Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Uman Parshad v. *Gandharp Singh from the High Court of the Judicial Commissioner of Oudh; delivered July 6th*, 1887.

Present:

LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD BAGGALLAY.
SIR RICHARD COUCH.

IN this case only one question was argued, and that was whether the two transfers executed by Gulab in the years 1863 and 1864 to Bissesur, the husband of her only daughter, were real transfers, or benami. That question turned out to be a complicated one, and it was necessary to go into a good deal of evidence of a varied and rather voluminous nature. The Plaintiff maintains that the substance of the transaction is the same as the form of it, and that the property, consisting of four villages, conveyed to him by deeds, duly attested registered immediately afterwards and subsequently proved and filed in a suit, was actually sold to him. As to the deeds there was no doubt. The only question is whether Bissesur the grantee was a benamidar.

It is familiar to us all that the system of putting property benami is so extremely common in India that the mere fact of a deed being executed in proper form, and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to show that it was a sham transaction

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will suffice for the purpose. Still, such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a benami or sham transaction.

The first question here is, what are the probabilities of the case on consideration of the deeds themselves, and the position of the grantor? What motive had Gulab for putting the property into benami? She was not purchasing the property. It was vested in her in possession, and had been so for a considerable number of years. It is not suggested that she was in any difficulties, so that creditors might be baffled by the proceeding. On the contrary it appears that she was a woman of substance and position in her own country. The only suggestion is, that inasmuch as there was a suit between her and her brothers-in-law, represented by one Balbhadar, concerning these villages, she used this transaction in order to impede Balbhadar's proceedings. But whatever such a transfer might do to impede general creditors, it is difficult to see how it could impede Balbhadar, who was claiming the property by a title as directly available against a transferee from Gulab as against Gulab herself. Moreover the four villages were part of fifteen villages which were the subject of dispute between her and her brothers-in-law, and which she had received on a partition between them. With regard to some of the fifteen villages she was out of possession. With regard to these four she was in possession. She was in possession of more, it requires a minute examination to tell how many, but certainly of five, and no reason can be assigned why she should have selected four villages out of those which were in dispute, and which were in her possession, and have placed those four in the name of a benamidar. There is no

antecedent probability that this is a benami transaction.

Then their Lordships ask what is the direct evidence on the point, oral evidence given by witnesses who profess to speak to it. There are two witnesses called for the Defendant — Hira Singh, and Sitaram—who say that the transaction was a sham one, and that Gulab remained in possession, apparently they mean to say during the rest of her life. But they give no details; they speak to no acts of possession; even as to the time of possession their language is quite vague and general; and they tell, both of them, the most extraordinary story with respect to these deeds, namely, that when Balbhadar, the person against whom it was suggested that these deeds were to be a defence, appeared upon the scene, Gulab immediately told Balbhadar that the deeds were all sham deeds. Their Lordships have no hesitation in treating the evidence of those witnesses as worthless.

The only other witness who gives direct evidence on the subject is in rather a curious position. He was the patwari of one or more of these villages—certainly of the village of Turni—and he was called in this suit. His name is Sheo Sahai. In this suit he stated first that the transaction was a sham one, and that Gulab remained in possession, and received the rents. But then a document was put into his hands, which was a deposition made by him in a mutation proceeding sixteen years before and within three or four years of the date of the transactions, and he was asked whether it was true, and he said it was true. He was rather indignant at the truth of it being impugned, and he said:—"Do you think I would tell a falsehood? Of course it is true." But that deposition shows that there was a sale by Gulab to Bissesur, and that Bissesur entered into possession and received

the rents, and that when Fatteh, who was the common heir of the two, Gulab and Bissesur, applied for a mutation of names, she applied for it on the footing of Sheo Sahai's evidence, and as the heir of Bissesur. Therefore the evidence of Sheo Sahai must be taken as some evidence to show possession on behalf of Bissesur. There is actually no evidence the other way, and so the balance of testimony on that point inclines in favour of the Plaintiff.

Their Lordships will now turn to another branch of the case. It is said that there is no mutation of names; that no witnesses have been called to prove the deeds; that no proof has been given of payment of the money; no proof of the receipt of the rents; and no proof of the payment of the revenue by Bissesur. It is quite true that all that negation of evidence appears in the case. With regard to the mutation of names, the matter is explained in this way. It is said that owing to the dispute between Gulab and her brothers-in-law the application for mutation was delayed; and their Lordships certainly find it to be the case that when a decree had been given in favour of Gulab in August 1866, and when such a time had elapsed as, in the opinion of the patwari Sheo Sahai, had precluded an appeal, the application is made, namely towards the end of 1866 or the beginning of 1867. That may be the true explanation. But however that may be, the absence of any mutation of names hardly tells much in favour of the Defendant's view, because if this were a benami transaction entered into for the purpose of baffling somebody who was claiming the property, the mutation of names would be an important part of the proceeding; because without that mutation Gulab remained the ostensible owner in the Collector's records, and the process of baffling her adversary would be a very imperfect one.

Indeed it is common experience that in these benami transactions there is a mutation of names when it is intended to baffle creditors, and all the proceedings which would attend a real transfer are carefully gone through in order to throw a veil over the reality.

With regard to all the other points, it must be remembered that this is not the ordinary case of a benami dispute. In the ordinary case you have the benamidar or those claiming under him on the one side, maintaining that the transaction is a real one; and you have the former owner and those claiming under him on the other side, maintaining that it is a sham; and each party has in his own power such receipts, such evidence of payments, such connexion with the agents concerned, as should suffice to prove his own case if it is a true one. But the peculiarity of this case is that the title of benamidar, and the title of the original true owner, coalesced in the person of Fatteh Kunwar within four years of the first transaction and within three years of the second; and it was she—and it is the Defendant who is her representative—who have had in their hands the whole of the evidence necessary to prove whether the transaction was a sham or a real one. Therefore the absence of evidence certainly does not tell against the Plaintiff, but it rather tells against the Defendant, who might have produced both witnesses and documents which would throw light upon the case.

Under these circumstances great importance is to be attached to assertions of title made, either by Gulab or Fatteh, from time to time in legal proceedings. Let us follow them in chronological order. In the first place there was Balbhadar's suit, which was commenced in 1863, and in which a decree was made in 1866. The Judicial Commissioner has rested

great weight upon the decree in that suit as against the Plaintiff. What he says is:— "Seeing then that Gulab Kunwar continued in possession long after the sale "deeds, and sued on her own title in her own "name, and got a decree for this property "in her own name for herself and her heirs, "I can hardly imagine a clearer case of adverse "possession as against Bissesur Bakhsh and "his heirs." As to the possession, that has been dealt with; as to the suit, there is clearly an inaccurate statement by the Judicial Commissioner. The suit was instituted by Gulab for recovery of several villages which came to her under the partition, and of which, by a series of complicated proceedings, she had lost possession. She never sued for the five villages of which she was clearly in possession, and of which the four now in suit are part. The way in which those villages came in was on the plea of the Defendant, who said that, so far from Gulab having the right to recover from him the villages for which she sued, he had the right to recover from her five villages of which she was in possession. How exactly that matter was dealt with in Court before the Judge we do not know. It may have been that the parties agreed there should be a decree covering the whole matter in dispute, but those five villages were not regularly in suit at all. The decree does deal with them. It gives to Gulab the absolute proprietary right in them, and dismisses the Defendant's claim—the counterclaim to recover from the Plaintiff the five villages in her possession. Those words are relied upon as proving Gulab's possession. But it is obvious, independently of the fact that it was quite irregular to make a decree about these villages, that there was no question of possession as between Gulab and Bissesur in this suit.

Such an issue never was raised or thought of. The only question of possession, if any, was as between Gulab and Balbhadar. Strictly and regularly there was no question whatever of possession, but if any were brought in, then it was only as between Gulab and Balbhadar, and as between those two she was in possession. She was then recorded in the Collector's books, and it was quite sufficient for the determination of any question that could possibly be brought, even irregularly and by consent of the parties to that suit, to treat her as the party in possession. And in point of fact the decree uses the right language upon that point. It decrees to her a right against the Defendant Balbhadar Singh, and against nobody else.

Then come the mutation proceedings on the 1st of January 1867, in which the evidence of Sheo Sahai, which has been before observed upon, was given. In those proceedings Fatteh Kunwar, who was the heir both of Gulab and of Bissesur, claims to be registered as the heir of Bissesur. Why should she have made that claim? Her interest was all the other way. If she were heir of Gulab she had absolute dominion over the property. If she were heir of Bissesur, she had only the widow's estate, and we shall see presently what importance she attached to that distinction. Moreover it was more simple to claim as the heir of Gulab. She was the recorded owner, and, as far as the Collector's records went, Fatteh had only to show that she was Gulab's only child, and the mutation would be made as a matter of course. But she does not do that. She introduces that which is entirely new matter into the Collector's records—the conveyance to Bissesur, and then makes out her claim as heir of Bissesur. That seems to their Lordships strong evidence that, in the opinion

of Fatteh Kunwar, or of her advisers at that time, her true title was as heir of Bissesur.

Next comes Ratan Singh's suit in 1868. Ratan Singh after the death of Gulab revived the old dispute between Gulab and her brothers-in-law, with only this difference: that whereas in Gulab's lifetime they contended that she was entitled only to maintenance, now after her death they contended that she was only entitled to the widow's estate. That dispute was raised in 1868. Fatteh Kunwar appears and puts in a plea by her agent, in which she again sets up her title through Bissesur. The judgement proceeds on that footing. The judgement is to the effect that the Plaintiff's claim is declared "not to lie "against Defendant, who holds as her husband's "heir the property acquired by him by purchase "from Gulab, who was possessed of the legal "power to settle." Of course that is no decision binding the present parties, but it shows as distinctly as anything can show the position which Fatteh Kunwar thought it right to assume in the year 1868.

All these things are rather emphasised by the wajib-ul-arz which was made at Fatteh Kunwar's instance in 1869. Before dealing with the effect of it, their Lordships wish to make some observations upon the extraordinary and startling character of that document. A wajib-ul-arz has been considered to be an official record, of more or less weight according to circumstances, but still an official record, of the local customs of the district in which it is recorded. It has been received before this tribunal and elsewhere as important evidence. In the case cited from the 7th Indian Appeals it is stated that "these documents are entered on record in "the office. They must be taken upon the "evidence, which is general evidence, to have

" been regularly entered, and kept there as " authentic wajib-ul-arz papers." In that case effect was given to the wajib-ul-arz produced. In this case the Judicial Commissioner has treated the wajib-ul-arz in question as a document of weight, which must be taken as showing local customs until some proof to the contrary is produced. But on looking at the evidence their Lordships find that this wajib-ul-arz was the concoction of Fatteh Kunwar herself, received by the settlement officer as an expression of her views which she had a right to enter upon the village records, because she was proprietor of the estate. But they are not entered as her views, they are entered as the official record of a custom. And supposing 50 years had gone by, and then a dispute arose about the family or the local custom, this would probably have been produced from the office as an entry made 50 years ago, under circumstances of no suspicion at all, and it would be taken that the Government officer had recorded it as the local custom. And now we find it deliberately stated (though there was an appeal from the entry of this wajib-ul-arz) by the Oudh Courts that the proprietor has the right to enter his own views upon the village records, and have them recorded as if they were the official records of the local customs. Well, that is an exceedingly startling thing, and their Lordships think that the attention of the Local Government should be called to what has appeared in this case to have been done in one instance, and may be done in other instances. It does not only render those records useless — they are worse than useless — they are absolutely misleading, because they are evidence concocted by one party in his own interest. It is to be hoped that under the Act of 1876, which empowers the Local Government to make rules under which these records shall be

framed, such proceedings will not take place any more.

So much for the character of the document. Now for its effect. It is not now contended that, if Bissesur was entitled, the custom which the wajib-ul-arz asserts can prevail. In fact there is no evidence of it. Mr. Graham most properly abandoned that part of the case. But that does not get rid of the circumstance that in 1869 Fatteh Kunwar thought it to her interest to put this fictitious document on the village records, asserting her own power to alienate such estate as she had got from Bissesur. If she had taken everything as the heir of Gulab, there was no object in getting the entry made; but if she was the heir of Bissesur, then she had a strong object, because otherwise she could not make a complete alienation of the estate.

That, in their Lordships' opinion, strengthens the circumstance that up to that time she had always been asserting herself to be the heir of Bissesur, and leads them to conclude that she could not have asserted it for any other reason than because it was the truth.

Then comes the gift by Fatteh Kunwar to her daughter in 1876; and again we find that though it is not very precise as to the nature of her title, she states that Munnia is a natural heir "after me and my husband." Now that exactly accords with the position which Munnia would have if the property came from Bissesur, and it does not accord with the position which Munnia would have if the property came from Gulab. Therefore it appears again that Fatteh Kunwar considered herself as taking the property from Bissesur, and as conveying it to Munnia under that right which she alleged on the face of the wajib-ul-arz that she possessed, but which in fact she did not possess.

The only remaining proceeding is the declaratory suit by Uman Parshad in 1876. That raised the very question which has now to be decided in this suit. The suit was got rid of because it was declaratory only. But the parties had now come face to face. Uman Parshad, the very man, or representing the very family, against whom the benami transfer was said to be effected, comes and claims the property. Now clearly is the time when this benami title should be set up to embarrass the enemy. But it is not set up. Nothing is said about it, except what may be gathered from a very obscure, and probably very imperfect sentence taken down by the Judge as either the plea or the argument of Mr. Jackson, who was the counsel for Fatteh Kunwar. It is difficult to gather anything precise from it; but he seems to have suggested that Bissesur took as benamidar, not for Gulab, but for his wife Fatteh Kunwar—a totally different case from that which is made on the present occasion. That again is very strong evidence that Fatteh Kunwar, or her advisers, felt that they could not with truth and honesty declare that it was a sham transaction.

Thus we find that Fatteh Kunwar had gone on from 1866 to 1879 asserting herself to be in possession of this property as heir of Bissesur; and no assertion to the contrary was made during her lifetime. If she had made the contrary assertion, perhaps some proceedings might have been taken; but the lapse of time affords an additional reason why her grantee or representative should not be allowed to turn round and assert a directly contrary title.

The result is that all these lines of consideration point in favour of the Plaintiff's contention; and inasmuch as he has the form of the transaction on his side, and everything points in favour of the substance of the transaction being with him too, his case should prevail.

Their Lordships will humbly advise Her Majesty to discharge the order of the Judicial Commissioner, and to dismiss the appeal to him with costs, and the Respondent must pay the costs of this appeal.