ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1904. September 27.

BAI MOTIVAHOO (PLAINTIFF), APPELLANT, *vs.* PURSHOTAM DAYAL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Will—Unregistered memorandum of an oral gift—Subsequent disposal by will—Presumption of advancement—Indian Trusts Act, II of 1882, section 82—Transfer of Property Act, IV of 1882, section 123.

According to the law, as it prevails in Bombay, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife, or of an advancement for her benefit.

PER BATTY, J.:—In India, as a general rule, the criterion as to ownership of property is the source from which the purchase money was supplied; but it is not the sole criterion, and depends on the presence or absence of rebutting circumstances.

Among Hindus the grounds against assuming advancement are specially unfavourable to the claim of a widow to an absolute estate.

A Hindu widow brought a suit against the executor of her husband's Will for a declaration that she was the sole owner of a house, which was purchased in her name by her husband and which was subsequently otherwise disposed of by her husband in his Will.

Held, that the plaintiff had not established her title to the house and that the disposal by Will was valid.

APPEAL FROM BATTY, J.

The plaintiff was a widow and sought a declaration that she was entitled absolutely to a house in New Hanuman Lane, Bombay, alleging that it was purchased for her by her husband who died in December, 1896. The plaintiff relied on a document written by her husband in which it was stated that the property in question belonged to her. This document was unregistered and the plaintiff's husband subsequently on 13th December, 1896, made a Will disposing of the said property. The document in question which the defendants at the trial objected to being admitted in evidence on the ground of its not being registered and which was admitted provisionally ran as follows:—

There is one large house (situated) in New Hanuman Lane, bearing No. which has been got built. The said house has been transferred in the name of

* Appeal No. 1348, Suit No. 634 of 1900.

my wife Vahu Nanivahu. Also the bills from the Collector's (office) in respect thereof are received in her name. And as to the rents of the said house which are received, the same also are credited in her name. I have in my life-time given the said house to her. She has full authority (? to receive) whatever rents the said (house) may yield or (? and) to make use of that house in any way as she may like. I have given the said (house to her) of my free will (and) pleasure. No one else whatever has any right to or interest in the same. The said (house) has cost (me) from Rs. 68,000 to 70,000. I have purchased the same in her name of my free will (and) pleasure.

The most material clause of the testator's Will was clause 2, sub-clause 1, which ran as follows:—

There is one property which is situated in New Hanuman Lane, outside the Fort of Bombay, and which stands in the name of my wife Vahu Motivahu *alias* (Nanibai) and which bears the Municipal Assessment Nos. from 150 to 152. Out of the income of the rents of the said property my "executors" shall pay Rs. 50, namely fifty, every month to Th. (Thakar) Mathuradas Gordhandas or in the event of the decease of Thakar Mathuradas Gordhandas to the person (or persons) in his family who may have been appointed his heir (or heirs). After (that) my wife Vahu Motivahu shall, in the event of her decease, that is to say, at the time when her death shall take place, make a "Trust" of the said property for such religious and charitable purposes as she may like; with that exception the said property is not to be dealt with in any other way.

The plaintiff alleged that her deceased husband, the testator, had made an oral gift to her of the house in question and that though she had joined in taking out Probate to the Will of her husband as one of the executors, she had never heard the Will read until after Probate was granted. The suit came on for hearing on December 5th, 1903, and the most material issue raised was, "whether the disposition contained in clause 2, sub-clause (1), of the Will as to New Hanuman Lane property is a valid disposition and binding on the plaintiff."

Basil Scott (Advocate General) for the plaintiff.

We assert an oral gift to us of the New Hanuman Lane property and the unregistered document is a memorandum of the transaction. Rents of this property have been kept in an account in the plaintiff's name in the testator's books.

The fact that the testator collected the rents is consistent with the theory that the plaintiff is the owner of the house, *Emnabai*

1904.

BAI MOTIVAHOO v. PURSHOTAM DAYAL.

v. *Hajirabai*[1]. The fact that the plaintiff took out Probate does not estop her from asserting her rights under the gift. She only found in Probate on the understanding that the property in question was referred to in the Will as her absolute property. There is also a strong presumption in her favour of advancement, *Lewin on Trusts*, pp. 172—177; *Agnew on Trusts*, p. 98.

Lowndes for defendant 1.

Defendant 2 *in person*.

BATTY, J.:—In this case the plaintiff is a widow. She seeks a declaration that she is entitled absolutely to a house in New Hanuman Lane, Bombay, alleging that it was purchased for her by her husband deceased on 13th December, 1896. She relies on a document written by her husband and alleges that he had no power to dispose thereof by the Will dated the day of his death as he purported to do. She further claims a life-interest as widow of her deceased husband in certain ornaments and moveable property as on his intestacy and a decree that the defendant should hand over to her all the moveable property in his possession other than that which the deceased husband of the plaintiff set apart for the maintenance of a certain *sadavart*. The original defendant Gopal Dayal having died, Purshotam Dayal having obtained Letters of Administration *de bonis non* was made a party and at a later stage Mathuradas Gordhandas as a party in whose favour the Will of the testator purported to create a charge on the house above-mentioned, was also added.

The plaintiff alleges that the plaintiff joined in applying for Probate of her husband's Will on misleading assurances made by the defendant as to her rights, at a time when she had no independent advice. The written statement denies this last allegation, states the Will to have been in the possession of the plaintiff and to have been by her submitted to her legal advisers, and that practically defendant took no part in giving instructions. It further denies the house in question to have been purchased for the plaintiff and objects to the document relied on by the plaintiff as neither duly executed nor registered. The remaining questions raised in the pleadings are not now in dispute.

(1) (1888) 13 Bom. 352.

The following issues were raised:—

1. Whether the disposition contained in clause 2 (1) of the Will as to New Hanuman Lane property is a valid disposition and binding on the plaintiff?

2. If the said disposition is good, valid and binding, what is the effect of the disposition of the said property in the event of the death of the plaintiff?

3. What is the effect of the dispositions contained in clauses 4 and 10 of the Will and who is entitled to the properties therein referred to?

4. Whether the plaintiff is entitled to any and what relief?

The first issue is practically the only one in dispute.

The facts present little difficulty. For it is admitted that the testator, the husband of the plaintiff, bought the house in question in her name but with his own money. The plaintiff says he told her the purchase was made for her, that he had possession of the title deeds but handed them over to her, that the house was rebuilt and on its completion the plaintiff and her husband occupied the 4th floor, the rest being let to tenants, and that the plaintiff used to hand over the rents to her husband to be credited in the accounts of the firm. The Collector's bills (collectively marked Ex. D) and the Municipal Bills (collectively marked Ex. E) are in the plaintiff's name and the plaintiff says they remained in her possession.

The plaintiff further states that the document mentioned in her plaint as that on which she relied and which is marked XI was given to her by her husband after the house was rebuilt and that her husband said, on her reminding him of his advanced years, "all right, I will give the house in gift to you." As to when this oral declaration was made, her statements are somewhat confused. After saying that it was made while the house was being rebuilt, she adds that XI was given her on the completion of the house and that the oral declaration was made at that time. And with regard to the rents she alleges that though her husband collected them, he used to hand them over to her, but admits that after a sum was collected he used to take it to the shop and she never saw it again and did not even get any of that money back and though it was credited in her name, she never drew on it.

Her evidence with regard to the part she took in applying for Probate for the Will is far from convincing. The Will was for

1904.

BAI MOTIVAHOO v. PURSHOTAM DAYAL.

two years in her possession and there can be no doubt that she had every opportunity of becoming fully apprised of its contents. She professes, however, she never heard it read till after Probate had been obtained. Devidas, her sister's son, acted for her in seeing solicitors for the purpose of obtaining Probate of the Will, her own petition Ex. I and the schedule were interpreted to her by the Court Interpreter at her own house before Probate was obtained—and it is clear that she must have been fully aware that her husband had dealt with the property in his Will and that she acquiesced until subsequently she had a difference with the executors.

Devidas Kanjee, the son of the plaintiff's sister, professes to know nothing personally of the instructions given on her behalf in connection with Probate. He, however, cannot deny that he attended at the solicitors' office when instructions were given. It is, I think, in order to account for his making no mention on these occasions of the plaintiff's present claim that he professes to have learnt from the plaintiff for the first time when he read over the Will to her, that she laid claim to the house as given to her by her husband. He admits that he never heard of this gift during the husband's life and believed that the house belonged to the husband who collected the rents.

Mathuradas Gordhandas, the son of the plaintiff's brother, however, asserts that the house belonged to the plaintiff. He apparently made no protest on her behalf and would have the Court believe that he never read the Will until after Probate had been obtained and the plaintiff then exclaimed that the house was hers. He says, had he been aware that it was included in the list of the testator's property, he would have pointed out the mistake, but that during the four years after the husband's death and the grant of Probate, he never made any enquiry as to the provisions of the Will. I do not think these witnesses are credible; the one in professing ignorance of the plaintiff's claim when he could not deny knowledge of the Will, the other in alleging ignorance of those provisions when he was wanted to prove knowledge of the plaintiff's claim. They are both anxious to account in different ways for delay in setting up the present claim. But both of them are too closely interested in the plaintiff

to have remained ignorant of the necessity for asserting it if it were tenable.

The plaintiff seems to have based that claim on two grounds —gift and the conveyance in her name. The Advocate General in argument relied upon the latter. And I do not think there is evidence sufficient to support the plaintiff's allegation of a gift completed by possession. The plaintiff's husband remained in possession. This would not be fatal to the claim if the husband had done all he could to give effect to the gift. The oral declaration was of a gift *in futuro*. The husband collected the rents and the plaintiff never saw them again. The entry of the plaintiff's name in the books and bills of Collector could not transfer possession and is consistent with the position that the purchase was *benami*. The husband, it is true, had the rents entered in an account kept in the plaintiff's name. But to adopt the phrase used in *Gopeekrist* v. *Gungapersaud*(1) this was "an account of a transaction in the name of a person rather than an account with a person." It is urged that the collection of the rents by the husband is consistent with delivery of possession: *Emnabai* v. *Hajirabai*(2). But there a registered deed of gift was executed and the parties were Mahomedans. In the case of a Hindu wife, the gift would not convey an absolute estate of inheritance in the absence of express words showing such to be the intention: *Annaji* v. *Chandrabai*(3), and see *Hirabai* v. *Lakshmibai*(4) and *Lallu* v. *Jagmohan*(5). If neither actual possession nor oral declaration completed the gift, the document marked XI would be either inoperative, or as unregistered, inadmissible. And lastly the transfer was not effected in the manner required by section 123 of the Transfer of Property Act, 1882. It is very possible that the plaintiff's husband may, when pressed by the importunities of the plaintiff, have promised to make the gift but it seems he never carried that promise into effect. It remains to consider whether the plaintiff can assert a title as urged by the Advocate General on the strength of the conveyance executed in her name. The plaintiff's story of the gift made or promised seems incon-

(1) (1854) 6 M. I. A. 53 at p. 82.
(2) (1888) 13 Bom. 352.
(3) (1892) 17 Bom. 503 at p. 505.
(4) (1887) 11 Bom. 573.
(5) (1896) 22 Bom. 409.

1904.

BAI MOTIVAHOO v. PURSHOTAM DAYAL.

sistent with such ground of title. Moreover, it is not disputed that the plaintiff's husband was the source from which the purchase money was supplied. And this in India is as a general rule the criterion: *Dhurm Das* v. *Mussumat Shama Soondri Dibiah*(1): *Gopeekrist* v. *Gungapersaud*(2): *Moulvie Sayyud Uzhur Ali* v. *Mussumat Bebee Ultaf Fatima*(3). It is true it is not as pointed out in *Pandit Ram* v. *Maulvi Muhammad*(4) the sole criterion, but the rebutting circumstances existing in that case are wanting here.

The presumption of advancement that would arise in England (Lewin on Trust 172-77; Agnew 98) does not arise in India (*vide* cases cited *supra*), the source from which the purchase money was paid shifting the onus: *Prince Suleman Kadar* v. *Nawab Mehndi*(5). This is so even in the case of Mahomedans. Among the Hindus the grounds against assuming advancement are stronger and are specially unfavourable to the claim of a widow to an absolute estate. Section 82 of the Trusts Act, 1882, does not diminish the effect of the Privy Council ruling above cited. The Advocate General contends that there is nothing to show that the testator had any object in protecting his property by a *benami* purchase. But I think that a purchase made by a Hindu husband from his own money in his wife's name, cannot be held sufficient evidence of intent to confer on her an absolute estate, merely because no special reason has been shown in the particular case for a practice so general in India.

I therefore find on the first issue that the disposition therein referred to is binding on the plaintiff.

On the second issue there is no contention that the gift over to Dhurma must fail for vagueness and I decide that issue accordingly.

On the third issue there is no dispute and the decree will therefore contain a direction in the terms of prayers B and C of the plaint, that the defendant do hand over the moveable property in his possession to the possession of the plaintiff as on an intestacy entitled to a widow's life-interest therein. The defend-

(1) (1843) 3 Moo. I. A. 229 at p. 240.
(2) (1854) 6 M. I. A. 53 at p. 74.
(3) (1869) 13 M. I. A. 232 at p. 247.
(4) (1893) 26 I. A. 38.
(5) (1897) 25 I. A. 15.

ant Mathuradas in his deposition has stated that he gives up the interest conferred on him by the Will but I think that this was intended to be conditional on the recognition of the plaintiff's claim only. During her life the question is one between him and the plaintiff in which he is of course at liberty to waive his own rights.

As to costs—no objection is raised as to their coming out of the estate. The first defendant Purshotam Dayal's costs to be as between attorney and client.

From this judgment the plaintiff appealed.

Scott (Advocate General), with *Setalvad*, for the appellants.

Lowndes with *Bhandarkar*, for the respondents.

JENKINS, C. J.:—The plaintiff is the widow of Doongersey Nursey, and she has brought this suit against Gopal Dayal, who is described as an executor of the Will and testament of her late husband.

She too is appointed an executrix of that Will.

Mathuradas Goverdhandas was subsequently added as a defendant as being a person interested under the Will, and on the death of Gopal Dayal in the course of the suit Purshotam Dayal was added in his place.

He is described as being administrator *de bonis non* with the Will annexed of the property and credits of the said Doongersey Nursey.

This however is a mis-description as probate was granted to him as an executor in the events which happened.

The plaintiff by this suit seeks a declaration that she is absolutely entitled to a house in New Hanuman Street Nos. 150 to 152, and that the testator had no power to dispose thereof by Will, and the prayer to the plaint seeks other declarations and certain reliefs.

I confess I do not see what was the necessity for this suit in the form in which it is brought, because the lady, it is said, is in possession; no one has disturbed the possession; and no one has threatened to disturb her possession. But she has brought the trouble of this suit on her own head with the consequence that Mr. Justice Batty has decided adversely to her and we have

1904.

BAI MOTIVAHOO v. PURSHOTAM DAYAL.

been asked notwithstanding any irregularity that there may be in the suit to treat it as one properly constituted, no party raising any objection in respect of them.

The whole question then centres itself in this: whether the lady is absolutely entitled? And in order to make this out she has, according to the theory she advances, to convince the Court that a gift was made in her favour. This theory of a gift is put before us in two ways: first of all it is said that the property was purchased in her name and under such circumstances as that it must be deemed to have been so acquired by way of gift to her; and the 2nd point is, that there was a gift independent of that involved in the original acquisition of the property.

Now though the property was purchased in the name of the plaintiff it is established that the purchase money was the money of her husband, and Mr. Justice Batty has pointed out how the property has been dealt with, and that the rents were received by the husband, and no part ever came to her though collected in her name.

Now according to the law as it prevails in Bombay a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit. Mr. Justice Batty approaching the case from that standpoint, has considered whether there is anything in the particular circumstances of the case that would raise a presumption in favour of the transaction now under consideration, being or involving a gift to the wife, and having discussed the matter very fully he decides in the negative. Notwithstanding what the Advocate General has urged to the contrary there is no part of the judgment of the learned Judge in this connection with which I do not concur. It seems to me to be clear that the original gift is not made out. It is quite true that there is the evidence of witnesses who depose to declarations made by the deceased husband to the effect that he had made the gift or intended this as a provision for his wife. The learned Judge heard those witnesses: he did not consider that their evidence was such as to entitle him to hold that in fact a gift was made out in that manner; and I am clear that we ought not in that respect to dissent from him.

Then we have the two significant facts that the lady herself in her own evidence, not under the stress of cross-examination, but in answer to her own counsel, clearly indicates that in her view the gift was not made on the occasion of the purchase but subsequently. We have the further circumstance that the husband himself disposes of the property in a way inconsistent with the idea that he had made any such gift as is now set up.

At the same time it is clear no subsequent gift has been made out, because there is no evidence of it such as the law requires.

Therefore I am of opinion that Mr. Justice Batty's determination adverse to the gift in favour of the plaintiff must be upheld.

The only other point that arises is the question whether the power of appointment contained in the will in favour of such religious and charitable purposes as the plaintiff may like is bad. Mr. Justice Batty has decided that it is invalid, but he apparently came to that conclusion not as the result of argument, but because there was no contest before him on this point. But the Advocate General assures us that he never for a moment assented to the proposition that such a power of appointment was invalid, and I am inclined to think that there must have been some misapprehension on the point.

I however refrain from deciding whether or not this power of appointment is or is not a good one, because we have not before us parties interested in contending that it is invalid. At the same time I do not feel prepared at this stage to uphold the decision of Mr. Justice Batty on this point adversely to the plaintiff.

I think that, taking this suit as it is framed, it would be inadvisable for us to follow the course adopted in different circumstances by the Privy Council in *Bai Motivahoo* v. *Bai Mamoobai* [1], and that the more convenient course will be for us to set aside so much of Mr. Justice Batty's decree as declares that the gift of the house to *Dharm* after the death of the plaintiff is void for vagueness, leaving that matter open for discussion should the question ever arise in a suit properly constituted for the purpose of determining the question one way

(1) (1897) L. R. 24 I. A. 93.

1904.

BAI MOTIVAHOO v. PURSHOTAM DAYAL.

or the other. But this is a very slight alteration in a decree which so far as this part of it is concerned was given by the learned Judge because no objection to it was taken, and I do not think it makes any difference in the manner in which we direct the costs of this appeal to be borne by the appellant.

It has been brought to our attention that in that paragraph of Mr. Justice Batty's judgment which deals with the third issue he directs that the defendant do hand over the moveable property in his possession to the possession of the plaintiff as on an intestacy entitled to a widow's life-interest therein, and on that the comment is made that the use of the word "life-interest" probably was a mistake. I think that must be so and the parties themselves have recognized it by drawing up the decree with the omission of the word "life-interest." The Advocate General has desired that we should refer to the matter in case hereafter an attempt might be made to bring the decree in conformity with the judgment.

Attorneys for the appellant: *Messrs. Thakurdas and Co.*

Attorneys for the respondents: *Messrs. Crawford, Brown & Co.*

W. L. W.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar.

SUNDARJI DAMJI (PLAINTIFF) *v.* DAHIBAI (DEFENDANT).*

1904.

November 19.

Hindu Law—Jains—Performance of funeral ceremonies—Minor son—Widow.

According to Hindu Law, which applies in this respect to Jains, the son of a deceased person has the preferential right to the performance of the monthly, six-monthly and anniversary ceremonies of the deceased. It is not only his right but his religious duty. In default of the son (which term includes the grandson and great-grandson) it is the duty of the widow to get them performed where the husband has died in division and the widow becomes his heir.

The widow is not only interested in the performance of the ceremonies but where the son is a minor it is her religious duty to see that they are duly performed.

* O. C. J. Suit No. 87 of 1904.