Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Radha Mohun Mondul and others v. *Jadoomoonee Dossee, from the High Court of Judicature at Fort William, in Bengal; delivered February 26th*, 1875.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS was a suit brought by the widow of one of six sons of one Nurronarain, to recover the share which she was entitled to as heiress of her husband in certain family property, and she claimed a portion of that property in her absolute right and a portion as one of the joint shebaets of certain idols, that latter property being debuttur property. Her share became a fifth instead of a sixth by a family arrangement whereby the share of one of the brothers had been extinguished. Her case came in the first instance before the Judge of the Twenty-four Pergunnahs; that judgment, together with the judgment of the High Court, and the course which the case has taken, make it unnecessary to refer to a great number of issues and of statements and a great deal of evidence in the case. That Judge decided in her favour with respect to a certain portion of the real property and a certain portion of the personal property, and so far there is no question with respect to his decision. With respect to her claim to the debuttur property, he decided in her favour as to a portion of it, namely, a fifth share of Government papers for the sum of Rs. 14,000. He decided that she

was entitled to a fifth share of those securities, and to retain them in her hands; but that inasmuch as they were debuttur property, she was not competent to waste the same either by gift, sale, or in any other way. Upon the question —which was one of the main questions in the cause, raised between the parties—whether she had any right or title at all to property which was debuttur, he observed, "It is admitted "by both the parties that there exist ornaments, "plates, and furniture as well as debuttur lands "and rents for the use" of certain idols. The "question which then presents itself for my "consideration is, whether the Plaintiff can "have possession of the said properties. The "Defendants do not allege that the widows "of the family shall not be competent to hold "possession of the said endowed properties; in "other words, that they have not the power of "exercising that control over the same which "the male members of the family can exercise. "They merely say that as the said properties are "of a debuttur character they are not susceptible "of division among the shareholders; and that "since the Plaintiff is a childless widow she is "not competent to carry on the service of the "gods. That the properties in question do not "admit of any partition among the co-sharers is "a fact which must be admitted by me; but I "do not see any reason why a widow of the "family should be incapacitated from superintending the service of the gods. It is not "urged by the Defendants that any such "rule has been laid down in the family, "and that under it the widows have been "excluded from the above superintendence. "On the other hand, among the Hindoos, "persons belonging to no other caste except "that of Brahmins can perform the service of a "god with his own hands, that is, worship the

" idol by touching its person. Men of other " castes simply superintend the service of the " gods and goddesses established by themselves, " while they cause their actual worship to be per- " formed by Brahmins. Thus, when persons of " the above description can conduct the service " of idols in the above-mentioned manner, why " should not the widows of their family be able " to carry on worship in a similar way." And after citing a decision of the High Court, he came to the following conclusion :—" Conse- " quently there is nothing to prevent the Court " from finding that the Plaintiff has a right " to hold possession of the debuttur properties " enumerated by the Defendants in the 12th " paragraph of their written statement, and to " superintend the service of the Gods conjointly " with the other co-sharers."

Two other questions arose which it is necessary to notice, and two only. The Plaintiff claimed, among other properties, a right to a one-fifth share in a talook called Talook Chunder Hatt, which is No. 86 in the particulars of her plaint; and she claimed that, not as debuttur property, but in right of her husband, as her absolute property. The subordinate Judge found that this property was in fact the property of a certain idol which may be called Sreedhur; and, therefore, he held that she had not maintained the allegation in her plaint. It was, indeed, suggested by her advocate before him that although she had failed to prove an absolute right in the property, still she was entitled in her right of joint shebait to a share of the property of the idol; but the subordinate Judge held that as she had not framed her plaint in that way and had not sued as shebait she could not recover in that capacity, and, therefore, he decided against her upon that point.

The other question, which is the most important question in the cause, was this: The Defendants contended that other Government papers for a sum of two lacs and 15,000 rupees, which with the accumulations of interest had become a sum of two lacs and 57,000 rupees, had been, by an agreement of the whole family then in existence in 1859, devoted to the service of this idol Sreedhur, and, therefore, that the Plaintiff could not recover a share of that property, which she sued for, not in her capacity of shebait, but as part of her husband's estate. It was contended on the part of her advocate that the supposed agreement of dedication, even if actually executed, was colourable and collusive, that it was not intended to have effect, and was merely entered into for the purpose of defeating the possible rights of the widows, and keeping the property in the hands of the male members of the family. The subordinate Judge found in favour of the Defendants upon this contention: that the agreement was executed, and was a *bonâ fide* agreement; and upon the same argument being used which had been used before with respect to the talook, namely, that if the Plaintiff was not entitled to any share of this as heiress of her husband, still she was entitled to some share of it as shebait, he made the same reply that she had not sued as shebait, and therefore dismissed her claim to it.

The decree is in these terms: After giving her certain relief it says, "that she be further "competent, by furnishing security against "waste, to keep in her own possession a fifth "share of the Company's papers for Rs. 14,000, "belonging to the estate of Manick Chunder "Mundul, and owned by the idol Goopeenath "Thackoor, which are now in the hands of "the principal Defendants; that with the ex-"ception of the idol Sreedhur Thackoor, in

" regard to whose shebaitship the competency " or otherwise of the Plaintiff has not been " determined in this suit, she shall have the " power of holding joint possession with the " principal Defendants of the realities and per- " sonalties belonging to the other joint gods " of the litigant parties."

Upon this, both parties appealed to the High Court. It is not necessary to notice the appeal of the Defendants. That was dismissed with costs, and no question is now raised about it; but it is necessary to notice the main points which were raised by the appeal of the Plaintiff. She contended that in addition to the relief which she had obtained in the Court below she was entitled to a share of this talook which had been mentioned, and also to a share of the Government papers for two lacs and 57,000 rupees, either beneficially or as shebait. The High Court upon the first issue, namely, as to her share of the talook, decided in her favour, that she was entitled to claim one fifth as shebait, and they observed that, although perhaps by a strict construction of the declaration she might be held not to have expressed her claim to it properly, nevertheless this was an objection rather of form than of substance, and that looking to the whole case, and considering that the evidence of both parties was gone into, they thought the justice of the case required that they should give her this relief.

Their Lordships are of opinion that the High Court was right in treating the objection which had been made to the reception of this claim by the subordinate Judge as an objection rather of form than of substance, and in giving her the relief which she prayed for.

Then comes the question, and the more important question, as to her right to a share of the large sum of rupees, being Government paper,

which the Defendants allege had been appropriated irrevocably by the family to the service of the idol Sreedhur by a memorandum of agreement of the 9th of February 1859. Upon that question the High Court, after intimating that there was no estoppel on the part of the Plaintiff, as there would have been none on the part of her husband from setting up that the agreement of appropriation on the part of the family was fraudulent and collusive, a point on which it is not necessary now to enter, came to the conclusion that the agreement was collusive. They do not appear to have doubted that such an agreement was executed upon the day it bears date, but they treat it as invalid, and their reasons are to this effect: They observe that in the memorandum of agreement "No person is named whose duty "it would be to see that the income from the "notes was applied for the purposes mentioned, "nor any provision for its being applied, and "further, that upon the Defendants' own "showing it was not applied, but was allowed "to accumulate, and was invested in the pur-"chase of other notes." Then "that the notes "have not been produced." Then that Hurry Mohun, the late husband of the Plaintiff, had pledged some of these notes at the bank of Bengal; then, further, that there were no attesting witnesses to the memorandum, although they do not lay much stress upon that; and then they proceed to observe: "The "real aspect of the transaction appears to us "to be, that the parties, not wishing at that "time to divide the whole of the government "notes amongst them, or, possibly, in order to "prevent a widow from taking any part of it, "and to preserve it for the male members of "the family, resorted to this contrivance to keep "a portion as a joint fund to accumulate, and

" be afterwards used or divided as they might " have occasion."

Their Lordships are unable to concur in this finding of the High Court. The document is conclusively established, at all events, as far as its execution is concerned, about which there never appears to have been any serious dispute. Two of the Defendants, Radha Mohun Mundul and Issur Chunder Mundul, give evidence, and very distinct evidence, upon this point, and that evidence is confirmed by other witnesses. The occasion which is said to have given rise to it appears a legitimate one, and one not unlikely to suggest the execution of such a document. It is said that one of the brothers, Chundernarain, being in an ailing condition, and probably not expecting to live long, desired that a division should be made of the family property, as far as it consisted of Company's paper, and was divisible; whereupon a memorandum of agreement was entered into, which is to this effect: that the heads of the family then existing, being the five brothers, and Bhuggobutty Dossee, the widow of Uddoitto, a deceased brother, agree to set apart certain promissory notes of the value of two lacs and 15,000 rupees for the daily service of a certain idol called Sreedhur, and other religious objects connected with such service, and to divide the residue among them, in shares amounting to 45,000 rupees for each. They take each the share of 45,000 rupees, and they all sign the agreement. There is abundant evidence of this document being subsequently acted upon. It appears that about three years after the document was executed, Nistareenee Dassee, the widow of Romanath, the son of Uddoitto, one of the brothers, brought an action against the brothers who were then alive to recover her share as a widow, whereupon the Defendants, including Hurry Mohun himself,

the husband of the present Plaintiff, set up this agreement. It does not appear that the Plaintiff in that suit disputed it; and finally she accepted a compromise upon the terms of that agreement, she retaining what she would be entitled to receive on the supposition that it was valid, namely, altogether 45,000 rupees, of which 20,000 had been previously paid to her mother-in-law, Bhuggobutty Dossee, who, as has been observed, was a party to the agreement. But, further, in addition to the evidence of the Defendants themselves, there is that of gomastahs and others that this agreement was acted upon, that a temple was erected to the idol at a considerable cost, though the precise cost can scarcely be determined without going through a number of accounts, and that that temple took several years in erection. A number of accounts are put in, which, no doubt, may be open to an observation made by the High Court that specific entries in them were not sufficiently called attention to in the Court below, but which nevertheless, cannot be disregarded; and unless these accounts are wholly fabricated, which their Lordships see no reason whatever to suppose, they do show beyond all doubt that the agreement was acted upon to a great extent for many years, and that a great deal of money was spent upon the purposes contemplated by it. With regard to the observation of the High Court that the interest was not applied to the purposes indicated by the agreement, but was allowed to accumulate, and was invested in the purchase of other notes, it must be borne in mind that the amount accumulated, some 42,000 rupees, would by no means be the whole interest of those notes, and that such an accumulation would not be at all inconsistent with the agreement having been acted upon, and a considerable portion of the income having been applied to the purposes stated in it.

On the whole, it appears to their Lordships that this agreement is substantiated by very strong evidence. It is shown to have been acted upon by all the parties; and their Lordships do not think themselves justified in putting it aside and declaring it to be a colourable transaction having no validity, merely upon the suggestion—for it amounts to no more—that the amount set aside was an exorbitant amount, and that there might possibly have been some intention to defraud widows or some other persons. It is not upon mere speculations of this sort that an agreement proved by evidence so strong to have been not merely executed, but acted upon for a number of years, can in their Lordships' judgment be properly set aside.

This agreement being, in their Lordships' opinion, established, the question still remains whether the Plaintiff is not entitled to her share of this property as joint shebait of debuttur property appropriated to the service of this idol; and this question appears to their Lordships to depend very much on the same considerations as those which have induced them to uphold the judgment of the High Court with respect to her share of a talook which was purchased for the same idol, and, as far as it appears, by the same fund. It may be here observed that although there is evidence of some parol agreement (one of the witnesses putting it as an agreement before the execution of this memorandum of February 1859,) that the head of the family, the eldest brother, should be the sole shebait, nevertheless that evidence appears to their Lordships to be inconsistent with the documents. The document itself, of February 1859, contains no mention or suggestion of there being any one shebait to the exclusion of the rest. On the contrary, it would appear from it that all parties were equally entitled to be shebaits of the idol.

But, further, the accounts which have been put in by the Defendants show by their heading that such was the intention; for, so far from stating that any one member of the family is entitled to retain all the property and to see to its application himself, the heading of the accounts treats all the members of the family, including widows of deceased brothers, as joint shebaits.

Under these circumstances, it appears to their Lordships that the Plaintiff, although she has failed to establish the title which she relied upon to the two lacs and 57,000 rupees, is nevertheless entitled to a share of it as joint shebait; and, therefore, their Lordships will humbly recommend Her Majesty to reverse so much of the decree of the High Court as declares the Plantiff's right to a fifth share of the two lacs and 57,000 rupees, and the interest thereon, and as directs that one fifth share and interest be delivered over and paid to her, and as condemns the Defendants in the payment of the costs of that Appeal; and, in lieu thereof, to declare that the Plaintiff is entitled as joint shebait to a fifth share of the Government notes for two lacs and 57,000 rupees, and is competent by furnishing security against waste to keep in her own possession the said fifth share and to hold the same, subject to the trusts for the worship of the idol Sreedhur, and by ordering that each party should bear his own costs of that Appeal, that is, the Appeal to the High Court; and their Lordships think that there should be no costs of this Appeal.