***Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Babu Mahomed Buksh Khan and others* v. *Mussummat Hosseini Bibi and others from the High Court of Judicature at Fort William in Bengal; delivered February 15th*, 1888.**

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

IN this case the suit is brought to recover property contained in a hibanama or deed of gift bearing date the 30th May 1881, and purporting to be executed by a widow lady named Shahzadi Bibi, who is dead. The persons to whom the hibanama purports to convey the property are grandchildren of Shahzadi, the infant children of her daughter Omda, who had died a very short time before. The ground of action alleged by the plaint is that the hibanama was a fabricated document, and that the alleged signature of Shahzadi was a forgery.

To understand the story and the position of the parties it is necessary to give a short sketch of the pedigree of the family. Shahzadi Bibi was the daughter of Sikundar Ali and Hesamut Bibi; she had two brothers, Nawab Ali and Mannujan. Nawab Ali married a person of the name of Hedayat. Shahzadi Bibi herself married one Nubi Buksh. By him she had only two children, both daughters, Omda Bibi and Hosseini Bibi. Omda Bibi married Mahomed Buksh Khan, and by him had nine children, who are the infant

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Appellants. Hosseini married Rubidad Khan. Mahomed Buksh Khan was the son of Jehangir Buksh Khan. Jehangir married a person of the name of Mahamdu. Mahamdu's mother was Hasan Bibi. Jehangir's mother was Rousham Bibi, who also appears to have been the mother of Nubi Buksh and the sister of a lady called Daem Bibi, who was grandmother or in the position of grandmother to Shahzadi.

It appears that from Daem Bibi, Shahzadi derived a property consisting of some 22 villages. In 1876, being then the wife of Nubi Buksh, but living apart from her husband, and apparently not being on good terms with him, she determined to make over this property to her daughter Omda Bibi. Her general mooktar at that time was Mahadeo Lal. He seems to have remonstrated against the gift, and to have informed her husband, who also remonstrated. The lady, however, was firm in her purpose, and on the 9th September 1876 she executed a hibanama granting this property to her daughter.

Now there is no question as to the genuineness of that document. It is executed by Shahzadi, by the pen of Mahadeo Lal, her general mooktar; but she also authenticates it by writing upon it some words in Hindi "likha-se-Janoge," which are said to mean "From what is written you will know." Among the attesting witnesses were Jehangir Buksh Khan, Jewan Lal, Mahadeo Lal, and Dost Mahomed Khan, who were examined in this suit in connection with the execution of the hibanama of 30th May 1881. It is not unimportant to observe that it appears by the attestation of the hibanama of 1876 that Dost Mahomed Khan was the person who then identified Shahzadi Bibi, which confirms his statement in this case that he was in the habit of appearing before her.

After that deed was executed disputes arose between Nubi Buksh Khan and Shahzadi. It is

said that there were suits, both civil and criminal. Ultimately an arrangement was made on the 22nd December 1876 by which a life-interest in the bulk of the property was secured to Nubi Buksh, and subject to that the hibanama was confirmed. In order to equalise the shares of his two daughters, it appears that Nubi Buksh, after settling some property on two other children, who were not the children of Shahzadi, gave 10 annas of the rest of his property to Hosseini and 6 annas to Omda.

At the end of 1879, or the beginning of 1880, Nubi Buksh died. On his death fresh disputes arose in the family. They were ultimately settled by a deed of compromise bearing date the 14th February 1880. From that time until the present quarrel the parties appear to have lived on good terms. The result of the various transactions which have been referred to was to place the two daughters, Omda Bibi and Hosseini Bibi, on an equal footing as regards the property they derived from their parents. Hesamut Bibi, the mother of Shahzadi, a witness for the Respondents, says in her evidence, " both " Hosseini and Omda Bibi were equally rich, one " of them was not richer than the other."

Shahzadi Bibi lived at Amas. Mahomed Buksh Khan and Omda lived at Khira. In May 1881, Omda fell sick and she was moved to a place called Nawadi. Shahzadi went to Nawadi to be with her sick daughter. About four days after she went there Omda died. She died on the 14th May 1881. The body was taken to Madarpore, which was the family burying place, and all the immediate relatives including Shahzadi went there, and stayed at the house of Hasan Bibi, during the customary period of mourning, which is nominally 40 days. On the death of Omda, by Mahommedan law, Shahzadi succeeded to a sixth of her estate. Her estate consisted of

the 22 villages, which were conveyed to her by the deed of September 1876; of other villages which she derived under the arrangement of 1876 and the compromise of 1880; of her dower, which amounted to one lac; and of a decree against Jehangir Buksh Khan, the amount of which is not stated, and which does not appear in their Lordships' opinion to be material for any purpose in the suit. If it had been material no doubt the parties would have taken care to have informed the court what the amount of that decree was. On the 18th June 1881 the 40 days of mourning ended with the ceremony called "Chehloom." Mahomed Buksh Khan then went to Khira, and took Shahzadi with him. On the 22nd of June, it appears that Shahzadi made a complaint before a magistrate that she was detained there against her will. The magistrate investigated the complaint, and seems to have thought that it was to a certain extent well founded, and he sent her home to Amas under the protection of two constables. She repeated that complaint on the 15th of July, and again on the 25th of that month; but on the 2nd August the magistrate in charge came to the conclusion that there were no sufficient grounds for a prosecution, and that if she chose to go on she must act at her own risk. The matter then dropped.

On the 22nd September 1881 Shahzadi filed her plaint in this suit. The only ground of action alleged in the plaint is, that the hibanama of 30th May 1881 was a fabricated document, and that her alleged signature was a forgery. On the 12th October 1881 Shahzadi died. The proceedings were continued by her daughter Hosseini Bibi, and her father and mother Sikundar Ali and Hesamut Bibi. On the 16th March 1882 issues were settled. Amongst the issues was this, "2nd. Whether the

" hibanama on behalf of Shahzadi Bibi is " genuine and valid, and executed with her " knowledge and consent, or whether it was " manufactured without her knowledge and con- " sent, or whether it was executed under undue " influence?" In their Lordships' opinion the latter part of that issue ought not to have been admitted. It was absolutely inconsistent with the case made by the Plaintiff. It only becomes possible on the assumption that the alleged cause of action is unfounded. There was another issue which also was only admissible on that assumption, namely, " 3rd. Whether in case the " said hibanama is proved to be genuine it is " invalid on any ground according to Mahome- " dan law."

The questions therefore which had to be decided by the court, and which now have to be considered by their Lordships are three:—First, was the deed really executed by Shahzadi? Secondly, if so, are there any circumstances which go to prove that it ought not to be held binding upon her? and thirdly, is the gift valid under Mahomedan law?

Now, to take the first question: Was the deed really executed by Shahzadi? It purports to be executed by her by the pen of Mahadeo Lal, who was no doubt for a considerable time her general mooktar. It purports to bear as her signature the Hindi words which admittedly she wrote on the deed of the 9th September 1876, by way of authenticating that document. Her execution is attested by no less than 21 witnesses, 9 of whom as well as the writer have been examined in support of the deed. She was a Purdanashin lady. There were women inside, and they of course, according to the evidence, could have seen her execute the deed. Three swear they saw the execution. Two whose presence is deposed to by several witnesses swear that they were not even

in Madavpore. Their evidence however is not believed by either Court. Of the male witnesses, three, and three only according to the evidence, could have seen the deed executed—Nawab Ali, who died before the hearing, Mannujan, and Dost Mahomed. The others attest the deed on Shahzadi's admission. In the afternoon of the day on which the deed is alleged to have been executed, the Sub-Registrar came over and took her acknowledgment. The Sub-Registrar is stated by the Subordinate Judge to be "a respectable and learned person." He deposes that he knew Shahzadi's voice, and that she acknowledged the deed before him.

The Subordinate Judge, who had the advantage of seeing the witnesses, unhesitatingly came to the conclusion that the deed was genuine. He relied principally on the evidence of Mannujan, Mahadeo Lal, and Manwar Ali, the Sub-Registrar. The High Court came to a different conclusion. They say: "We think "that a large amount of suspicion attaches to "this evidence, and we are not satisfied that "the deed was really executed by Shahzadi." Their Lordships cannot consider the judgement of the High Court satisfactory. The learned judges suspect everybody; they suspect everything. Every one who took an intelligent part in the transaction, the dead as well as the living —Shahzadi's relations as well as her son-in-law's dependents; even the Sub-Registrar of the district who attended only in the discharge of his official duties—one and all are alike involved in general and indiscriminate suspicion.

The learned judges say that they cannot but regard Jehangir Buksh Khan as the prime mover in the matter; and they add, "We cannot help "suspecting that this witness had a good deal "more to do with the preparation, execution, "and registration of this deed than he has

" chosen to tell the court." In their Lordships' opinion this witness seems to have answered fairly every question that was put to him, and if his evidence be true, and there is nothing to contradict it, his connexion with the transaction was of the slightest. According to his statement, he was summoned by a letter from Shahzadi to come over and witness the execution of the deed. He came over in the early morning; he spoke to Shahzadi, and she spoke to him. She acknowledged that she had executed the deed, and he attested it. Then he mounted his horse and rode away, and that appears to be the only connexion he had with the transaction, except that he is the father of Mahomed Buksh Khan, and Mahadeo Lal was his general mooktar.

The learned judges also mention as a matter of suspicion that no independent person seems to have been called in to attest that deed, and that no independent person has deposed in favour of its execution. The latter conclusion is not quite accurate. The Sub-Registrar, whether he is to be believed or not, was unquestionably an independent person, and had no connexion whatever with either side. It is somewhat difficult to understand what is meant by the objection that no independent person was called in to attest the deed. It has not been suggested that any member of the family or any person who would naturally have been present if the deed were genuine was absent on the occasion when it is said to have been executed. Every member of the family with whom we are acquainted, with the exception of Hosseini Bibi and her husband, was present and attested the deed. It would not have been very natural that Hosseini or her husband should have been called in to attest a deed which disappointed their hopes or at any rate defeated their chance of succession. But, in point of fact, according to the statement

of Rubidad Khan, Hosseini Bibi was incapacitated by illness from going to Madarpore. It is stated that she did not go there until the chehloom. Rubidad Khan also states that he was not there; that he was present at the burial, but that from the time of the burial till the chehloom he did not go to Madarpore. It is difficult to see what advantage would have been gained by summoning an independent person to attest the deed. The lady was a Purdanashin lady. A stranger would not have been admitted to her presence. The attestation of a stranger who could not have seen her write and who could not have known her voice would have carried the matter very little further.

Then there are three minor matters of suspicion on which the learned judges comment. They say the draft of the deed was not produced. It is difficult to see what light that draft could have thrown upon the transaction. At any rate, it was not called for. It is said that two letters which are mentioned in the evidence as having been sent by Shahzadi to summon Mahadeo Lal and Jehangir Buksh Khan were also not produced. They were not called for either. The Plaintiffs seem to have been satisfied with a statement of what was contained in those letters by the recipient of the one and the writer of the other. Of course, if the deed was forged, notwithstanding the publicity connected with it, there could have been no difficulty in forging Shahzadi's signature to a letter.

The learned judges also observe that it is a remarkable circumstance that none of the female witnesses who were behind the purda make any direct statement on the point of Shahzadi's writing the words in Hindi. They merely state, say the judges, in general terms that Shahzadi executed the deed. That observation also does not appear to be quite

accurate. The three ladies who were behind the purda, and who gave evidence for the Defendants Malik Jehan Bibi, Hasan, and Mahamdu, state that the deed was executed by Shahzadi in their presence. One—and one only—of those ladies was cross-examined upon the point, and her statement in cross-examination is very positive. That is Mahamdu. She says, "The females had "witnessed it in my presence. First the females "witnessed it and then the males. The signa- "ture of Shahzadi Bibi was put in my presence. "Shahzadi Bibi ordered Mahadeo Lal to sign "for her, and then he signed for her. After "that she wrote below it two or four letters in "Hindi which she knew." Mahamdu seems to have been the first witness who was examined on behalf of the Defendants—certainly the first or second—the other two were not cross-examined upon the point. Their cross-examination appears to have been entirely directed to irrelevant objects.

"Another very suspicious circumstance" in the opinion of the learned judges is this, that the Hindi words written, or said to have been written on the deed, by Shahzadi Bibi with the object of authenticating it, are identically the same, letter for letter, as those which are found on the hibanama of 1876. They add, "The fact of "these Hindi words corresponding so exactly "with those on the deed of 1876, which was "apparently not in Shahzadi's possession or "produced before her at the time of execution, "does certainly raise the suspicion that they were "not really written by her but had been copied "by some other person from the former deed."

Now it is material to mention a circumstance which in that passage appears to have been overlooked, namely, that those words occur not once only, but twice. They were written in the morning, and they were written again in the evening when

the Sub-Registrar came over to take Shahzadi's acknowledgment. The Sub-Registrar states that he knew Shahzadi's voice; he states that he read the deed to her. Then he goes on to say—"I asked whether she had executed the deed "of gift or not? She said that she had "executed it, and it might be registered. On "the back of the deed of gift I, at that "time, wrote out the registration with my "own hand. After that I asked the Mus-"summat who knew her. The Mussummat said "that Nawab Ali Khan and Mannujan Khan, "who are her full brothers, knew her. I then "asked both of them, and they said that they "knew her. After that I wrote out in the deed "the identification by both. After that I "pointed out to Nawab Ali Khan the place "where he should sign for Shahzadi Bibi, and "also the place where they should affix their "own signatures. After that Mahadeo Lal, "mooktar, signed for Shahzadi Bibi by his own "pen, and she also wrote 'You will know from "what is written.' Nawab Ali Khan and "Mannujan Khan affixed their signatures. "After the signature affixed by Mahadeo Lal, "Shahzadi Bibi affixed her signature. I did "not make any objection to what Shahzadi Bibi "wrote because on other occasions also when I "had taken her admission and made registration "she used to write so much, and I knew that she "knew to write so much." Therefore whether the first signature—that is the Hindi words—be genuine or not, it is quite plain that these same words were added again in the evening when the Sub-Registrar went over to take Shahzadi's acknowledgment. If the learned judges of the High Court are right, who was the forger? None of the ladies could write. That is clear. Jehan Lal, the writer of the deed, was not present at the time; he only came up just as

the Sub-Registrar was going away. The only males who, according to the evidence, saw the lady on that occasion were her brother, Nawab Ali, and Mannujan. Mannujan cannot write. So that the words must either have been written by Nawab Ali or by the lady herself. There is not the slightest ground to suspect Nawab Ali of any fraud or forgery, and therefore it appears to be the necessary conclusion that the words must have been written by the lady herself.

When the cloud of suspicion in which the High Court has enveloped the transaction has been cleared away, the evidence in favour of the genuineness of the deed is absolutely overwhelming. There is no evidence whatever on the other side.

There is nothing but Shahzadi's assertion that she did not execute the deed—an assertion in which no doubt she persisted from the time she complained to the magistrate down to the time of her death.

Their Lordships think that the Subordinate Judge was right in relying on the evidence of the Sub-Registrar and of Mahadeo Lal the mooktar, with whose character the Subordinate Judge also seems to have been acquainted. He says he "holds a diploma, and is a respect-"able person in his community, and the court "has never seen any act of his by which it can "suspect him." Mannujan broke down on cross-examination. The Subordinate Judge attributes his confusion entirely to illness, and apparently the civil surgeon and assistant civil surgeon of the district certified to that effect. Be that as it may, their Lordships think that it would not be safe to rely on Mannujan's evidence, except so far as it is corroborated by other witnesses, and they consider that more reliance is to be placed on the fact that the signature of Shahzadi was identified by her brother Nawab Ali, who seems to have been in a superior position to Mannujan.

He was a person of education, and appears to have been trusted by other members of the family. The mother, Hesamut, employed him to receive for her the allowance which her husband was condemned to pay, and she says "I was on "good terms with Nawab Khan. There was no "misunderstanding between us at any time. I "had confidence in him." Certainly if this deed was a forgery he must have known all about it, but what possible reason can there be to suspect him of having been a party to such a gross fraud? In their Lordships' opinion there is none. It is not necessary to go further into the evidence. It is sufficient to say that their Lordships have come to the same conclusion as the Subordinate Judge, that the deed was really executed by Shahzadi.

Then comes the question, was the deed executed under such circumstances that it ought not to be allowed to stand? Duress and coercion may be laid out of consideration. The witnesses who spoke to anything of that kind were discredited by both courts. But there remains the more subtle form of undue influence. Their Lordships desire not to say a word which could interfere with the settled principles on which the court acts in considering the deeds of Purdanashin ladies or could tend to lessen the protection which it is the duty of the court to throw around those who are unable to protect themselves. They do not forget that this lady was a Purdanashin lady. They do not forget that at the time of the execution of the deed she was living in more than ordinary seclusion; that she was in very deep distress; and that she was surrounded by the members of that branch of the family to which the objects of her bounty more immediately belonged. But bearing all these things in mind, and reviewing the whole evidence, they come to the conclusion that the lady knew

perfectly well what she was doing, and that in every sense the act was her own act.

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same though the circumstances differ; and, as a general rule, the same questions arise. The first and practically perhaps the most important question is, was the transaction a righteous transaction, that is, was it a thing which a right-minded person might be expected to do? Can there be any doubt about the answer to that question? Shahzadi made a settlement on Omda. Omda was her favourite daughter, and had a large family. By an untoward and unlooked-for event a share of Omda's fortune which was principally derived from that settlement devolves on Shahzadi. To her the acquisition of property by her daughter's untimely death seems to have been an odious and repulsive thing, and she determines as soon as possible to give it back to her daughter's orphan children. Was there anything unnatural in that? It appears to their Lordships to have been a most natural act, and one which a right-minded person would be disposed to do.

Then there comes the question—was it an improvident act? That is to say, does it show so much improvidence as to suggest the idea that the lady was not mistress of herself, and not in a state of mind to weigh what she was doing? Upon that Mr. Doyne made some forcible observations. He said that by the earlier hibanama this lady had stripped herself of all that she possessed; that she had reduced herself to penury; that then by accident a portion of the property came back to her, and he insisted that it was an improvident act on her part to divest herself immediately of that pittance when she had nothing else to live upon. Now that case is not made by the evidence. There does not appear from first

to last any complaint on the part of this lady that she was reduced to poverty. Nor was her position that of a pauper. She had a house of her own; she had servants; she comes in a dooli; so far as the evidence goes she had enough for her wants, and her wants as a Hindoo widow were probably very small. It does not therefore appear to have been a transaction so improvident as to show that it was not her own act.

Then was it a matter requiring a legal adviser? What could have been simpler than what she desired to do? She was not apportioning her property among the members of her family; she was not determining how much she could spare, but when property came to her by this sad accident, she says, "I will have none of it." What could a legal adviser have told her? If he had advised her to wait till she left the house where Mahomed Khan was; if he had told her to place herself between two fires, and allow Rubídad Khan on the one hand and Mahomed on the other to urge the claims of their respective children she would not have benefited much by the advice.

Lastly, did the intention of making the gift originate with Shahzadi? Upon that there is positive evidence, and there is negative evidence. The positive evidence is very strong, but the negative evidence appears to be stronger still. Mahadeo Lal, who was unquestionably her general mooktar as long as she had any property to deal with, and who was employed by her to prepare this deed says:—"I went to Shahzadi " Bibi at the deori for condolement, and then " Shahzadi Bibi told me this:—'I at first given " 'my property in writing to my daugher Omda " 'Bibi, but now owing to her death one-sixth " 'share devolves upon me. As I have no hope " 'of living long I do not like to take the estate " 'of Omda Bibi. I wish to give that share " 'to her sons and daughter. Please write out a

" ' draft of hibanama.' " In cross-examination he says even more positively that it was her own doing, and that he prepared the hibanama by her own direction.

Then Mahamdu says this in cross-examination : —" Shahzadi Bibi herself commenced to talk " about the hiba. I do not recollect how many " days after going to Madarpore conversation " took place about the hiba. But she had " spoken of it after 10 or 15 days. Shahzadi " Bibi first spoke about the hibba. to me and " other females. Shahzadi Bibi said :—' I had " ' already given in writing during the lifetime " ' of my daughter. Now she is dead, and a " ' share has devolved upon me. How can I " ' snatch it from grandsons and granddaughters ? " ' The children have become motherless. I will " ' again give them in writing.' We told her " ' It is your pleasure. You have got a share ; " you may do with it whatever you like.' " There is not a scrap of evidence to show that the idea was suggested to her by Mahomed Buksh Khan or anyone else. And it is a circumstance not to be overlooked that Mahomed Buksh Khan did not obtain any benefit personally for himself.

But the negative evidence is still stronger. No case of undue influence was set up by Shahzadi. The plaint is based on forgery and forgery alone. The question of undue influence was introduced for the first time in the issues ; but although it was introduced then, it was not accepted by the family. We find that on the application for registration which took place a few days after the issues were settled—the date is the 23rd March 1882—the sole averment still is that the deed was a forgery. It is somewhat singular that although the ladies who were examined as witnesses for the Defendants were the first witnesses who were examined, and they stated that Shahzadi executed the deed of her own free

will and without undue influence, the ladies on the other side who came forward a month afterwards to give evidence preferred to state what both courts have held to be absolutely untrue, namely, that they were not present at Madarpore at all—they preferred stating that to admitting that they were present and trying to make out a case of undue influence, which they must have known then would have been fatal to the deed if it could be proved.

Their Lordships therefore hold that the suggestion of undue influence is not proved.

There remains the question whether the gift was good by Mahomedan law. On that two points were made. In the first place it was said to be open to objection on the Mahomedan doctrine of Mooshââ, which appears to be this: that a gift of an undivided share in a subject capable of division is not good because it would lead to confusion. But it appears to be settled by Mahomedan law that if there are two sharers of property, one may give his share to the other before division. That seems to be established by a passage in Macnaghten's Precedents, Case XIII., which was adopted in the case to which Mr. Mayne referred of *Ameena Bibee* v. *Zeifa Bibee*, reported in 3rd Sutherland's Weekly Reporter, page 37.

Now, if one of two sharers may give his share to the other, supposing there are three sharers, what is there to prevent one of the three giving his share to either of the other two? Mr. Doyne was asked what confusion that would introduce. Mr. Doyne took refuge in the doctrine itself, which he said was a very refined doctrine. To extend it to this case would be a refinement on a refinement, amounting in their Lordship's opinion almost to a *reductio ad absurdum*.

The other point was that the gift was invalid because possession was not given. That subject

was considered in a case which came before this Board in 1884, *Kali Das Mullick* v. *Kanhya Lal Pundit* in 11th Indian Appeals, page 218. There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the hibanama itself authorises the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold under these circumstances that there can be no objection to the gift on the ground that Shahzadi had not possession, and that she herself did not give possession at the time. That view seems to be supported by a passage in Macnaghten's Precedents, Case X., where the question was: If property left by two brothers devolve on the widows, "Are the widows entitled "to dispose of their late husband's property by "gift, and if they have a right to do so is the "deed of gift executed by them in favour of one "of the husband's heirs available in law?" Then it is stated that, "Although the widows at "the time of the execution of the deed of gift "were not seised of the property, yet if agree-"ably to their desire, the donee, in pursuance of "a judicial decree, became subsequently seised "thereof, the fact of the donors having been out "of possession at the time of making the gift is "not sufficient to invalidate it."

Their Lordships therefore are of opinion that the appeal ought to be allowed, and that the decree of the High Court ought to be reversed

and the decree of the Subordinate Judge restored, and they will humbly advise Her Majesty accordingly. The Respondents will pay the costs of the appeal, and the costs in the High Court. The deposit of 300*l.*, which was made by the Appellants, will be returned.