

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ismail Mussajee Mookerdum v. Hafiz Boo, from the Chief Court of Lower Burma; delivered the 14th March 1906.

Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

LORD ATKINSON.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

The suit out of which this Appeal arises related to certain transactions on the part of Khaja Boo, a Mahometan woman, who died in the year 1900, at an advanced age, said to have been ninety years.

The transactions in question took place in 1889. Khaja Boo resided at Rander near Surat, in the Bombay Presidency; but she and her family seem to have had connections of long standing with Rangoon. She had, at the time of the events which have to be considered, one son, the present Plaintiff, Appellant, and one daughter, the present Defendant, Respondent. With her son, whose antecedents were not good, she was on terms of bitter hostility, and much litigation had taken place between them. The daughter was a married woman, whose husband resided in Rangoon; but she herself was living with her mother at Rander.

Khaja Boo owned a house in Rander, and two properties in Rangoon. One of the latter was

the fifth class Lot No. 27 in Block C ii, the other an undivided half share in Lot No. 6 in Block E in Barr Street, in which the other half share belonged to Adjim Hassim Mookerdum, of Rangoon, the husband of Hafiz Boo.

On the 19th January 1889 Khaja Boo executed at Rander a power of attorney in favour of two residents of Rangoon, Cassim Hashim Baroocha and Ismail Ebrahim Munnee, which conferred on the attorneys very general powers to act on behalf of Khaja Boo in Rangoon, but nothing of great importance turns on this power.

On the 12th February, in the same year 1889, Khaja Boo executed at Rander another power in favour of the same two persons, by which, in addition to a general authority to act for her, she expressly empowered her attorneys to deal with the two properties which have been mentioned. She authorised them to sell and dispose of lot No. 27, and "to pay the sum realized from such sale to my daughter Hafiz Boo, either in cash, or by purchase at her will and consent from the whole or part of the said sum, lands, houses, and shares," . . . and to have the same "transferred to the name of the said Hafiz Boo, her heirs and legal assigns."

As to the undivided half share in lot No. 6, she authorised her attorneys to obtain a partition with the owner of the other half share, and "to have my portion of the land, viz., 50 feet by 11 feet, with all buildings and erections thereon, at an estimated value of Rs. 10,000 (ten thousand) only, for the payment of which sum I have fully and finally arranged and settled here with my said daughter Hafiz Boo, to be wholly and absolutely transferred to the name of the said Hafiz Boo for the benefit of herself, her heirs, and legal assigns."

Of the two attorneys thus appointed the first, Cassim Hashim Baroocha, was a man who appears to have carried on in Rangoon, on a considerable scale, the business of land management under powers of attorney from absent proprietors. So that there is nothing in the choice of attorneys either improbable or justly suggesting suspicion.

The attorneys proceeded to act under the second power. They sold lot 27 and invested the proceeds, in part at least, in the purchase of several properties in Rangoon in the name of Hafiz Boo and presumably under her instructions. With regard to lot 6, they carried out the partition with the other part owner, and then executed on behalf of Khaja Boo a conveyance of her partitioned share to her daughter Hafiz Boo. The conveyance recited that Khaja Boo had agreed with Hafiz Boo for the sale to her of these premises for the sum of Rs. 10,000. It proceeded to say that Khaja Boo in consideration of the Rs. 10,000, of which the receipt was acknowledged, grants, assigns, and transfers the premises in question to Hafiz Boo, her heirs, executors, administrators, and assigns, to hold them unto and to the use of the said Hafiz Boo her heirs, executors, administrators, and assigns for ever.

On the 29th July 1889 Khaja Boo executed another document, by which she recited the two powers of attorney which have been mentioned, acknowledged a variety of payments made by the attorneys, including the sum of Rs. 11,020, to Hafiz Boo (being the price of lot 27), and the payment to Khaja Boo herself of Rs. 293, at the time of the execution of the present deed, and proceeded to give an absolute release to the attorneys.

It would seem from the evidence that the documents which have been mentioned were

prepared in Rangoon and sent to Rander for execution. There is nothing, their Lordships think, to be surprised at in this. It seems a not unnatural course with regard to documents affecting a professional land agent carrying on business in Rangoon, and documents which were, in the main, to be acted on in Rangoon.

The effect of these transactions was, in substance, that Hafiz Boo became possessed of nearly the whole of her mother's Rangoon properties or their proceeds. The Plaintiff admits that at a later period, after he had removed his mother to his own house, he obtained from her a conveyance to himself of her house at Rander.

The Plaintiff brought the present suit on the 25th February 1901 in the Chief Court of Lower Burma. He made Defendants first his sister, Hafiz Boo, and second and third the two attorneys, but the suit against the attorneys was subsequently abandoned. The substantial object of the suit was to invalidate and annul the transactions of 1889 which have been mentioned.

The plaintiff alleged (paragraph 2) that at the time of the occurrence referred to

“ the said Khaja Boo was suffering from dementia and was not
 “ in a fit state of mind to execute contracts or to manage her
 “ affairs, and up to the month of July 1898, the first Defendant
 “ was residing with the said Khaja Boo, who was entirely
 “ under her dominion and control, and the first Defendant,
 “ and, as the Plaintiff believes, the other Defendants were well
 “ aware of the mental condition of the said Khaja Boo.”

The Plaintiff prayed that the estate of Khaja Boo might be administered and the necessary accounts taken, that it might be declared that Khaja Boo was from a date prior to 1889 of unsound mind, that it might be declared that the sum of Rs. 11,250 received as the price of lot No. 27 belonged to Khaja Boo, that any pretended gift of those proceeds to Hafiz Boo

was invalid, and that the Defendants were liable to account for those moneys, or their investments, as part of the estate of Khaja Boo, and that the conveyance of lot No. 6 might be declared invalid, and the property declared to be part of the estate of Khaja Boo.

The Defendant Hafiz Boo denied the allegation of the plaintiff as to Khaja Boo's state of mind, as did the other Defendants. Issues were settled, some of which must be mentioned. (1.) Was Khaja Boo in an unsound state of mind during the year 1889? (2.) Were the properties (those purchased from the price of lot 27) bought with funds belonging to the said Khaja Boo, and do such properties now form part of her estate? Was the conveyance of the southern half of lot No. 6 by Khaja Boo in consideration of Rs. 10,000, paid by Defendant, a valid conveyance? (3.) If not, is the Plaintiff's claim to have it set aside barred by limitation?

The case came on for hearing before Bigge, J., and a large mass of evidence was given directed to the question of Khaja Boo's mental capacity in 1889. It is unnecessary to examine the evidence from this point of view, because the learned Judge found that the Plaintiff had failed to show that his mother was of unsound mind in 1889. The Court of Appeal took the same view, and their Lordships have not been asked to question those findings.

The learned Judge at the trial, however, after negating the allegation of insanity, went on to say :--

"I think the Plaintiff would have been wiser, if, instead of basing his claim on the untenable theory of his mother's madness, he had rested it on undue influence, from which aspect I now proceed to examine the case."

From that point of view the learned Judge came to the conclusion that Khaja Boo, at the

period in question, was entirely under the control and domination of her daughter; that the latter had unscrupulously used her power over her mother in order to get her mother's property into her own hands, and that the whole proceedings ought to be avoided on the ground of undue influence.

He accordingly gave a decree directing that Khaja Boo's estate should be administered under the direction of the Court, declaring that Hafiz Boo was liable to account for the price of lot No. 27, and that the conveyance to her of the partitioned half of lot No. 6 was invalid, and must be cancelled, and ordering the usual accounts and enquiries. The case came on appeal before the learned Chief Judge, and Birks, J., who reversed the finding with respect to undue influence, and dismissed the suit with costs in both Courts. Against that decision the present Appeal has been brought.

The principal contention before their Lordships on behalf of the Appellant was, that the finding of Bigge, J., on the question of undue influence was right and ought not to have been reversed by the Court of Appeal. With regard to this contention their Lordships must observe, that the question of undue influence was never properly before the Court at all. No such case was set up in the pleadings. The nearest approach to it was in the passage of the Plaint already cited, in which it was said that Khaja Boo was entirely under the dominion and control of her daughter; but that is only said incidentally in connection with the allegation of mental incapacity, which allegation formed the real case of the Plaintiff. And accordingly, when the issues were settled, there was a clear issue as to Khaja Boo having been of unsound mind in 1889, but none with regard to undue influence. The result has been that the question

of undue influence has been discussed and considered, not upon evidence given with reference to that question, but upon evidence called for a totally different purpose.

Assuming, however, that undue influence might properly be made a ground of decision in the present case and under the present circumstances, their Lordships agree with the Court of Appeal in thinking that the evidence is insufficient to establish anything of the kind. As their opinion is in accordance with the Judgments appealed against, they think it unnecessary to examine the evidence in minute detail. They think it sufficient to indicate its general purport.

Khaja Boo was a very old woman, with the natural infirmities incident to her age. She was not of unsound mind or unable to attend to business. She is spoken of as purdanashin, but she had no objection to communicate, when necessary, in matters of business, with men other than members of her own family, and to some extent she did so. She was able to go to Court and give evidence in her litigation against her son, and she was able to attend at the Registrar's office in person to acknowledge her deeds for the purpose of registration.

On the other hand, her daughter resided with her, presided over her household, and had the general management of her affairs. It is not shown, whether with regard to the specific transactions impugned, the mother consulted anybody.

As to those transactions themselves, they appear to their Lordships to have been very natural under the circumstances existing at the time. The mother was extremely hostile to her son. She was old, and in case of her death her son would have inherited the greater part of her property. The only apparent way to prevent

his doing so, was to divest herself of the property in her life time. What the son himself thought about his mother's intentions appears from the fact found, that he issued an advertisement declaring her to be insane, and that any conveyance by her would be ineffectual.

The mere relation of daughter to mother, of course, in itself suggests nothing in the way of special influence or control. The evidence seems to their Lordships quite insufficient to establish any general case of domination on the part of the daughter, and subjection of the mother, such as to lead to a presumption against any transaction between the two. With regard to the actual transactions question, there is no evidence whatever of undue influence brought to bear upon them. For these reasons their Lordships are of opinion that no case of undue influence has been established and that therefore the general contention of the Appellant fails.

It was further contended, however, that, irrespective of any question of undue influence, the proper legal inference, both with respect to lot No. 27 and the properties purchased with its sale proceeds, and with respect to the partitioned share of lot No. 6, was, that there was no valid transfer to Hafiz Boo, that she was a mere benamidar for her mother, and that the whole property formed part of the estate of the latter. This view was accepted by the learned Judge at the trial, but not by the Court of Appeal. The case stands somewhat differently with regard to the one property and the other.

The power of attorney of the 12th February 1889, when dealing with lot No. 27, by its terms seems to contemplate an absolute gift of the sale proceeds to Hafiz Boo, and this is how she treated the matter in her written statement. In her evidence, which was very confused, she tried to say that she paid that

purchase money to her mother. This was clearly untrue, as both Courts have found. The fact, therefore, remains that the properties purchased by the sale proceeds were purchased no doubt in Hafiz Boo's name, but were purchased out of funds emanating from her mother's estate. This circumstance no doubt, if taken alone, affords evidence that the transaction was benami, but there is, in their Lordships' opinion, enough in the facts of the case to negative any such inference. It seems clear that what was done in 1889 was prompted by hostility to the son, and was with a purpose of excluding him from inheritance, an object which could not have been attained by any benami transaction. And the strong words of gift contained in the power of attorney are in accordance with this intention and calculated to give full effect to it. The question being purely one of intention, their Lordships think that the evidence points to an absolute gift, not to a benami transaction.

The power of attorney, when dealing with the other property, lot No. 6, in its terms seems to regard the transfer to Hafiz Boo of the partitioned share as a sale for Rs. 10,000 already paid, and the conveyance to Hafiz Boo of the 22nd April 1889 is to the same effect. Both in her written statement and in her evidence Hafiz Boo asserted that she had actually paid the Rs. 10,000 to her mother, which is certainly not true. It was contended that this transaction must be regarded as a benami one, or, at any rate, that if a genuine transaction at all, it was a sale, not a gift, and it was said that the property still formed part of the mother's estate.

Here again, the question is purely one of intention. The observations already made with respect to the general purpose of Khaja Boo fully apply to the present property. The language of the power of attorney and of the conveyance

made under it are strong to show that the estate was to vest in Hafiz Boo and her heirs.

The fact that the sum of Rs. 10,000 is mentioned as the price, a sum which, according to the evidence, was far short of the actual value of the property, and the fact that that sum is stated to have been paid in advance, whereas in fact it was not paid at all, are strong to show that the transaction was not a sale but a gift, with an imaginary consideration inserted, in a manner common in such transactions in India. Their Lordships, therefore, think that, as to this second property also, the case of benami fails.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellant will pay the costs.
