

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussamut Kripamoyee Debia v. Romannath Chowdhory, from the Sudder Dewanny Adawlut of Calcutta; delivered 2nd August, 1861.*

---

Present :

LORD KINGSDOWN

SIR EDWARD RYAN.

MASTER OF THE ROLLS.

---

SIR LAWRENCE PEEL.

THE question in this appeal is whether the purchase of a putnee-talook made by Juggurnath Roy, on the 6th September, 1835, was a benamee transaction, that is, whether it was bought with the money of and in trust for Hurro Kanth Roy, who is now deceased, but whose widow is the Appellant. Substantially the question depends upon whether an ikrar puttro, or declaration of trust, purporting to bear date the 29th Kartick, in the year 1242, which corresponds to the 14th November, 1835, and which also purports to have been executed by Juggurnath Roy, is a real or a supposititious document.

We entertain no doubt, if on the evidence it should appear that no reliance is to be placed on this document, that there is no other evidence before us sufficient to establish that the transaction in question was a benamee transaction.

In consequence of the non-payment of the rent, the amount of which was disputed, the putnee-talook was, after various proceedings to which it is unnecessary to advert, sold by the revenue authorities, on the 21st May, 1836, by public auction, to Kalee Kanth Lahoree, who was the highest bidder; who

has since died, but whose heir is the first Respondent on the record.

The suit to recover the putnee-talook was first instituted by Hurro Kanth Roy, on the 1st March, 1845; that suit failed in April 1850 by reason of misdating the ikrar in the plaint, which error the Court refused to allow to be corrected.

On the 18th July, 1850, the Appellant filed her plaint in this suit.

On the 26th December, 1854, the Principal Sudder Ameen dismissed the Appellant's suit with costs.

This decision was appealed from to the Court of Sudder Dewanny Adawlut at Calcutta, and on the 28th December, 1857, the Decree of the Court below was affirmed with costs, which is the Decree appealed from to us.

The original kubalah granting the putnee-talook was made on the 22nd Bhedoon, 1242, which corresponds to the 6th September, 1835; it was attested by fourteen witnesses, and, at the same time, a kubooleut, or counterpart, was executed by Juggurnath Roy, containing the usual condition that if the rents were not paid, the zemindar should be at liberty to sell the talook, under the provisions of Regulation VIII of 1819. This counterpart was executed by nine witnesses, of whom the first and last were also attesting witnesses to the kubalah, but the remaining seven witnesses were distinct and different persons.

That the same witnesses, fourteen in number, who attested the kubalah should be obtained to attest the ikrar, two months later, is a circumstance which, in our mind, gives rise to very grave suspicions. No valid reason is given for this peculiarity; the collection of exactly the same fourteen persons who had attested an instrument two months before, for the purpose of attesting another instrument, must have occasioned both difficulty and delay, and it is not pretended that the circumstance of the witnesses who attested both instruments being the same could confer additional validity on the ikrar. So little did this seem to be a matter of importance to the parties engaged in the transaction on the 6th September, 1835, that of the two instruments then simultaneously executed, only two witnesses attested both. The suspicion created

by this circumstance is augmented by the consideration that in the original plaint, which was filed on the 1st March, 1845, the ikrar is alleged to bear the same date as that of the kubalah. If, in truth, the ikrar had been executed at the same time with the kubalah, it might well be that the same witnesses who attested the lease would also attest the declaration of trust; and, indeed, such a supposition would be natural and probable. Upon the assumption that the original Plaintiff had intended to set up a fictitious ikrar, with a view of establishing the transaction to be one of a benamee character, it would be natural to set up an ikrar of even date with the original kubalah, in which case it would be naturally attested by the same witnesses, and accordingly such was the Plaintiffs' allegation contained in the original plaint; and we cannot but consider it a matter also open to suspicion, that in so important a matter as the statement in the plaint of the ikrar, on which the whole of the Plaintiff's case depended, an erroneous date should have been assigned to that instrument. It is to be observed, also, that the ikrar itself, on the face of it, seems to have been framed as if it had been intended to be contemporaneous with the kubalah, for it speaks of the delivering up of the umulnamah, or letter of authority, *of to-day*, that is, of the day of the date of the ikrar; but the only umulnamah of the existence of which any evidence is given, is the umulnamah of the date of the original kubalah.

On the assumption that it was intended to set up a fictitious deed, various circumstances might, after the institution of the original suit, render it impossible to act on that intention, and to establish by proof an ikrar of even date with the original kubalah.

The following are instances. The witnesses speak of Huro Kanth Roy as having been present at the time when the ikrar was executed, and even of the conversation which passed between him and Juggurnath Roy on that occasion. Huro Kanth Roy was at the date of the execution of the kubalah distant four or five days' journey off, at Calcua. This fact might possibly have been established by evidence brought on the part of the Defendants. There were present at the time when the kubalah was executed, in September 1835, the witnesses to

the kubooleut, and these witnesses, or some of them, might have been called, and not only disproved the presence of Hurro Kanth Roy, but might also have disproved the execution of any ikrar at all at that time, and might have given evidence which would have been irreconcilable with the evidence on the part of the Plaintiff.

Assuming, therefore, that a fictitious deed was intended to be set up, this circumstance might explain how it was originally intended to set up an ikrar of even date with the original kubalah, and how that intention was afterwards abandoned as far as regarded the date of the instrument.

Another circumstance which creates grave suspicion in our minds is the age of Hurro Kanth Roy at the time of the transaction. This we consider to be proved by the deposition of Hurro Kanth Roy himself, made in a distinct matter on the 12th May, 1843. By this deposition it appears that he was then at the Government School at Rampoor, and that he stated his age to be at that time 17 or 18. This was eight years and nine months after the date of the ikrar. This would reduce his age at the time of the transaction to 9 or 10 years old. The explanation attempted to be given, that he understated his age for the purpose of entering the school, by the regulations of which no pupil could be admitted who had passed a given age, even if admitted, could only extend to a year or two, but no latitude which could be given to this suggestion would induce us to believe that a man of 26 or 27 could pass off for a youth of 17 or 18; but we have no reason to doubt the accuracy of the statement of his age contained in the deposition which was made by himself in a matter in which his age was not a matter of importance, and by which it appears that he was then under the master of the school, and in which he speaks of the other lads of the school.

We are therefore of opinion that, on the evidence before us, the age of Hurro Kanth Roy in November 1835 must be considered as not exceeding 10 or 11 years. In what way a boy of 10 or 11 years of age could be possessed of money sufficient for the purchase of the putnee-talook, the evidence fails to explain.

But this is not the only difficulty presented in the way of the Appellant by the youth of her husband at

the time of this transaction. The evidence given by the witnesses of the conduct of Hurro Kanth Roy on this occasion is irreconcilable with the supposition that he was not more than 11 years old, even allowing much to the precocity ascribed to Indian youths.

Ram Nedhee Deb (page 106), says that this boy of 10 or 11 years old gave directions for obtaining some of the Rajah's Mehal, if any were to be let out in putnee. The witnesses all speak of his understanding the transaction, and taking a part in it.

Gooroo Dyal Roy (page 76), says that Hurro Kanth Roy sent the money for the kubalah, 4,700 rupees in specie, from Calcutta, by him and three other persons, accompanied by five or six others, by a boat ; a very improbable mode of transmitting money in a country where Government notes were in circulation.

Kalee Pershad Dass (page 79), says that Juggurnath Roy and Hurro Kanth Roy corresponded on this subject, and that Hurro Kanth Roy wrote letters to Juggurnath Roy on the subject, and they all state that he went from Calcutta to Sydabad, for the purpose of completing the transaction.

A careful examination of the witnesses also discloses various inconsistencies in their testimony. Two of them, viz., Haroo Dass (page 72), and Gour Mohun Dass (page 75), in their depositions made in the first suit, speak of the ikrar as originating from Juggurnath Roy ; but the two witnesses examined in the suit, Ram Nedhee Deb (page 105), and Sheetal Ram Raha (page 108), say that the ikrar was made at the instance of Hurro Kanth Roy.

This latter observation would not have much weight were it standing alone, but combined as it is with the other circumstances enumerated above, it adds to the suspicion necessarily created by the other facts in the case. It is not to be overlooked also that the ikrar was not registered ; to this omission, however, little weight would have to be attached, if the whole of the rest of the case were free from suspicion, by reason of the desire to keep the matter secret, which, on the assumption that it was a benamee transaction, and intended to be concealed from Rajah Gobin Chunder, was intelligible enough.

The circumstances above enumerated, if they stood alone, would bring our minds to the conviction that no reliance could be placed on this ikrar in a Court of Justice as an authentic document.

But there is some evidence, on the other hand, in favour of the transaction having been originally a benamee transaction. The strongest portion of this is to be found in a letter which, singularly enough, has been produced on behalf of the Defendant, Kalekanth Lahoree; it is, therefore, free from all suspicion when used on behalf of the Plaintiff: this is a letter (page 117) written in October 1835, between the date of kubalah and the ikrar addressed to Juggurnath Roy, apparently by the Maharanee Kishenmonee Takooranee, who was the aunt of Hurro Kanth Roy. It seems to have been written in answer to a letter from Juggurnath Roy, requesting from her directions respecting this putnee, and in it she directs that a mooktearnamah should be made out in the name of Nub Kunt Roy, and coupled with that of Oomapersand Lahary, to whom the documents relating to the putnee and the kubalah were to be forwarded. This direction, to some extent at least, seems to have been acted upon by Juggurnath Roy, and it is certainly very difficult to reconcile the writing by Juggurnath Roy of the letter to which this was an answer, with the supposition that he was the beneficial owner and purchaser of the putnee talook. This observation, however, although in favour of holding that the transaction was originally one of a benamee character, does not establish the case of Hurro Kanth Roy, or make out any title in him to the putnee talook. It may be that the Maharanee was the purchaser of the putnee talook, but that is not the case of the Plaintiff, or what we have to consider in this appeal. This document has, however, although indirectly, a bearing on the part of this case which is that which is indeed the principal foundation of the Plaintiff's case, viz., the presence of all the deeds and papers relating to this putnee talook, and the Wasilat papers during the time which elapsed after the kubalah, and before the sale in May 1836, which are all now in the hands of the Plaintiff. This letter of the Maharanee authorizes the delivery of all papers relating to the kubalah to Nub Kunt Roy. Hurro Kanth Roy is stated in the judgment

of the Court (page 154), to have resided with Nub Kunt Roy, who predeceased him, and it is suggested that by this means the original documents may have come into the possession of Hurro Kanth Roy. Whether this be so or not, it will not, in our opinion, affect the ultimate decision of the case.

The mode by which the Plaintiff alleges that she acquired possession of these documents is not established to our satisfaction, and this being so, we cannot allow the simple possession of them to outweigh the other circumstances of the case, which, in our opinion, strongly preponderate in favour of the Respondent.

One circumstance, however, and that a very material one, remains to be noticed, and which makes strongly against the claim of the Appellant; and this circumstance is, that the sale having taken place in May 1836, no suit is instituted until March 1845, a period of nine years. This circumstance is the more noticeable because it appears that the Rajah Gobind Chunder, on whose account alone the matter is alleged to have been kept secret, had died in November 1836, thereby releasing Hurro Kanth Roy from the fear of his making any claim to the putnee talook, the apprehension of which is alleged to have been the cause of the benamee.

Another circumstance connected with this lapse of time is also most important, for the suit was not instituted until after the deaths of both Juggurnath Roy and of Nub Kunt Roy had taken place, and they were the persons who could have spoken positively to the truth of this case, and whose evidence was of the greatest value in the determination of it.

Taking all these matters into consideration, and also bearing in mind that this is an appeal from the unanimous decision of the Court below on a question of fact in which they had the opportunity of seeing and testing the mode of giving evidence of such witnesses as appeared before them, we are of opinion that the decision of the Court below ought to be affirmed; and their Lordships will humbly recommend Her Majesty to dismiss the Appeal, with costs.

---