Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Geresh Chunder Lahoree v. *Mussamat Bhuggobutty Debia and others, from the High Court of Judicature at Fort William, in Bengal; delivered the 12th day of July,* 1870.

Present:

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THE Appellant in this case is the heir-at-law of Sarodapershad, who was the adopted son and heir of Kali Kant Lahoree. The Respondents are the sisters of Mirnamoye Debia, deceased, who was the widow of Kali Kant. The Suit which has given rise to this Appeal was a Suit in the nature of an ejectment brought by the Respondents, claiming under a deed of gift from Mirnamoye to recover from the Appellant three several parcels of land. Their case was that these lands, which, on three different occasions, had unquestionably been purchased in the name of Mirnamoye, were part of her stridhun or peculiar property; that she had, therefore, the power of disposing of them; and had effectually exercised that power by the deed of gift in question. The case of the Appellant was that the lands, though purchased in the name of Mirnamoye, were purchased by Kali Kant with his own funds in the name of his wife, and formed part of his estate in which, under his will, she had only a life interest; and further that the alleged deed of gift was either a forgery, or, having been procured from Mirnamoye

by the fraud and contrivance of her brothers, was not an effectual disposition of the property. It lay, therefore, upon the Respondents, who was seeking to disturb the possession of the Appellant, to establish both that the property was the stridhun of Mirnamoye; and that she had effectually conveyed it by this deed of gift. If either of these issues be determined against them, it follows that, on the death of Mirnamoye, the title to the lands in question passed to Sarodapershad, who was the heir-at-law of both his adoptive father and his adoptive mother; and that the Appellant as his heir is entitled to retain possession of them. Both issues were, however, determined, first by the Zillah Court, and afterwards, on Appeal, by the High Court, in favour of the Respondents; and the present Appeal is against those decisions.

Their Lordships are of opinion that, upon the evidence before them, they ought not to disturb the finding of the Courts below upon the first of these questions. They do not adopt all the reasons assigned by either Court for coming to this conclusion. They desire to state in particular that they are not satisfied that the 20th and 21st Sections of Act I of 1845 raise a presumption of law fatal to the case of benamee purchase set up by the Appellant; and they observe that this objection, if well founded, would at most apply only to one of the three parcels of land in dispute (Somashpara); and not, as is stated by the learned Judges of the High Court "to all the denominations of lands claimed by the Defendants." They find, however, that Mirnamoye had certainly some stridhun. They find that Kali Kant in his lifetime solemnly and deliberately admitted that these purchases were made out of her funds, and for her benefit as well as in her name. The evidence no doubt fails to show satisfactorily that her peculiar funds amounted to a sum which would cover all the purchases which she is said to have made. But it cannot be said conclusively to prove the contrary.

Again, though the extracts from Kali Kant's books afford some evidence in support of the allegation that these purchases were made out of his funds and were therefore presumably taken benamee for him, they are not absolutely conclusive. Their Lordships are unable to say how the separate funds of the

husband and wife may have been intermixed by them. We know by his own statement that he did on one occasion take and employ 8,000 rupees belonging to her. It seems, therefore, to their Lordships that this evidence cannot fairly be taken to outweigh the positive admissions of Kali Kant himself. It is argued, however, that credit is not to be given to those admissions, because they may be assumed to have been made falsely, with the object of defeating the claim of the present Appellant to share in the self-acquired property of Kali Kant, including these parcels of land. But looking to the remarkably fair and open character of the pleadings in which the statements in question were made, and considering that the defence of Kali Kant (a defence which proved successful) was that the Plaintiff in that suit (the present Appellant) was not entitled to share in any part of his self-acquired property, whether held benamee or otherwise; and that those pleadings admitted that some of the purchases then in question had been taken benamee; their Lordships feel that they would not be warranted by the evidence before them in imputing to Kali Kant that he had been guilty in a Judicial proceeding of deliberate falsehood. It is, therefore, unnecessary to consider how far a Court of Justice is at liberty to disregard admissions so made in favour or for the benefit of a person claiming as the heir of him by whom they were made.

Assuming, then, that the Courts below have correctly found that the property in question was the stridhun of Mirnamoye, their Lordships have to consider whether the Respondents have established that the deed of gift was, under the circumstances of its execution, a valid disposition of it in their favour.

It cannot be said that this issue has been fully or satisfactorily tried in the Courts below. It does not appear on the record whether there was any formal settlement of the issues; or, if there was any, in what terms this particular issue was framed. The statement of the Zillah Judge that the conveyance by Mirnamoye to her sisters is not denied by the Defendant, implies either that he mistook the effect of the Defendant's written statement, which unquestionably disputed the validity of the deed, or that he never addressed his mind to try an issue on which nevertheless both sides had put in a consider-

able amount of evidence. The Appellate Court observed on this part of the case that the Judge below had apparently by inadvertence taken for granted that the conveyance was not denied, and had passed no opinion except inferentially on its validity. But instead of sending the cause back for the trial of the issue on which the Court of First Instance had thus failed to pass any satisfactory judgment, the learned Judges of the High Court proceeded to dispose of it on the evidence which had been taken in the Court below. It follows, therefore, that the only Court which has really tried the question was equally with their Lordships under the disadvantage of having to determine it on the written depositions, and without an opportunity of seeing the witnesses.

What are the undisputed facts of the transaction? About the end of May, 1856, Mirnamoye, labouring under the disease of which she died, left her house in Rajshaye, and went, for the sake of medical advice, to Shoyabad near Moorshedabad, where she took up her residence in the house of the Pundit Gobind Kant. She was accompanied by her sisters (the Defendants), her dewan, Krishonath Sannyal and other servants. Early in the following July, her brothers, Ram Kristno and Doorgadoss Chowdry, came to her from Rajshaye. The hibba, or deed of gift, bears date the 16th, and was produced for registration on the 18th, and actually registered on the 19th of July, under a mookteanamah, purporting to have been executed by her contemporaneously with it. Early in August 1856, other mookteanamahs, and a petition purporting to have been also executed by Mirnamoye, were produced; the first in the Collectorates of Rajshaye and Bogra, the last in the Court of the Judge of Zillah Rajshaye. Their object was to give publicity to the hibbah, and to cause the properties comprised in it to be transferred in the books of the Collector into the names of the Respondents. The Zillah authorities required that these documents should be verified. On their requisition the Principal Sudder Ameen of Moorshedabad appears to have sent a Peishkah to take Mirnamoye's deposition at the house of the Pundit, and on his report to have declared them to have been verified. The order to that effect was passed on the 19th of August, and on the 25th of August, 1856, Mirnamoye died. Nothing further

was done between these dates to give effect to the hibba, or deed of gift. After her death the validity of the deed, as well as the power of Mirnamoye to dispose of the property, was disputed by the guardian of Sarodapershad, and a contest for the mutation of names was carried on in the Revenue Courts, which was finally determined by the Board of Revenue in favour of Sarodapershad, whose possession was confirmed, the Respondents being left to assert their title by a regular Suit in the Civil Court.

Their Lordships now proceed to consider more particularly the evidence by which the Respondents have attempted to prove the due execution of the hibba by Mirnamoye. Their principal witnesses are the Pundit Govind Kanto, whom the learned Judges of the High Court seem to have considered a respectable witness, the Dewan, and Ram K istno Chowdry, one of the brothers of Mirnamoye. The Pundit seems now to be employed as Pundit in one of the Civil Courts, but at the date of the transaction he did not hold that office, but stood in some kind of spiritual relation to the two brothers (the Chowdries), they being his "Jujman." His story is that, early in July 1856, Mirnamoye expressed to him an intention to give all the property over which she had a disposing power, to her brothers; and desired him to write to them and request them to come to Shoyabad. He did so write, but the letters are not produced. He goes on to state that Ram Kristno came to the place several days before Doorgadoss, who accounted for the delay in his coming by saying that it had been occasioned by his having caused a draft of the instrument for which he had been brought to be prepared at Rampoora.

From the cross-examination of the Pundit it appears that finally Mirnamoye was made to execute two hibbas, viz., the one in question in this suit, and one by which she gave other part of her stridhun to her brothers in the names of their wives; that the actual form of this disposition, varying as it did from the intention said to have been expressed by her to the Pundit, was prompted by the brothers, one of whom brought the drafts from which the instruments executed were prepared, with him. He also states a conversation which supports the allegation of the Defendant, that the gift in question, though nominally made to the sisters, was for the

brothers. To the actual execution of the instrument this witness does not speak. He accounts for his absence by saying that he was suffering from fever, and unable to bear the press of the crowd which assembled on that occasion; that he retired to the house of one Prem Baboo, situated at a short distance from his own, and was informed from time to time of what was going on by his disciples; that he made one short visit to his own house, where he saw the Dewan writing with stamped paper before him, but could not stay there.

Their Lordships are compelled to say that this absence of the Pundit begets a suspicion in their minds which the story told by him of its cause does not dispel. It is by no means improbable that a person in a respectable position in life, knowing that a deed was about to be unfairly obtained, would take care not to be personally present, and would contrive to give only such corroborative evidence of the transaction as he might think he could safely give. In the present instance the only legal proof which the Pundit gives of the actual execution of the document is the subsequent and verbal admission of Mirnamoye Dabee in a conversation with him. The learned Judges of the High Court laid some stress on this admission. But their Lordships need not remark upon the danger of trusting to that kind of evidence, unless the witness is wholly above suspicion.

Doorgadoss Chowdry deposes that he has no interest in the deed of gift, and treats it as made for the benefit of the Respondents. He does not confirm the account given by the Pundit of the change of intention on the part of Mirnamoye; he does not speak of having brought any draft with him; or give any account of the preparation of the deed; or show how it came to be made in the names of the two sisters; or who gave the instructions for it.

The Dewan who wrote the hibbanamah says that the gift was intended to be in favour of the brothers; that he cannot tell why it was executed in the names of the sisters; and he does not state from what draft or under whose instructions he wrote the deed in the form in which it was executed. He says that the Respondent Ram Soondery put Mirnamoye's seal to the document at her request. The

brother and the subscribing witnesses say that Mirnamoye sealed it herself.

Of the testimony of the subscribing witnesses it is unnecessary to speak at length. They are either cultivators living at a distance from the place of execution, or menial servants. It is not satisfactorily explained why some of them were there at all. And the testimony of the Dewan makes it, to say the least, extremely doubtful whether they were in fact there; and whether according to a reprehensible practice, not uncommon in India, their names were not afterwards written on the deed. Only one of them professes to have written his own name. They were not examined when the deed was registered, and the subscribing witnesses who were then examined were not produced at the trial of this cause. Some of them speak of Mirnamoye as present in the verandah amidst a crowd of men, giving her own instructions and describing the property verbally, and personally asking the witnesses to become subscribing witnesses.

It is further to be observed that, although the Pundit says he heard of the execution from the Kobiraj and other respectable persons, and although Doorgadoss names several persons far more respectable in station than the subscribing witnesses, as present at the execution, none of those persons either subscribed the instrument, or have given their testimony in support of it. Again, if it had been clearly proved by the officer sent to verify the execution of the mooktearnamahs by Mirnamoye that she had acknowledged those instruments to be hers, that would have been an important corroboration of the Respondent's case. But that officer was not called as a witness, his actual report is not forthcoming; and the testimony of the Dewan leads to the conclusion that he performed his duty in the most perfunctory manner, and was satisfied on the report of a maid servant, not called or examined, that Mirnamoye had admitted the execution of the mookteanamahs.

Is, then, the evidence adduced by the Respondents, and considered without reference to any conflicting testimony on the part of the Appellants, sufficient to establish the due execution of this deed of gift? Their Lordships, differing respectfully from the

Judges of the High Court, have come to the conclusion that it is not.

The disposition is one by a Purdah woman, made not very long before her death, and whilst she was labouring under a mortal disorder. Their Lordships consider that it is not open to the objection of inofficiousness. Her preference of her own blood relations to a son adopted by her husband, and otherwise provided for, was not unnatural. But this Committee and the Courts in India have always been careful to see that deeds taken from Purdah women have been fairly taken; that the party executing them has been a free agent, and duly informed of what she was about. Again, when the disposition, as in this case, is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeded, to be satisfied that it was the free voluntary act of the party by whom it purports to have been executed, and expresses his real intentions. In the present case the Respondents' evidence is conflicting as to the party intended to be benefited and leaves it uncertain, to say the least, what were the instructions for the deed, and from whom those instructions emanated. Evidence so untrustworthy, so uncertain, and so conflicting, is not such as enables their Lordships to declare affirmatively that the hibba was in any sense the act and deed of Mirnamoye, or even that she herself put her hand and seal to it.

Their Lordships, therefore, have come to the conclusion that the Respondents having failed to prove a material link in the title upon which alone they can recover, the decrees under appeal ought to be reversed, the Suit dismissed with costs in the Courts below, and that the Respondents should pay the costs of the Appeal. And they will humbly advise Her Majesty accordingly.

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