Hyder and Sufdar, or Mehrunnissa on their behalf, were in possession as early as August 1870, and that they or their vendee have ever since remained in possession.

The plaint was filed on the 6th April 1885. The main defences set up were that the Plaintiffs had no title, and that the suit was barred by time. Both depend upon the views taken of Ahmed's intentions and of his actual dealings with the properties. If it were clearly established that his wife and sons were merely benamidars and he the true owner up to his death, the time since elapsed would, owing to the minority of the Plaintiffs, not be sufficient to bar the suit. Accordingly, the Subordinate Judge addressed himself to the questions of title and possession, and the High Court took the same course; and as both Courts, upon those issues, came to a conclusion adverse to the Plaintiffs, they rested their decrees on that ground, and gave no formal decision upon the point of limitation. They did however elaborately discuss the question of fact, whether or no Afzulunnissa's sons were put into possession in Ahmed's lifetime, and found that they were. That fact, when found, was used by the Courts as evidence of the Defendants' title. But it is obvious that it might have been used in a more direct way to support the defence of limitation. If during Ahmed's lifetime he was out of possession and his sons in, time began to run in their favour against him, and the minority of his heirs will not give them further time to sue.

It was earnestly contended by Mr. Cowie that the whole decision turns upon questions of fact, and that there are concurrent findings in

favour of the Defendants, which ought not to be disturbed, or indeed examined into any further. Their Lordships agree that there is no substantial question of law in the case, but in order to see how far the Courts have concurred in their view of the facts, it is necessary to examine precisely what their findings are, and to distinguish between the two properties in dispute. It will be convenient to take the putni first.

The Subordinate Judge, commenting on a number of facts, finds that the purchase of the putni in the names of the sons was for their benefit; that Ahmed Reza intended at the time of the purchase, and thenceforward till his death, that the putni should be theirs; that Hyder and Sufdar have derived benefit therefrom for about 20 years; and that their beneficial enjoyment destroys the presumption of benami. He states the duration of enjoyment loosely, and exaggerates it somewhat; but the former part of his judgment shows an accurate perception of the actual dates. The main facts on which he relies are, Ahmed's petition of 1869, Rowshun's or rather Ahmed's plaint of 1860, and a number of zemindari papers showing that separate accounts were kept of the putni and of Ahmed's own 6 annas 1 gunda. He also states that the Plaintiffs' witnesses are not truthful; and he comments adversely on the fact that Kishen Chand Chowdhry, who is mentioned in Ahmed's petition as an important servant of the estate, and who is in the service of the Plaintiffs, was not called by them, though the Defendants frequently requested them to call him.

The High Court find in terms "that the "putni was acquired . . . by Hyder and "Sufdar, and was always treated as their ex-"clusive property." They rest their judgment mainly on the documents relied on by the Subordinate Judge and on the sale deed of 1863.

Their Lordships have then the First Court and the Appellate Court concurring in their conclusion as to a question of fact, and upon nearly the same considerations. The question moreover is one for the decision of which familiarity with native families and estates, and with the practice of benami purchases, confers great advantages. Of all classes of questions this would be one of the last in which this Committee could be induced to depart from the wholesome general practice of abiding by concurrent decisions of the Courts below.

The case of the 11 gundas is not so simple. The Subordinate Judge finds that Ahmed intended the transfer to Afzulunnissa to be for her benefit, and that she and her sons afterwards derived benefit from it, for about 30 years prior to the suit. He considers that Afzulunnissa became owner at the date of the ikrarnama, and he connects it, but only by conjecture and by proximity of time, with her marriage.

The High Court, on the other hand, think that the transfer to Afzulunnissa was simply a transfer from one benamidar to another. But they are so pressed with the evidence of title and of possession furnished by the plaint of 1860, the deed of sale of 1863, the petition of 1869, and the zemindari accounts, which have been mentioned before, aided, in their opinion, by the form of a rent suit of September 1869, in which Mehrunnissa and her two grandchildren are joined with Ahmed as zemindars, and by the long undisturbed enjoyment after Ahmed's death, that they cannot resist the conclusion that in some way the property was transferred before his death. They connect the transfer with Ahmed's second marriage; and their finding is that in or about the year 1859 the property was given by Ahmed to Afzulunnissa or her sons, and was thenceforward acknowledged and dealt with by him as their property.

Their Lordships cannot find here any such concurrence as would justify them in abiding by the ultimate decision in favour of the Defendants as something which ought not to be inquired into, and they have accordingly heard the case fully argued as to the 11 gundas. They are bound to say that they cannot find sufficient evidence of any gift to Afzulunnissa in the year 1859, when no overt act was performed. For a gift in the year 1854, when the ikrarnama was executed, there is to say the least a very plausible case. To the considerations relied on by the Subordinate Judge, two may be added which assumed some prominence during the argument here.

One is that no explanation can be given why the ikrarnama should have been executed at all, unless there was to be a change of ownership. Mr. Doyne frankly stated that he could not think of any, and their Lordships do not find any suggested in the Lower Courts. Mr. Doyne thought it sufficient to argue that, as the purchase money came from Ahmed, the law would presume that he was the true owner. So it would as between him and Kasim. But as between him and Afzulunnissa the case is quite different. Ahmed was the absolute owner of an estate held for him by a benamidar. In that state of things he marries, and, somewhere about the same time, directs his benamidar to effect a transfer of the formal and ostensible title to the lady. Why should he change his benamidar? Why should he take as benamidar his very young wife instead of his professional agent? The Subordinate Judge says that to make benami in the names of wife or sons is never considered to be safe. Whether safe or not, nobody suggests that it was a probable or desirable change to make. The transaction is quite intelligible on the theory of a gift, but otherwise it remains an enigma.

Again Mr. Doyne urged very strongly that

Ahmed was alarmed at the claims which were being pressed against him, and therefore had a strong motive for setting up a benamidar. The High Court, as above mentioned, have been at the pains to show that there could be no such alarm in 1860 or afterwards. But supposing that it existed in 1854, what is the inference? That Ahmed would be content to interpose a sham title of a flimsy description between himself and his creditors? Or that he would make a real provision which would save his wife in case his own fortunes were wrecked? To their Lordships it seems that the second alternative is the more probable. They do not place much reliance on these conjectures, which are very speculative, but it seems to them that, however the case is presented, the theory of gift in 1854 affords a more probable explanation of the facts than the theory of a change of benamidar.

From the above observations it will appear that their Lordships incline to the view taken by the Subordinate Judge of the true intention of Ahmed in causing Kasim Ali to execute the ikrarnama of 1854. And then the possession by Afzulunnissa's sons which is clearly found by both Courts to have existed some time, though the precise beginning of it is uncertain, prior to the death of Ahmed, may be sufficient to satisfy the rules of Mahomedan law.

But after all, there remains a good deal of obscurity on the question of title. Their Lordships prefer to rest their decision on the conclusions of the Courts with respect to possession, as to which they had reasonable evidence. Ahmed, being out of possession, might have brought a suit to recover it, and to have it declared that the formal title vested in Afzulunnissa and her successors was only benami for himself. From such evidence as their Lordships

have of his wishes, he never would have done so, but, however that may be, the time for bringing a suit began to run in his life, and after twelve years became an absolute bar to him and his heirs.

Their Lordships will humbly advise Her Majesty to affirm the decree appealed from and to dismiss the appeal with costs.