PRIVY COUNCIL

F.J.R. Kerwick

Vs.

K. M. Kerwick
Lords Buckmaster, CJ, Atkinson, Sir John Edge and Mr.Ameer Ali. JJ)

3.8.1920

JUDGMENT

Lord Atkinson J.

1. This is an appeal from a decree dated the 19th June, 1918; of the Chief Court of Lower Burma (Civil Appeal Side) reversing a decree of the original side of the said Court dated the 29th November, 1917. The suit out of which the appeal arises was brought by the appellant, who is the husband of the respondent, to have it declared, first, that two houses, named respectively Kildare and Kerry, situated at Rangoon, the sites of which the appellant had purchased out of capital of his own or borrowed and had procured to be, by two deeds, conveyed to the respondent, upon which sites the appellant had at his own expense erected two dwelling houses, were held by her as his *benamidar* and that he was the true owner of the same; and second, that the respondent might be ordered to convey these houses to the appellant within such time as to the Court might seem fit. The respondent by her answer admitted that the sites of the said houses had been so purchased and conveyed to her, and the two houses had been built upon them as stated, bub alleged that the said sites were so conveyed and the houses built upon them for her as an advancement and that she was therefore entitled to them beneficially as her own property.

2. The two deeds bear date the 3rd July, 1907, and 10th June, 1908. The grantor in both was one Dr. Pedley and both were duly registered. The general rule and principle of the Indian law as to resulting trusts differs but little, if at all, from the general rule of English law upon the same subject, but in their Lordships' view it has been established by the decisions in the case of *Gopeekrist Gosain v. Gungapersaud Gosain* [1] and *Moulvie Sayyud Uzhur Ali v. Mt. Bebee Ultaf Fatima* [2] that owing to the widespread and persistent practice which prevails amongst the natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers of

it *benami* for no obvious reason or apparent purpose, without the slightest intention of vesting in the done any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negating the presumption of the resulting trust in favor of the person providing the purchase money, such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in one name of a wife or child. In such a case there is, under the general law in India; no presumption of an intended advancement as there is in England. The question which of the two principles of law is to be applied to a transaction such as the present which takes place between two persons, born in India of British parents, and who have resided practically all their lives in India is of general importance. It would appear to their Lordships that the learned Trial Judge did not correctly appreciate the grounds upon which this Board based their decisions in the two cases already cited. The grounds of his decision are clearly set forth in the following passage from his judgment:-

> "I think that if this had been the case of an Englishman newly arrived in India; and presumably imbued with and still retaining English views and ideas, is might be argued from the above case that the English presumption should be drawn, but as a fact the alleged done was born in India and so had parents before her, while the donor whose position is the more important had also been born in India and had spent the whole of his life hers with the exception of periods when he was on leave and two years which he spent in England completing his education."
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> "Under such circumstances I consider that the Indian rule should apply; I also think that if the English view should be adopted the force of the presumption which is of course rebuttable would be very materially weakened, and that the result would be the same."

3. The Court of Appeal reversed this decision holding that the principle of law applicable to the case was that which would he applied to a similar case if tried by the Court of Chancery in England, that an intended advancement would prima facie be presumed, that presumption might be rebutted, but that the onus of rebutting it rested upon the appellant. They further held that the appellant had failed to discharge this onus. It is a mistake to suppose that according to the cases already cited in determining which rule of law is in any given case to apply in India entirely depended on race, place of birth, domicile or residence. These were not to be treated as

constituting per se as decisive. What were treated as infinitely more important were the widespread and persistent usages and practices of the native inhabitants. But subject to this qualification it is their Lordships' view that the principles and rules of law which would be applicable to this case if it were tried in one of the Courts of Chancery in England were applicable to it when tried in Rangoon, and that the decision of the Court of Appeal on the point was in their opinion right.

4. Two points were glanced at in argument before this Board: first, as to the extent to which a married woman can in India acquire property for her separate use, free from the control of her husband, and second the effect, if any, which the non-observance by a civil servant of the Crown in India of the rules passed for the conduct of civil servants, may have upon a purchase by him of immoveable property in contravention of these rules. Does the acquisition of the property become void, or is the offending servant merely subjected to dismissal or some disciplinary punishment? Neither of these questions was raised in the Courts below by the pleadings or evidence given by the respective parties. Nor were they dealt with by the learned Judges in either Court. Under these circumstances their Lordships think it right to abstain from expressing any opinion whatever upon them.

5. The provisions of sections 81 and 82 of the Indian Trusts Act, 1882, do not appear to affect this case.

6. The remaining question for decision, one of fact but by no means an easy one, resolves itself into this. Has the appellant discharged the burden which rests upon him, and rebutted the presumption that the conveyances to his wife of the sites of the two houses mentioned and the subsequent erection of those houses, Kildare and Kerry respectively, upon those sites were advancements or not? *(Marshal v. Crutwell, [3])*

7. The appellant at the trial stated in evidence that he never intended to give these houses to his wife beneficially. That statement was, on the authority of the case of *Devoy v. Devoy* [4] decided by Sir Page Wood, held to be admissible, but the facts of the case in which the ruling was made, and the observation by which it was accompanied, have to be borne in mind. There a father transferred a sum of stock into the names of himself, his wife and a daughter jointly. The transfer note was signed by himself alone. The learned Vice-Chancellor said:-

> "The transfer by the father into the names of himself, and his wife and child, jointly, of a sum of stock, raises a presumption that he intended it as advancement. That presumption may be rebutted by evidence. But in order to

rebut it, the evidence must show the real nature of the transaction,"

8. The father had made an affidavit verifying the bill in which it was stated that he never intended to give the stock to his wife and child or the survivor of them, or to place it beyond his control; that he did not know that the effect of his transferring the stock into their names would prevent him from availing himself of it in case of need, that had he known it would have had that effect he would not have made it. That at the time he made the transfer he was a fellowship porter in easy circumstances, and that his motive in making it was that he might not be induced to have recourse to the stock except his necessities should compel him to do so; but that the stock should remain as a provision for the future. The wife also made an affidavit stating that she had read her husband's affidavit and believed the facts stated in it to be true, the father fell into the Thames, was disabled from following his calling, and was unable to maintain his family except by resorting to the stock. In reference to this evidence the Vice-Chancellor in giving judgment said:-

> "Here the evidence shown that the father intended to confer only a qualified interest and not to make an absolute gift. From the state of his circumstances at the time of the transfer, he thought he might be able to afford this sum of stock as separated from the rest of his property, so as to secure it for the benefit of himself, his wife and child. But he considered it prudent to preserve a dominion over it for himself, if his circumstances should make it necessary for him to resort to it."

9. The conclusion to be drawn from this case would appear to be this that the mere statement by a husband or a father who has made an apparent advancement in favor of a wife or child that he did not intend it to confer any beneficial interest in the thing given or transferred to the done or transferee is of little avail unless he establishes at the same time with reasonable clearness that he had other and different motives for the action he took, Has the appellant done that in this case? (After dealing with evidence the judgment concluded): on the whole their Lordships are of opinion that the appellant has discharged the burden which rested upon him, that the evidence rebuts the prima facie presumption that an advancement to his wife was intended, that the decree appealed from was wrong and should be reversed and the judgment of the Trial Judge should, for reasons however other than those given by him be restored. There will be no order as to costs either here or in the Courts below, except that any costs paid by the appellant under the decree of the Appellate Court should be returned to him.

10. And they will humbly advise His Majesty accordingly.

Appeal allowed.

Cases Referred.

1. (1869) 13 M.I.A. 232 : 13 W.R.1 : 4 B.L.R. 1 : 2 Suthar 279 : 2 Sar. 522 (P.C.),
2. (1857) 3 S. M. and Co. 403 : 26 L.J.C.H. 290 : 15 W.R. 222 : 3 Jur. N. Section 79,
3. (1854) 6 M.I.A. 63 : 4 W.R. 46 : 2 Suther 13 : 1 Sar. 493 (P.C.),
4. (1875) 20 Eq. 328 : 44 L.J.C.H. 504.