Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhowun Doss and another v. *Sheik Mahomed Hossein and others, from the late Sudder Dewanny Adawlut at Agra, North-Western Provinces, Bengal: delivered 5th March*, 1870.

Present:

SIR JAMES W. COLVILE.
THE JUDGE OF THE HIGH COURT OF ADMIRALTY.
LORD JUSTICE GIFFARD.

SIR LAWRENCE PEEL.

THE only question on this Appeal is whether the interest of the mortgagees under a Deed of conditional sale, dated the 7th of November, 1855, is now vested in the Appellants, as the assignees of a woman whom it will be convenient to designate by her original name, Hoosein Buksh, or in the Respondent, Hossainee Begum, as the heiress and representative of Mirza Abdoolla Beg.

The Suit in its inception was one brought by the Appellants to enforce the security against the mortgagors who are represented by the two other Respondents. The Respondent Hossainee Begum intervened by petition, alleging that Hoosein Buksh had no right to assign the mortgage security which was part of the estate of the Mirza, and as such now belonged to her, the petitioner, as his representative. She was admitted to defend her title as a party to the Suit, which thus embraced two distinct questions, viz., 1st, whether the Appellants, under the title derived from Hoosein Buksh, are entitled to stand

in the shoes of the original mortgagee, and, if so, 2ndly, whether they are entitled to the relief sought against the mortgagors. The first only of these questions has been fully tried in the Courts below, or argued on the Appeal here.

In a former Suit touching the estate of Mirza Abdoolla Beg, between the Respondent Hossainee Begum, and Hoosein Buksh, it had been determined by the Decrees of two Indian Courts confirmed on appeal by Her Majesty in Council that the latter was not, as she alleged, a wife, but a mere concubine of the Mirza; that a document which she had propounded as his will in her favour was spurious; and that the Respondent, Hossainee Begum, as his heiress at law, was entitled to his estate.

The following is the history of the security in question. In November 1855, the mortgagors being the owners of a half-share in Talook Komurpoor which they had previously mortgaged to Bishnoo Doss, the father or ancestor of the Appellants, borrowed 7,000 rupees in order to pay off that mortgage, and for other purposes. As a security for the repayment of the new loan with interest, they executed the deed of conditional sale of their share in the Talook to enforce which this Suit is brought. By instruments of the same date (the 7th of November, 1855) they took from the mortgagee a lease of the mortgaged premises at a yearly Jumma of 3,996 rupees 12 annas and 6 pie; and accordingly remained in possession, under the obligation of paying out of that sum the Government revenue and other charges on the property, and accounting for the balance, being 840 rupees per annum, as profits to the mortgagee on account of this usufructuary mortgage. The mortgage was taken, and the sum granted, in the name of "Mussamat Jareutool Butool, otherwise Bebee Hooseinee Kullan, wife of Mirza Abdoolla Beg." And the question, as already stated, now is, who was the real mortgagee?

This question was, in the Courts below, treated as involving two issues, viz.,—1st, who was the person designated by the above description, *i.e.*, whether it was Hoosein Buksh, or the admitted wife of Mirza Abdoolla Beg, one Zenut Bebee; and, 2ndly, whether the money was not advanced by the Mirza, and the security taken for his benefit, though benamee in the name of the person, whoever she

might be, to whom the description was intended to apply.

Their Lordships are of opinion, that if the money advanced can be shown to have been the money of the Mirza, it becomes immaterial to consider who was the nominal mortgagee. For the case made by the Appellants, and sworn to by their witnesses, is, that the money was advanced by Hoosein Buksh out of her own monies; and the mortgage taken in her name for her own benefit. There is no suggestion on the Record that, though the money came from the Mirza, the transaction was by way of gift, or provision for her; and the Appellants cannot now be allowed to set up a title inconsistent with that asserted in the Courts below. This being so, it is to be regretted that the Judgments of those Courts do not so much proceed on a clear finding on this material issue, to which the evidence taken was almost wholly directed, as upon inferences from the conduct of Hoosein Buksh, and other circumstances which will be hereafter considered.

The case made by the Appellants was, as already stated, that the money was that of Hoosein Buksh. It is supported only by the testimony of servants, of whom one at least has been discredited in the former Suit. Some of them undertake to swear that when she came into the Zenaneh of the Mirza she brought a large sum of money (15,000 rupees or more) with her—a circumstance far from probable. The principal Sudder Ameen has expressed an opinion that the Appellants' witnesses are untrustworthy as compared with the witnesses of the other party, and their Lordships feel that very little reliance can be placed upon them. Hoosein Buksh herself has not been examined; nor is her story corroborated as it might have been, to some extent, by the production of the Collector's receipts for revenue which, as appears from the instrument called the acceptance of the lease, the mortgagors were bound to hand over to the mortgagee.

The case of the Respondent as to the money is, that it was made up of a sum of 6,900 rupees, which was brought for the purpose from the bank of one Narain Doss, under an order of the Mirza, and of a sum of 100 rupees added to it from his cash in the house. The witnesses who depose to this are, for the most part, also menial servants.

Nor can their Lordships, who have not the means of seeing them, judge how far the principal Sudder Ameen was warranted in considering them more worthy of credit than those on the other side. The evidence of the Gomashta called to prove the payment from the bank of Narian Doss, if free from the objections taken to it, would unquestionably turn the scale in the Respondent's favour. Those objections have now to be considered.

The first is, that the date of the entry in the Banker's books as given in the Record, corresponds with the English date, the 22nd of November, 1855, and is therefore inconsistent with the Respondent's Case, inasmuch as it shows that the payment of the 6,900 rupees was posterior to the date of the mortgage transaction. Their Lordships, however, are not satisfied that the Hindee date is correctly printed in the record. It is Mitu Katuk Soodee, 13th. The Hindee date of the conditional sale is Katuk Boodee, 13th. The name of the month and the number of the day are the same. The difference is between Soodee and Boodee or "the light" and "the dark side of the moon." An error, therefore, in one word would account for the discrepancy. Their Lordships cannot but think that if there had really been this gross inconsistency between the Respondent's evidence and her case, the fact could not have escaped the notice of the native Judge who tried the cause in the first instance; or of the Appellants. Yet the former admitted the entry without comment, and apparently gave credit to it; and neither in their reasons of appeal, nor, so far as appears, in the argument before the Appellate Court was this objection taken by the Appellants.

A more formidable objection to the entry is its particularity. It is asked, why should it state that the money was paid "through Thakoor Hurrun Singh for a mortgage in presence of Sheikh Mahomed Hossein and Sheikh Mahomed Hussun to Bishnoo Doss and Gopal Doss." The statement seems to point rather to a payment at the bank than to one at the house of the Mirza. Nor do the other witnesses speak to the payment to Bishnoo Doss and Gopal Doss; though such a payment at some time and in some place must have formed part of the transaction. It is also argued that, if the Respondent's Case were true, she might have proved it by

calling Sheikh Mahomed Hossein, the surviving mortgagor, and other respectable persons named by the witnesses or in the entry. That there is considerable force in these arguments cannot be denied. But it is to be remarked that there was no cross-examination of the Gomashta upon the entry or otherwise. The evidence seems to have been given without objection or comment in the Court below. If, therefore, the Indian Courts had distinctly found upon this evidence that the money was advanced by Abdoolla Beg as alleged by the Respondent, and their Judgments had expressly proceeded on that finding, their Lordships, notwithstanding the difficulties about the entry, and the character of the Respondent's witnesses, would not have seen grounds sufficient to justify them in disturbing these concurrent judgments.

Unfortunately, there has been no distinct finding on this issue of fact. And their Lordships must consider whether the grounds which the Judges of the two Courts do assign for their conclusions, are sufficient to justify them.

The Judgment of the principal Sudder Ameen proceeds chiefly on the ground that Hoosein Buksh, having included the mortgaged property under the description of "Komurpore," in the enumeration of the Mirza's properties at the foot of the spurious will must be taken to have admitted that it was part of his estate. The Judgment of the Appellate Court adopted this ground, but proceeded also on the conclusion that the nominal mortgagee was not Hoosein Buksh, but Zenut Bebee. Its reasons for that conclusion are not in their Lordships' opinion satisfactory. It may be admitted that "Jariutool Butool" is a term as applicable to the one person as to the other. But the *alias* Hossainee Kallan is at least nearer to the name of Hoosein Buksh than it is to that of Zenut Bebee. Hoosein Buksh, if her story is true, might well give to herself in the deed a more noble title than properly belonged to her, and yet be careful in the will to call herself by her original name in order to avoid any dispute touching the description of the legatee. It is also perfectly consistent with her case that she should describe herself as the wife of the Mirza. Nor, though improbable, is it absolutely impossible that he, if the transaction were with him, would allow her to be so described?

Their Lordships therefore are not prepared to affirm that Hoosein Buksh was not the *benamee* mortgagee, though they do not say that she has been satisfactorily proved to have been so.

The other ground of the Judgments seems to them to be stronger. It is met by the suggestion that the "Komurpore" mentioned at the foot of the will is not the property comprised in the mortgage. The Principal Sudder Ameen, however, a native judge with local knowledge, has held that the "Komurpore" in the will did properly designate that property. The reasons of appeal make no specific objection to this finding; and the objection taken in argument before the Judges of the Sudder Court, who had not local knowledge, was only that the word might mean some other property; there was no attempt to show what it did mean. And their Lordships are disposed to think that the Principal Sudder Ameen was correct in the conclusion that the spurious will did treat the subject of this suit as part of the Mirza's estate.

The arguments founded on the dealing of the mortgagors with the Respondent Hoosainee Begum, and on the purchase by the Appellant of Hoosein Buksh's title, do not, in their Lordship's judgment, do much to advance the case of either party. The Appellants have, with their eyes open, purchased a very doubtful title, and as far as they could, have provided for the refund of the purchase-money (if any really passed), should they fail to substantiate it. As the owners of the other moiety of the Talook, they had an obvious motive for entering into the speculation. On the other hand, though the recognition of the Respondent's title by the mortgagors affords some ground for the inference that the Mirza was originally the real mortgagee, yet the indulgent terms which the Respondent has granted them supply a motive for that recognition.

Upon the whole, their Lordships are of opinion that the Appellants have failed to establish the title of Hoosein Buksh by evidence which would justify the reversal of the Decrees under appeal. Their Lordships' only doubt has been whether they ought not to remand the cause for a further and more satisfactory trial of the issue, by whom was the money advanced? But considering the weight of suspicion which attaches itself to the title of Hoosein Buksh, the preference which the Principal Sudder Ameen

has expressed for the Respondent's witnesses, and the reasons which he has assigned for his Judgment, they feel unable say that that Judgment was wrong, and finding it confirmed by the Superior Court they have come to the conclusion that it is their duty humbly to recommend Her Majesty to dismiss the Appeal. The costs must follow the result.

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