

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ashutosh Dutt v. Doorga Churn Chatterjee and another, from the High Court of Judicature at Fort William, in Bengal; delivered Saturday, 26th July 1879.

Present :

SIR JAMES P. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE principal question to be determined in this appeal is, whether or not the Respondent Doorga Churn Chatterjee had any right, title, or interest in a certain talook called Lot Panchgatchia, in Zillah Hooghly, liable to be attached and sold in execution of a money decree against him. The question arose in this manner. The Appellant sued him in the High Court, Original Jurisdiction, and on the 16th November 1864 obtained a decree against him for Rs. 3,500, with interest and costs. In execution of that decree an attachment was issued. The attachment is not on the record, but it appears from the plaint that under it a one-third share of the talook was attached, and thereupon Doorga Churn (the debtor) and his brother Shama Churn, who are the Respondents in this appeal, intervened and put in a claim to the property, alleging that it was not liable to attachment, inasmuch as they held it in trust for an idol, Raj Rajeswar, by virtue of a will executed by their mother Saras-

wati. The Judge of Hooghly having investigated the claim, distrusted the genuineness and *bona fides* of the will; he stated that he did not believe that the property was held in trust for the idol, and, under the provisions of Section 246 of Act 8 of 1859, disallowed the claim of the Respondents, and ordered the execution to proceed (Record, p. 31). The present suit was consequently brought by the Respondents against the Appellant under the same Section, to set aside the order of the Judge, and prayed that the will executed by their late mother should be confirmed, that the share of the talook which had been attached and ordered to be sold should be declared debuttur property, or property dedicated to religious uses, and not liable to be attached or sold for a private debt of Doorga Churn.—(Plaint, Record, p. 2.)

A written statement was put in on behalf of the Defendant, and several issues were raised, and amongst them the 3rd, 4th, and 5th, which were the material ones on the merits. The 3rd was, whether the will set up by the Plaintiffs was a genuine document, and whether the mother, Saraswati, endowed the property in suit for the sole benefit of the idol, and whether the profits of the disputed estate had been appropriated to the idol alone. 4th, whether the Plaintiffs were entitled to a declaration that the estate was not liable to be attached and sold in execution of the decree obtained against one of them personally. 5th, whether the Plaintiffs were the beneficial owners of the property. The Subordinate Judge found in substance that the will was genuine, that it was not colourable or fraudulent, and that it was intended to be acted upon, and thereupon he held that the property was debuttur, and not liable to be attached or sold for a private debt, and ordered it to be released from attachment. Each party was ordered to bear his own costs.—(Decree, Record, p. 48.)

Upon appeal to the High Court it was contended that the Lower Court was wrong in finding that the will was a *bond fide* instrument, and that the Court ought to have found upon the evidence on the record and the probabilities of the case that the will did not create a *bond fide* endowment, but was a mere device to secure the property from sale in execution of decree; that the endowment to the household idol was a mere colourable device to give a show of legality to a transaction which was in reality a perpetuity and to preserve the property in the hands of the family, and that, as such, it was void and illegal.

Further, it was contended that under any view of the nature and effect of the will the debtor, Doorga Churn, had a considerable beneficial interest in the property.

The High Court affirmed the decision of the Lower Court. They said:—“ We have no doubt
 “ that the will made by Srimati Saraswati Debi
 “ is a valid disposition of her property, and that
 “ the effect of it was to create an endowment
 “ substantially for religious uses. That being so,
 “ it is clear that the attachment issued against a
 “ share of this property at the instance of the
 “ execution creditor, and the order made by the
 “ Judge of Hooghly that the execution should
 “ proceed, ought both to be set aside; and it is
 “ impossible to say that the Subordinate Judge
 “ was wrong in confirming the will, and declaring
 “ the subject of it to be deowuttur property. It
 “ may be that, under that clause of the instru-
 “ ment which disposes of the surplus proceeds of
 “ the estate, the ‘shanshar,’ or members of the
 “ family establishment, may hereafter become
 “ entitled to some beneficial interest in such
 “ surplus; but this interest is of such a fluctuating
 “ and uncertain character that it could never
 “ form the subject of attachment or sale.”

The Lower Court having found that the will

was genuine and *bonâ fide*, and the High Court having upheld the decision, it has not been attempted to dispute that finding. It must, therefore, be assumed that the will was genuine and *bonâ fide* intended to operate; and effect must be given to it, so far as its provisions are in accordance with law.

The will is in the words following :—

“This will is executed by Srimati Saraswati Debi. I am always sick; hence I execute this will to the following effect:—I dedicate the auction-purchased property, No. 3496, Lot Panchgatchia, Pergunnah Baligori, Zillah Hooghly, standing in my name, to the Thakur Ishwar Raj Rajeswar that is in my house. And the Sarodia Pooja and other ceremonies that are being performed in the house will be performed as hitherto. After all these acts have been observed from the proceeds of the said property, if there be a surplus in the profits, then the family will be supported therefrom. This property of mine will not be liable for the debts of any person. None will be able to transfer it. None will have the rights of gift and sale. I appoint my eldest son Doorga Churn Chuttopadhya and the second son Shama Churn Chuttopadhya to be the executors of this will. When my youngest son Bhogobati Churn Chuttopadhya, who is now a minor, arrives at majority, he will similarly be an executor. Collecting the proceeds of this property, you will deduct therefrom the rent, revenue, taxes, charges for repairs, and whatever other expenses may be necessary for the preservation of property, and the collection charges; and will defray from the aforesaid profits the expenses of the daily worship of the said Thakur, the expenses of the *parbans*, *i.e.*, the *Dole-jattra*, the *Rashjattra*, &c. on his account, [the expenses of] the Doorga Pooja, the Shama Pooja, and the

Jagadhatri Pooja, the expenses of the annual *shradh* of my father-in-law, of the first *shradh* of myself and my husband after our death, and the expenses of our *ekodista* and *sapindikaran*. I appoint you as the executors of this will. You will pay my debts, and, collecting the sums due to me, you will incorporate them with my estate. And from the proceeds thereof you will meet the expenses described above; and if there be a surplus after deducting the said expenses, it will also be disbursed in the manner aforesaid. After your death, he who is my heir for the time being will be the executor of this will. Beyond performing the aforesaid worship of the *deb* and the ceremonies and *poojas*, none of my heirs shall have any interest in or profit from my property. And they will have no power of gift or sale over it. And it will not be attached or sold on account of their debts. To this effect, of my own accord and in full possession of my senses, I execute this will. The 2nd of Cheyt 1274.

“SARASWATI DEVI.”

According to the construction which their Lordships put upon the will, it cannot be said that the property was wholly debuttur. They consider that it created a charge upon the property for the expenses of the daily worship of the idol, as it was performed at the time of the death of the testatrix, and of the *poojas*, *shradhs*, and religious ceremonies for which provision is made by the will. For the purpose of this decision the charge may be termed generally a charge for such religious acts and ceremonies. So far the case falls within the class of which that of *Sonatum Bysach v. Sreemutty Juggutsoondree Dossee*, 8 Moore, I. A., p. 66, may be referred to as an example.

The next question that arises is, who are entitled to the beneficial interest in the talook,

subject to the religious and ceremonial trust. The testatrix has certainly attempted to dispose of this, and, if she has done so effectually, it cannot be held, as has been held in some cases, to have passed to her sons in their character of heirs at law as property undisposed of. Her disposition is contained in the words "after all these acts have been observed from the proceeds of the said property, if there be a surplus, then the family will be supported therefrom."

Their Lordships, not without some doubt and hesitation, have come to the conclusion that these words amount to a bequest of the surplus to the members of the joint family for their own use and benefit. It is true that the testatrix further declares "this property of mine will not be liable for the debts of any person. None will be able to transfer it, none will have the rights of gift and sale." But these directions, being inconsistent with the interest given, were wholly beyond her power, and must be rejected as having no operation. This being so, it follows that Doorga Churn took a share of the property in question, which, after satisfying the expenses actually incurred in the worship of the idol, cannot be assumed to be valueless, and might be considerable, and which, in their Lordship's opinion, was subject to be taken in execution by his creditor. Inasmuch as their Lordships are not precisely informed of the state of the family on the death of the testatrix, they are unable to specify what that share was, and there being no *constat* as to what is required for the performance of the religious trust, the interest acquired by a purchaser at any such execution sale would have to be ascertained and realised in some other further proceeding. In these circumstances, their Lordships are of opinion that the attachment should be allowed to stand; but that the

summary order of the Judge of Hooghly, which would apparently authorise the sale of one third of the talook, as if unaffected by the will of the testatrix, is erroneous, and should be set aside.

They will therefore humbly advise Her Majesty that the decrees of both the Lower Courts be reversed. That it be declared that the will of Saraswati was a genuine will and *bonâ fide* intended to operate, and that the effect of the will was to charge the property in the hands of the executors thereby appointed with the payment of such sums as might be necessary to defray the expenses which might from time to time be incurred in the daily worship of the idol therein mentioned, in the manner in which such service was performed at the time of the death of the testatrix, and with the expenses of the parbans and of the poojas and other religious acts and ceremonies in the said will mentioned; that, after defraying such expenses, the surplus belonged to the members of the joint family, of whom Doorga Churn was one, and that his interest in the talook, under the said will, was liable to be attached and sold in execution of the decree of the High Court of the 16th of November 1864; and to order that the summary order of the Judge of Hooghly be set aside, but that the Appellant be at liberty to proceed to a sale in execution of the right, title, and interest of Doorga Churn in the said talook under the said will, and that each party do bear their own costs of the suit in both the Courts below.

The Appellants having failed in their attempt to impeach the genuineness and *bona fides* of the will, their Lordships are of opinion that they are not entitled to the costs of this appeal.

