Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Fukhuroodeen Mahomed Ahsun Chowdry v. *Kumroonissa Khatoon and others, from the High Court of Judicature at Fort William, in Bengal; delivered 20th December,* 1872.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THIS is an Appeal from a Decree of the High Court reversing a Decree of the Principal Sudder Ameen of Fureedpore in a suit brought by Nujumonissa Khatoon against her husband Fukhuroodeen Mohomed Ahsun Chowdhree and others.

The suit was brought to recover possession of certain immoveable property specified in the schedule to the plaint, together with mesne profits from the month of Srabun, 1267 B.S. The Plaintiff also sought to recover certain jewellery, shawls, wearing apparel, and cash specified in the schedule, in respect of which no question arises in this Appeal.

Their Lordships will, therefore, confine their remarks to that part of the claim which relates to the immoveable property.

The Plaintiff's case was that upon her marriage with the Defendant, on the 18th Magh, 1241 B.S., the Defendant agreed to settle upon her as dower 5,000 gold mohurs, equivalent to 80,000 rupees, and 20,000 rupees, the total being equivalent to one lac of rupees, of which one half, of the value of 50,000 rupees, was to be prompt and the other half de-

ferred; that the Defendant, not being able to pay down the amount of the prompt dower, conveyed to her in lieu thereof in hibba-bil-owaz the lands sought to be recovered in the suit; that she took possession of the property, and remained in possession thereof until the month of Srabun, 1267 B.S., on which date she had been obliged, in consequence of her husband's cruelty and misconduct, to leave his house and to go and reside with her father, and that she had been actually obliged to obtain the assistance of the magistrate to enable her to leave her husband's house. She alleged in her plaint that upon this her husband gained over to his side the Naib Mohafiz, who had charge of the papers relating to the Zemindaries, and ousted her from the lawful possession of her property.

The Sudder Jumma of the Zemindaries mentioned in the schedule was stated in the plaint to be 10,618 odd rupees, and that of the putnee talooks to be 1,168, and the suit was valued upon that basis.

The plaint was filed on the 30th December, 1861, and with it a document purporting to be the hibbahnamah and conveyance of the property, and shortly afterwards—viz., on the 18th of January, 1862—an attested copy of the document was obtained from the Court on behalf of the Plaintiff. (P. 103, l. 6 to 12.)

The original document was afterwards abstracted from the Court.

On the 19th April, 1862, the answer of the Defendant was recorded through his pleaders, and afterwards on the 16th May, 1862, a written statement was put in and verified by the Defendant. He said:—

"At the time of marrying the Plaintiff, I had executed to the Plaintiff a *kabeennamah*, fixing 5,000 gold mohurs (which is equal to Rs. 80,000) and Rs. 20,000 total (Rs. 1,00,000) one lac of rupees on account of dower. Of this sum, Rs. 50,000 were for *moujjul* (prompt) dower, and another Rs. 50,000 were for *mowujjul* (deferred dower). In lieu of the prompt dower no properties were given by me in *hibbah* (gift). In 1252 I paid to the Plaintiff Rs. 24,000, out of the money due on account of the prompt dower, in order to enable her to purchase a decree in the name of Anund Lochun Mundee. There is ample proof to show that she did purchase the said decree with the money thus paid to her. After this, in the month of

Aughran 1258, in order to avoid all misunderstandings and disputes, I paid to the Plaintiff the balance of the prompt dower Rs 26,000, and also Rs. 50,000 on account of the deferred dower, (for which no claim could have been made against him according to the Mahomedan law and the imperial enactments), total Rs. 76,000 in cash; and upon this the Plaintiff executed to me a *farkhutty* (release), which is registered. The Plaintiff having duly returned to me the said *kabeennamah*, I tore it up."

The only issues fixed for adjudication to which it is necessary for the purpose of this Appeal to refer, are—

1. Whether the kabeennamah as alleged by the Plaintiff was executed by the Defendant?

2. Whether the Plaintiff was in possession of the property claimed, and was dispossessed by the Defendant?

3. Whether the release set up by the Defendant was executed by the Plaintiff?

It will be convenient to consider the third issue first, for both the Principal Sudder Ameen and the High Court concurred in finding that the allegation made by the Defendant that the entire amount of the dower had been paid, and that a release had been executed by the Plaintiff could not be admitted. It is, as pointed out by the Principal Sudder Ameen in his judgment, most improbable that the Defendant should have paid the deferred portion of the dower before it became due, and that he should have torn up the kabeennamah if it had been delivered to him at the time when he received the alleged release. But the improbability of the story reached its culminating point when the Defendant endeavoured to prove that the balance of the dower, which, according to his story, remained unsatisfied, amounting to 76,000 rupees, was paid in specie in bags containing 1,000 rupees each, which were carried by slave girls to the Plaintiff, who was then behind a purdah. Not one particle of evidence was given as to where the money came from, nor as to how it was disposed of by the Plaintiff, notwithstanding the Defendant's allegation in his written statement that it would be proved on the trial that the Plaintiff kept that money in her own possession, and that she had gradually spent and removed the same through her father and her son.

Their Lordships entirely concur with the two

lower Courts in disbelieving the Defendant's statement that he paid the full amount of dower, and that the Plaintiff executed a release.

They cannot avoid the conclusion that that statement was made and verified by the Defendant, knowing that it was false, and that he endeavoured to support it by forgery and perjury.

Such a course of conduct on the part of the Defendant naturally causes grave doubts as to the truth and honesty of the other part of the case in which he denied that he ever did convey to his wife any portion of his property in lieu of dower.

The opinions of the Principal Sudder Ameen and of the High Court are in direct conflict on that part of the case, and their Lordships are called upon by this Appeal to affirm that the decision of the High Court was erroneous.

It is not at all probable, considering the discussions which are proved to have taken place between the Plaintiff's father and the Defendant respecting the amount of dower to be settled, that the former would have allowed the marriage to take place without payment of the prompt portion of the dower unless some security had been given for the same by the Defendant, or some portion of his property has been conveyed to the Plaintiff in lieu thereof. There is no doubt that a considerable portion of the property alleged to have been conveyed to the Plaintiff had descended to the Defendant from his mother, and that that property had been conveyed to her by his father at the time of their marriage in lieu of dower.

It is not at all improbable that the Defendant should have settled upon his wife, in lieu of dower, a portion of that property which his own father had, in like manner, settled in lieu of dower upon his mother.

The Plaintiff in her written statement says :—

"The properties mentioned in the *kabeennamah* having been acquired by my husband in virtue of a *hibbanamah* (deed of gift) dated 11th *Bhadur*, 1227, executed by his father, therefore, in order to prove this fact, and also to enable my father to have the *kabeennamah* drawn out, my said husband had made over to my father an attested copy of the said *hibbanamah* on a stamped paper of the value of Rs. 16. This copy, and also the authenticated copy of the *kabeennamah* missing from the Court (which is in my hand), and other authenticated copies of documents will fully establish and prove my claim."

The Plaintiff's father, Mahomed Mozuffur Chandhree, also in his evidence, page 25, lines 48 to 52, deposed as follows :—

"In order to prove that the Defendant was in rightful possession of the properties, he was giving in *hibba-bil-ewuz* he made over to me a copy on stamp paper of Rs. 16 of the *hibbahnamah* he had received from his mother, which copy I gave to Ahsad Ally Khoondkar and others, and they drew a draft of the *kabeennamah* by referring thereto. The copy of the above *hibbahnamah* is in my hands. The *kabeen* was written on a stamp paper of Rs. 100, and to it a stamp paper of one rupee was attached. Many respectable persons were present at the execution of the *kabeen*. I do not remember the names of all. I remember the names of Kala Canto Sircar and Radhamohun Bose. I do not remember the date on which the *kabeen* was executed, but it was written in the morning of the day of marriage. Eight annas of Tuppa Ahmedpore, Pergunnah Beraheempore, Mehal Banneeabohoo, Tagoria, and of many other mehals were given by the Defendant in *hibbah-bil-ewuz* to the Plaintiff. I do not remember the names of all : they are mentioned in the *kabeen*. With the exception of Pergunnah Shonabajoo, in which the Defendant has a four annas share, and of which he gave only two annas, half of all the other Mouzahs, and Pergunnahs, and other properties, mentioned in the *kabeen*, was given in *hibbah*. Plaintiff being my daughter, I got the *kabeen* executed, and I therefore know all about her possession and dispossession."

That copy was produced and put in evidence upon the trial, and is set out at page 98 of the Record.

If these statements had been untrue, and the attested copy had been obtained by the Plaintiff's father in any other manner, nothing would have been easier than for the Defendant to come forward as a witness and deny the truth of the statements thus made by the Plaintiff and her father. But the Defendant abstained from coming forward as a witness and giving evidence upon the subject. Many witnesses in a respectable station of life (some of them near relations of the Defendant), and who were present at the marriage, deposed to the fact that the Defendant did execute a conveyance of part of his property to his wife in lieu of dower, and five of these also deposed that they were attesting witnesses to the conveyance, and their names appeared on the attested copy as witnesses to the execution of the hibbahnamah. The Plaintiff's father proved that the hibbahnamah remained with him from the time of its execution, and that he handed it over for the purpose of being filed with the plaint.

The Principal Sudder Ameen disbelieved the Plaintiff's witnesses as to the execution of the kabeennamah, but it was not on account of their character, or of their demeanour when under examination, upon which he might have had a better opportunity than the High Court of forming an opinion. He says:—

"The next point is whether the copy of the *kabeen* produced is genuine or not. In trying this issue, it appears from the *kabeen*, that defendant made a grant of certain properties in lieu of Rs. 50,000, and in proof of it five witnesses, named Khundkar, Mayesoodeen and others, have been adduced. One of them has said that the *kabeen* was executed in respect of money in cash. Out of the witnesses who were present at the assembly where the deed was executed, Tanda Meah has stated that he knows nothing. Be that as it may, the said witnesses cannot be trusted. The principal reason far this is that when Bala Meah, the father of the Plaintiff, made a petition to the Magistrate, stating that the Defendant had ill-treated the Plaintiff, he declared in his statement, that all the properties belonging to the Defendant were sold, *i.e.*, transferred under a *hibba-bil-ewaz* (deed of gift for a consideration) in lieu of the amount mentioned in the *kabeen*. Besides, Plaintiff's *mook tear*, Ram Gopal Sircar, and the Deputy Magistrate, have deposed to the same effect, and the latter, it seems, intimates, in his deposition, that he read the *kabeen*. He has also stated, that the entire property was hypothecated under the *kabeen*. But it appears from the copy of the *kabeen* filed with the record, that the case is quite contrary. Hence it clearly appears, that a *kabeen*, other than the one filed in this suit on behalf of the Plaintiff was produced before, and that the same was in the custody of the magistrate for four or five months. When this *kabeen* was taken back, it was seen that a transfer of such large and valuable estates for the comparatively small sum of Rs. 50,000 would not be easily and credibly received by a Court of Justice; then a fresh *kabeen* purporting to convey over less property than the former one, was prepared with the view to secure such properties. If such be not the case, then what has become of the *kabeen* which was in deposit with the Magistrate, and which purported to convey the whole of Azeem, the Defendant's property in *hibba-bil-ewaz*, and to which the Plaintiff's father Bala Meah, and *mookhtear* Ram Gopal Sircar, and the Deputy Magistrate, had in their evidence on oath alluded? The suspicion as to who has abstracted the *kabeen*—which naturally arises from its not being forthcoming, cannot in my opinion be thrown on the Defendant; inasmuch as as the Plaintiff had no sooner filed the *kabeen* with her plaint, than she took an attested copy of it. Hence of what avail would it be to the Defendant to abstract the *kabeen* when its copy was in possession of the Plaintiff? On the contrary, the suspicion attaches to the Plaintiff, for there subsists a relationship between the Plaintiff's father Bala Meah and the former *serishtadar* of this Court, Moonshee Moheeoodeen (which the latter has himself acknowledged in the *Estafasar* (statement) made by him at the

Foujdarec Court on whom the entire control of the office devolved, consequent upon the late arrangements made in the Principal Sudder Ameen's establishment. The said *kabeen* was written on stamped paper, and judging therefore that alterations in the several items of it, which were most probably made, would render the deed materially defective and suspicious, the said *kabeen* was through the medium of the said *Serishtadar* filed, a copy immediately secured, and the original abstracted. This was done with the object of casting the suspicion, *prima facie* a most plausible one, that it can be no other but the defendant who would destroy the Plaintiff's document. The chief reason for this conjecture is, that, when the Plaintiff had secured a copy of the said *kabeen*, and the defendant, although he had subsequently applied for one, never received it, until he had specially petitioned for it in the Persian language, to the then Principal Sudder Ameen, Ally Azeem Khan Bahadoor, an inhabitant of Hindoostan, who, it appears, immediately gave it to him. In consideration of these circumstances, it seems that the said *Serishtadar*, acting as the principal agent in the matter, connived with such of the other *amlah* (ministerial officers) as was necessary, and caused the *kabeen* to be abstracted. For, when so grave an act is to be perpetrated in the office, those attached to it cannot be kept aloof. Consequently in my opinion I cannot believe that by that *kabeen* any property other than cash was ever conveyed. The evidence of the five witnesses who have deposed on behalf of the Plaintiff and of those who deposed to her possession, I cannot credit."

The statement of the father that the whole of the property was conveyed in lieu of dower, and some of the other circumstances alluded to do certainly create a doubt as to the genuineness of the deed by which only a portion of the property was conveyed; but in their Lordships' opinion they are not sufficient to outweigh the direct testimony of the attesting and other witnesses who were present at the marriage when the deed was executed. The witnesses, Ram Gopal Sircar and the Deputy Magistrate, may very probably have been mistaken in their recollection as to the effect of the deed.

It was urged on the argument that the Petitioner herself had represented in her petition of the 9th September, 1846, that the whole of the Zemindaries were included in the hibbah; but independently of the fact that the object of that petition was to procure the release of the whole property from the attachment against her husband, there is no evidence that the Plaintiff ever signed that petition, or authorized it to be presented. It is just as probable that the Defendant caused it to be pre-

pared in the name of his wife as that the Plaintiff herself caused it to be presented. With regard to the person who caused the document which was filed with the plaint to be abstracted from the records of the Court, the opinions of the Principal Sudder Ameen and of the High Court are in direct opposition. Their Lordships are unable, from the materials before them, to form or to express any opinion upon that point. No evidence appears to have been taken upon the subject, nor was any thorough investigation of the matter made. Both opinions seem to rest upon mere conjecture. Their Lordships cannot think that the mere fact of the Plaintiff's having obtained an attested copy of the document after it had been filed was sufficient to warrant the remarks of the Principal Sudder Ameen, which impute to the Plaintiff that she had filed a forged document, obtained an attested copy, and then abstracted the original for the purpose of giving the copy in evidence, and preventing the detection of the forgery. Looking to the fact that the Plaintiff and her father had long been under the impression that the Defendant was endeavouring wrongfully to obtain possession of the kabeennamah, it is not very improbable, upon the supposition that the document filed was a genuine one, that they should have been advised to obtain an attested copy lest the original should by any fraudulent means be abstracted or made away with. Their Lordships feel bound to state that entertaining the suspicion which the Principal Sudder Ameen has expressed, it would have been much fairer towards the Plaintiff and her father if, when the latter was under examination, the Principal Sudder Ameen had interrogated him upon the subject.

It is unnecessary for their Lordships to examine in detail all the arguments and reasons of the High Court in support of their view of the case. They are of opinion that strong evidence was adduced in support of the Plaintiff's case, as regards the execution of the document set out in her plaint, and though the evidence of possession was slight, that it was as much as could reasonably be expected in a case in which a husband and wife had undivided shares in the same property. The Defendant in paragraph 8 of his written statement (page 10,

line 53) stated that at the assembly at which the kabeenamah, set up by him in that paragraph, was executed, Khoondkar Azeezul Islam and other persons whose names are there specified, and other respectable persons were present, and that many of them subscribed their names to that kebeenamah; and it is to be remarked that none of those persons were called by him as witnesses to prove that the document executed at the marriage was such as he described it to be. It is not unimportant to remark that the Plaintiff's father came forward and gave his evidence in open Court, and that the Defendant abstained from offering himself as a witness. Looking at all the circumstances and at the facts and probabilities of the case, their Lordships are of opinion that, notwithstanding the absence of the original document, the Plaintiff's case was proved, and that the decision of the High Court was correct. They will, therefore, humbly advise Her Majesty that the decision of the High Court be affirmed; and it is ordered that the Appellants pay the costs of the Appeal.

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