Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Raj Lukhee Debia, v. Gokool Chunder Chowdry, from the High Court of Judicature at Fort William, in Bengal; delivered 22nd July, 1869.

Present:

Sir James W. Colvile.
Sir Joseph Napier.
Lord Justice Giffard.

Sir Lawrence Peel.

THE question raised by this Appeal is whether the sale by two Hindoo widows of part of the estate of their late husband, one Gooroo Pershaud Talookdar, to the Respondent, can be upheld as valid?

The suit was brought to impeach this transaction by the Appellant as the adoptive mother and guardian of one Mohesh Chunder. The fact of that adoption is not now in dispute, nor is it disputed that Mohesh Chunder was by virtue of it, at the time of the institution of the suit, the next heir to Gooroo Pershaud or to the sons of Gooroo Pershaud, failing his widows or the survivor of them. Mohesh Chunder was still living at the date of the final decree which is the subject of the present Appeal; but he afterwards died childless, and the Appeal is brought by his adoptive mother, who, as such mother, is his heiress. There is a suggestion in the Appellant's case that she has, under the authority given to her by her husband, made a second adoption, but inasmuch as the validity of that adoption is incapable of being discussed in this suit, their Lordships cannot take that into their consideration.

The validity of this transaction is sought to be upheld upon two grounds, first: upon the construction of the Hibbanamah, or deed of gift, at page 37 of the record, which, it is contended, gave to the widow an absolute interest, subject to be divested

in the event of their sons or either of their sons coming of age. If that construction were correct, there would, of course, be an end of the case, because the deed of the widows would be good against all the world. Their Lordships will, therefore, first dispose of that question.

Upon the best consideration which their Lordships have been able to give to this document, they are of opinion that it provides only a species of trust for management, and that it does not interfere with the devolution of the estate, according to the ordinary law of succession, under the Hindoo law. The deed was executed by Gooroo Pershaud in the year 1823, at a time when he states himself to have been not only suffering from corporeal illness, but to have a purpose of going to reside at Benares, and therefore, from his then circumstances there is ground for the argument of Sir Roundell Palmer, that he meant to provide for the management of the estate, not only after his death, but during his life, and that seems to their Lordships to be the true construction of the deed. The learned Counsel for the Respondent has laid some stress upon the direction "you shall perform the ceremonies of "Sheraddo, etc., according to my means," and have contended that that implies a change in the person to perform the funeral ceremonies of the donor, and therefore, must be taken to imply a change in the course of succession to his estate.

Their Lordships, however, are of opinion that the words "Sheraddo, etc.," are somewhat wide and ambiguous, and that if the deed be taken, as they think it ought to be taken, to be an arrangement providing for the management of everything from the date of it during the life of the donor himself, they may be taken to refer to, certainly, to include those family ceremonies which he from time to time would, if he remained in his home, and in possession of his strength and faculties, be bound to perform.

They, therefore, cannot give to those words the force which, it has been contended, ought to be given to them.

That being their Lordships' view of the construction of the Deed, it may be convenient here to consider what has been the course of the succession to the property. If the succession were not altered by

the Deed, then of course, upon the Donor's death, the two sons became entitled to his estate. Those sons are shown to have survived him. Each is also shown to have died in the lifetime of his mother, and to have died childless and under age. The consequence of that is, that on the death of each, his interest would have passed to his mother, and that Mohesh Chunder, who was the adopted son of the Testator's nephew, became on his adoption the collateral heir of each son, subject to the interest of his mother. The result, of course, is, that upon the death of the widow, who is dead, Gouree Dabea, Mohesh Chunder became entitled to a present interest in the property, which is the subject of this contention, unless it can be shown that that property has been validly passed by the act of alienation which is the subject of the Suit.

Their Lordships have next to consider whether treating this Deed as one executed by women having only the limited interest of Hindu females in property which they take either from their husband or their sons, the transaction can be supported upon any of the grounds on which such a transaction is recognized as valid by the Hindu law. The law upon the point is well ascertained and has been established by many cases. Some question has been made to-day at the bar as to the right of a person who is a presumptive heir in reversion to question such a transaction; but their Lordships, if it were necessary to decide the point, would find it extremely difficult to overrule the many cases in which that right has been more or less recognized. But, in the view which they have now taken of the Hibbanamah and of the present right of Mohesh Chunder, upon the death of Gouree Dabea to enter into possession of two annas of this property, it really is not necessary in order to support the Suit to express any more decided opinion upon that question.

Then, upon what grounds are we to treat this transaction as valid? The statement upon the face of the Deed is, that the property was sold in order to liquidate the husband's debts. It recites, "Now "our husband's debts not being liquidated, the "liabilities are being gradually increased by loss in "interest. The debts due to the creditors cannot "be liquidated at once, by the average profits of

"the above zemindaries, particularly the debts of "the time of our husband for which we had made an "Instalment Bond in Court in our own names with "the creditors, Narain Dass and others. Now, that "money not being paid, the above creditors are about "to have all our zemindaries sold by auction by put-"ting in force the said Instalment Bond in Court." Therefore, there is a clear allegation that the transaction was entered into for the purpose of defraying the debts of the husband, including a particular debt, secured by an Instalment Bond, and an agreement made in Court, and under the threat of an immediate execution against the zemindaries; though the Deed goes on to say that it was executed for the further purpose of performing "the "Shrad, etc., of our husband at Gya."

It is not easy to see why, if the case so stated was true, there should have been any difficulty in giving far more satisfactory evidence of it than has been given in this Suit. There is the reference to an agreement in Court, there is the reference to a threat of execution and to the Instalment Bond which constituted the debt at least of Narain Dass. These things, if they had any real existence, were presumably capable of being proved.

But what has been the course of the litigation? The burden of proof was unquestionably on the party seeking to support the transaction, that is, the present Respondent. But it is an admitted fact, that in the Court of First Instance he gave no evidence in support of the transaction except the Deed itself. In that state of things the Principal Sudder Ameen very properly decided the issue against him.

The case, then, went to the High Court by appeal. When the appeal was heard in the first instance, the High Court, with some variation in the form of the Order, confirmed the decision of the Principal Sudder Ameen. There was then an application for a review, and a suggestion made upon that application that the Respondent had been shut out by the Principal Sudder Ameen from giving the evidence which he was ready to give in the suit. The Judgment of the Principal Sudder Ameen contains a distinct statement that no such application was made. He says, "It was indispensable, how-"ever, that he should prove that the sale was "made to pay the husband's debts, and the debts

"contracted for his funeral obsequies, but he has "filed no decree of Court, nor any other voucher "proving these points. He has not applied for a "summons in the name of any witness whatever. He "has not even named a single witness, nor adduced "any description of evidence whatever." Certainly it appears somewhat singular that, if the learned Judges of the High Court had no other contradiction of that solemn and direct statement upon the face of the Judgment of the Lower Court that no evidence had been tendered, they should have acted upon the very wild story told by the witness Gooroochurn Odheekary, and the copy of a Petition said to have been made from an original Petition lost in the extraordinary manner in which that witness states it to have been lost. It may be that the learned Judges did ascertain, by reference to the Principal Sudder Ameen or to the proceedings, that evidence had been offered and had not been taken, but certainly there is no Constat of anything of the kind. Upon this Record they seem to have acted solely upon that singular evidence to which I have just adverted.

Their Lordships, however, think that whether it were right or wrong in the Appellate Court in those circumstances to admit the additional evidence taken before it, it would not be right for their Lordships to exclude that evidence from their consideration; and they will, therefore, consider it as if there were no objection whatever to its admission.

The material portion of the evidence taken on review is the deposition of Khadem Ally, who describes himself as the Jemadar of Gokool Chunder Chowdhry, the Respondent. He gives a very detailed account of the execution of the deed and of the payment of the money, which he professed to have seen made at the time of the execution of the deed,—he states in particular that he was a witness to the payment of 9500 rupees, part of the consideration money to Narain Doss Muhajun upon account of the Instalment Bond. Although he had not mentioned Narain Doss in the first instance as among the parties present, yet at page 95, line 30, he does distinctly state that he was present. "Narain "Doss, who had taken Rs. 9500, was present there. "Seetul Talookdar had given him the said Rs. 9500. "On the said Narain Doss returning the Instalment

"Bond, Seetul gave it to the Thakooranies. On my "employer asking for it, they did not give it."

Here, then, is very specific evidence of a transaction which took place many years ago; but the singular thing is, that when it is contrasted with the statements of the Respondent himself, it does not tally in any degree with his recollection of what passed on the occasion. His statement is that the price of the property was paid in order to pay off the debts of Mohajuns, but he does not recollect the debts of what Mohajuns were paid, and he says, "I gave Gouree Dabea and Surbo Mungola the "money myself." The learned Judges of the High Court seem to have thought that in that conflict of evidence, it was impossible to give the credit to Khadem Ally which they otherwise would be disposed to give. Their Lordships think that in a case in which the party himself having an imperfect recollection of the transaction, and having stated that he paid the money to the vendors personally, a servant—a jemadar—comes forward after the decision of the case by the Court of First Instance and the Court of Appeal, to make out this elaborate proof of payment of debts to Narain Doss, —the least that can be said of evidence, so given, is that it is wholly untrustworthy. Nor does the deposition of the other witness also a servant, deserve more credit. The learned Judges, however, finally decided the case, partly upon the mere fact that Juggut Ram was an attesting witness, and must therefore be taken to have been a concurring party to the transaction, and partly upon the corroboration which they seem to think that fact afforded to the evidence of Khadem Ally. Their Lordships cannot see how the one can be any corroboration of the other. The fact that Juggut Ram attested the Deed is perfectly consistent with the fact that Khadem Ally is a tutored witness brought forward at the last moment to depose to having seen what he never saw. Again, with respect to the effect of the attestation of the deed by Juggut Ram, it seems to their Lordships that the learned Judges have attached to that circumstance a weight which it really does not possess. Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but

the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindoo law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of *præsumptio juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction. And one of the difficulties of allowing the present decree to stand is, that this point, which was raised at the last moment, was decided upon the mere proof, by the production of the deed, that Juggut Ram was an attesting witness to it. The point had never been raised before. The opposite party has had no opportunity of examining Juggut Ram as to the circumstances under which he became an attesting witness, or what his understanding of the transaction really was. The utmost that the Judges ought to have done in that state of things, was to remand the case to be retried, for the full consideration of that question.

Their Lordships cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might, no doubt, be shown by other evidence that when he became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. But considering who Juggut Ram was, and what the circumstances of this family were, their Lordships are further of opinion that his concurrence would not, in this case, be sufficient to set up the deed. In the first place, it is not proved, though on the other hand it certainly is not disproved, that at the date of the execution of this deed, which was executed before the adoption took place, Juggut Ram was the next heir in reversion. He was unquestionably a very distant relation, and although he appears to have taken a considerable part in the management of this family, and even in the adoption of the Plaintiff, he is not proved to have been the next heir. On the other hand, the

very fact of his connection with the family leads to the presumption that he knew that the present Appellant, had the power given to her by her husband to adopt a child, and that therefore his interest, even if it existed, as next reversioner was, in all probability, likely to be defeated. Therefore, if his concurrence were proved, it would not amount to such a concurrence by the husband's kindred as, in the opinion of their Lordships, would have defeated the Plaintiff's claim. Their Lordships have already said, that if anything could have been made of that point, it would have been rather a reason for a remand of the cause to be tried upon such an issue than for the immediate decision of the case against the Plaintiff; but in their Lordships' opinion there was no ground in the circumstances for such a remand, because such an issue had never been raised upon the pleadings, or in the earlier stages of the cause. The case of the party who sought to support the validity of this transaction was that the sale had been made for particular purposes. He gave no evidence of that. He did not, by any suggestion in his written statement or otherwise, put forward the concurrence of Juggut Ram either as supplying the want of proof of the existence of the debts and the necessity of the sale or as a consent equivalent to such proof.

Their Lordships are, therefore, of opinion that the Decree which is under appeal must be reversed; and the only question is, what should be the form of the order to be made? They have been furnished by Sir Roundell Palmer with the minutes of the Order which he thought he was entitled to claim; and to some extent their Lordships adopt those minutes. They think that the minutes should stand thus:—"Declare that the deed of the 16th "of November, 1845, was and is invalid as against "Mohesh Chunder and the Appellant as his heir, "and declare that Mohesh Chunder became on the "death of the widow Gouree Debia, and that the "Appellant, as such heir, is now entitled in possession to one moiety of the four annas, and order "that the Respondent do deliver up to the Appellant such moiety, and do pay to her the profits "thereof received since the death of Gouree Debia."

Their Lordships will therefore humbly advise Her Majesty to allow the present Appeal, to re-

verse the Decree of the Sudder Court, and to direct that, in lieu thereof, a Decree be made to the effect above stated, and further directing that the Respondent do pay to the Appellant the costs incurred by the Plaintiff in both the Courts below. The Appellant must also have the costs of this Appeal.