Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abdool Hye v. Mozuffer Hossein and another, from the High Court of Judicature at Fort William, in Bengal; delivered 30th November 1883.

Present:

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

IT is fortunately unnecessary to state in detail the complicated transactions and the very protracted litigation which characterise the case now before their Lordships. The present proceeding relates to the execution of a decree against Moulvi Abdool Ally, obtained so far back as 1866 by some of the representatives of his deceased wife Ifthakharunnissa, and in respect of which a very considerable sum is still due.

The main question for consideration is whether certain property which the decree holders have attached, and which they seek to sell, formed part of the assets of Abdool Ally at the time of his death, and liable to his creditors; and the answer to this question depends on whether a certain hebanama dated 19th Assin 1256 (4th October 1849), made by Abdool Ally in favour of his son Wahed Ally, is benamee, or is fraudulent and void as against his creditors; and in order to determine these questions, it is necessary to examine the position of Abdool Ally and the condition of his family when that gift was executed.

Ra 9905. 100.—12/83. Wt. 5011.

Abdool Ally was a zemindar, and prior to 1849 had married twice, first Ifthakharunnissa, and secondly, Nooronissa, by whom he had a son Wahed Ally and a daughter.

In October 1849 he was under a considerable liability for the dower of Ifthakharunnissa, so large that after her decease two of her representatives (the present decree holders) obtained a decree as for their share for Rs. 62,000.

He was in 1849 the owner of a variety of small properties, collectively of considerable value, but probably not more than sufficient to enable him to meet his engagements, and being thus situated, he appears, voluntarily and without any consideration, to have made the hebanama of the 4th October 1849.

That instrument is as follows:—

" To the Worthy of Remembrance,

" Sriman Meah Wahed Ally, of good behaviour.

" Deed of gift of jumma lands executed by " Moulvi Abdool Ally:—As it is known that in " such times as these there is no certainty of any " man's life, and as I am now past 55 years of age, " and that I have only you, my minor son, and a " daughter, Srimati Fukurunnissa Khatoon, who " is now without husband or offspring now in " existence; and as on my death it would not be " to be wondered at that you and your sister " should fall to quarrelling about the property " left behind by me; and as my daughter afore- " said having had from her husband zemindaries " and talooks, many properties, and is therefore " well provided for, and I having already " bestowed by regular deeds some of my property " to my wife Srijuta Noorunnissa Khatoon, and " being in undisturbed possession with full rights " of the remainder of the zemindaries and talooks " which I own and possess" (the properties are

here enumerated), "I of my own free will and "pleasure, being in sound health and of my full "knowledge, and as it would be difficult for you "to live well and comfortably without my giving "you all those talooks and zemindaries, do hereby "confer upon you the above-mentioned 10 annas "13 gundas 1 cowri 1 krant share of pergunnah "Nooroollapore, and the 7-anna share of pergun-"nah Idrakpore in separate and respective shares, "and in pergunnah Chunder-dip, the kharija "talooks of jowar Lalwa Banekachi, in their en-"tirety, and I cause you to be put in possession "thereof: You shall therefore enjoy possession of "all dwelling grounds, garden lands, cultivated "and waste lands, homesteads, orchards, churs "and sandbanks, new formations and reforma-"tions, roads and pasturages, with trees, rivers "and water-courses, ponds and tanks, water and "forest privileges, and proceeds of fruits, hauts, "markets, ghâts (river crossings), bazars and all "matters therein connected with the said talooks "and zemindaries, with tenants, zaerats, talook-"dars, howladars, and all other rent-holders, "rents in their entirety, to excavate or to fill up, "to settle thereon dwellings, plant orchards and "gardens, and by collections of the revenues and "by a transfer from the former names to your "own of all those talooks and zemindaries, at "the office of the Collectorate, and becoming "full owner in right of me, with power to give "or to sell, and you and your heirs in succession "shall enjoy possession thereof, and the rights "of myself and my heirs therein are hereby "abandoned and cease. To which effect I have "executed this deed of gift.

"Dated the 19th Assin 1256."

This grant appears to have been duly registered; but the instrument remained in the hands of Abdool Ally, and never appears to have been in possession of or under the dominion of the grantee.

Wahed Ally was then but 10 years of age, and his father, Abdool, continued in the possession and apparent ownership of the property, granted and took and received and applied to his own use the whole of the income and profits. He appears to have continued in such possession to the time of his death.

The property comprised in the gift seems to have been substantially the bulk of Abdool's then assets; and certainly, if that gift was to take effect, he left himself without the means of meeting his then existing liabilities.

The gift was not followed or completed by any actual change of possession or of management or apparent ownership.

On the 24th Jeyt 1258 (6th June 1851) Nooronissa, the second wife of Abdool and mother of Wahed, also executed a hebanama in favour of her son Wahed of considerable property obtained from her husband Abdool or inherited in her own right; but no question arises on this instrument in the Appeal now before their Lordships.

Wahed being still a minor, and shortly before he attained 18, was made to sign two ikrars, both dated 29th Falgoon 1259 (11th March 1853). That from Wahed Ally to his father recites the hibba of the 19th Assin 1256 (4th Oct. 1849); and that, his father, mother, and "half-mother" being alive, full brothers and sisters and half-brothers and sisters might be born to him. After further reciting that as Abdool, by reason of his gift to Wahed, was unable to make suitable arrangements for their maintenance, it became incumbent on him to do so out of the property received by him in gift, it then contains an agreement by Wahed to maintain his sister Fukhurunnissa, and any other sisters or half-brothers to be afterwards born in joint mess during their minority, and on their coming of age to allow them certain fixed stipends for maintenance. He also agreed, in case any full

brothers should afterwards be born, that he and they, subject to such allowances, should enjoy the properties in equal shares. These words follow this disposition:—"And thus I do make my "brothers and sisters co-sharers in the property "received by me in gift and the profits thereof." The ikrar concludes by declaring that during the father's lifetime the whole of the property named in it will remain in the father's charge, and under his management and control.

Some time after the signing of these ikrars Abdool married Amirunissa, mother of the minor Appellant.

After Wahed attained 18 he signed a third ikrar dated 16th Aughran 1263 B.E. (30th November 1856), in which, after reciting the two hibbas from the father and mother, it thus refers to the two former ikrars,—"That I being "your only son, and on account of your having "no other son possessed of all your affections, you "had, so as to prevent that any disputes could "arise with any one in future, bestowed upon "me, by your favour, and through the execution "of a deed of gift dated the 19th Assin 1256, "your ancestral zemindaries, specified in the "schedule. Besides this, having settled upon "my late mother, Noorunnissa, as her marriage "dower, your zemindary of tuppah Hawali "Jehanabad, and your talooks, &c., my mother "aforesaid as the owner thereof bestowed them "upon me through a deed of gift dated the "24th Joistee 1258; and I being the owner and "in possession of that property, worth, in "accordance with the deed of gift, Rs. 80,000, "I did formerly give and execute, as addressed "to you and to my mother, separate ikrars "(agreements), to the effect that all the pro-"perties named in the schedule of the aforesaid "deeds of gift and other properties should "during your lifetime remain under your control

" and in your possession. That I did not " possess the right of sale and gift over that " property, and that should uterine brothers to " me be born the property received in gift from " my mother should be enjoyed by all of us in " equal shares, and promising, should I have " sisters or half-brothers and sisters, to make " monthly allowances to them ?" It then recites that the father had contracted a marriage with Amirunnissa, who is stated to be a lady of good family, that provision had been made for the children of the former marriages by the earlier ikrars, and that it was proper to make some provision for her and any children to be born of Amirunnissa. It then states an agreement by Wahed to make allowance to the daughters of the marriage, and that should any sons be born, they, his half-brothers, should enjoy the property with him in equal shares, adding, " and thus I " constitute my brothers and sisters sharers " in the property and in the profits thereof." Wahed then grants an allowance to Amirunnissa of Rs. 150 per month for her table, and Rs. 500 a year for her clothes. The ikrar contains a statement that the father was in possession of the property by virtue of the former ikrars, and concludes by declaring that it will remain in his control and management during his lifetime, and that neither Wahed nor his heirs should interfere or lay any claim thereto.

Soon after this last marriage of Abdool Ally, disputes arose in the family, which resulted in a suit being filed in 1859 by Wahed against his father, to obtain possession of the properties conveyed to him by the hibbas, and to have it declared that the said ikrars were not executed by him but were forged documents.

Abdool Ally's defence to this suit was that the hibbas had not been executed *bonâ fide*, but for the purpose of diminishing his credit.

Pending the ligitation Wahed died in August 1866, and Abdool died in June 1867, leaving his widow Amirunnissa and her two sons, the Appellant Abdool and his brother Lotif, surviving; Lotif died soon afterwards.

After the death of Abdool the decree holders sought execution against his assets, and, *inter alia*, against parts of the property included in the hebanama of 19th Assin 1256 (4th Oct. 1849), which they contend is benami; that is to say, they allege that it was a transaction not intended to operate according to its tenor and effect, but merely as a cover from creditors, and further that it was fraudulent and void against creditors. If they are correct in those contentions that instrument cannot stand in their way; the property remained the property of Abdool, and the ikrar under which the Appellant claims is equally inoperative against them.

Their Lordships pass by a mass of litigation and a labyrinth of complicated questions which arose from time to time between the parties, and which will be found clearly described in the judgements pronounced from time to time in the progress of the cause by Mr. Justice Mitter and other Judges, and their Lordships desire to confine their observations to the questions which arise on this Appeal.

The questions which their Lordships have to determine are whether the gift of 1849 was one of those known as a benami transaction, or was it otherwise fraudulent and void as against the decree holders, whose decree was obtained in respect of a pecuniary liability existing at the time of the grant and still undischarged.

Their Lordships have considered those questions quite irrespective of the statements or declarations made by Abdool *post litem motam* in the litigation between him and Ahmed, and where his object was to defeat his own deed.

On a fair and full consideration of the state of

circumstances existing at the time of that heba, and the course of conduct pursued afterwards, their Lordships are clearly of opinion that it was benami to this extent that it was a mere pocket instrument, not intended to operate according to its tenor and effect, but by which property was put in the name of Wahed but for the benefit of Abdool.

The possession remained with Abdool, and he appears during his life to have acted as uncontrolled owner and for his own sole benefit. There is some remarkable documentary evidence too, from which it appears that after the heba, there having been from time to time accretions to the lands comprised in the heba, and which according to the law of India follow the principal, those accretions were claimed by Abdool; and he obtained grants of them to him and his heirs.

The heba was not, and could not, be dealt with as a family settlement; there does not appear to have been any occasion for it, and the grantee was a boy of 10, who is afterwards made to sign an ikrar, by the concluding provision of which it is declared that the property is to remain in the control and management of Abdool during his life, and that neither Wahed nor his heirs should lay claim thereto.

But, supposing the heba to be operative as between the parties, their Lordships have still to consider whether it is be upheld as against creditors.

By statute of 13 Elizabeth, c. 5, all covinous conveyances, gifts, and alienations of lands or goods whereby creditors might be in anywise disturbed, hindered, delayed, or defrauded of their just rights, are declared utterly void.

Whether or not that statute (which may not extend to or operate in the mofussil in India) is more than declaratory of the common law so far as it avoids transactions intended to defraud creditors,

there seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances have been given effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience.

Mr. Justice White, in delivering the judgement of the High Court, observes:—"What was the "position of Abdool Ally when he executed the "heba of 1849? At that time he had hanging over "his head a large liability under the kabinnama, "or deed of dower, which forms the subject of the "present suit, and which he had executed when "he married his first wife Eftarkhunnissa. She "had died leaving a married daughter, who has "since died leaving infant sons. The decree "holders, who are only some of the heirs, claim a "2-annas share of the dower, and have been held "entitled to Rs. 62,000 odd. The entire liability "under the kabinnama was, therefore, not far "short of 5 lakhs of rupees."

It is not necessary to adopt the whole of that statement. It is sufficient to say that the liability was very large.

The Judge of the District Court at Dacca makes use of the following remarkable language:— "However binding the documents may be as "among the parties to them, we are beyond "all doubt dealing with a gigantic fraud as "regards third persons. Until, however, we get "a law directed against voluntary and fraudu- "lent conveyances, we must go on searching in "each case for specific proof of fraud, &c.; gene- "rally, as now, finding that proof insufficient." But in observing on that passage, Mr. Justice White, in the Appellate Court, observes, "If the "hebas are found, upon proper evidence, to be "a contrivance to defraud creditors, they will "not stand in the way of the decree holders "executing their decree against the properties

" mentioned in the hebas. The statute 13 Eliz. " c. 5, which was enacted for the purpose of " rendering conveyances in fraud of creditors " void, is considered to be in affirmance of the " general principles of the law by which fraudu- " lent transactions are liable to be vacated at the " instance of those affected by the fraud. This " statute has been universally applied within the " territorial jurisdiction of this Court on its " original side; and whether it has or has not " been applied by name in the mofussil, the " principle on which it is founded has been fre- " quently asserted there, and is in accordance both " with Hindoo and Mohamedan law."

Their Lordships observe then that in the primary Court, where the Judge had the witnesses before him, he treats the transaction as a gigantic fraud as regards third persons.

The Judges of the High Court of Bengal arrived at a similar conclusion on the facts of the case. Their Lordships would be slow to differ from these tribunals thus concurring on conclusions of fact, and they do not find it necessary to do so. They have come to the conclusion that the heba of 1849 was a covinous instrument, not made *bonâ fide* or on any good consideration, and by which creditors (the holders of the decrees) have been delayed in their just rights; and taking the whole transaction together, they are of opinion that the intention of the settler was to protect the property from those who were his creditors at the time.

Their Lordships are of opinion that according to equity and good conscience the heba is fraudulent and void as against creditors, and that the decree appealed from is right and should be affirmed, and the Appeal dismissed; and will so humbly advise Her Majesty.

The costs must follow the event.