

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Thakoor Deyhee v. Rai Baluk Ram and others, from the late Sudder Dewanny Adawlut at Agra, North-Western Provinces of Bengal; delivered 1st February, 1867.*

SIR JAMES W. COLVILE.

SIR EDWARD VAUGHAN WILLIAMS.

LORD JUSTICE CAIRNS.

SIR RICHARD T. KINDERSLEY.

SIR LAWRENCE PEEL.

THE question on this Appeal is the right of succession to certain property of which one Choteh Bebee, a Hindoo widow, died possessed. She was the widow of one Ramjee, who died in 1824 without issue, and he was the only son and heir of Bence Ram, one of the five sons of Rai Suhuj Ram. The Respondents are all descended from the last-named ancestor through one or other of his four other sons, and are admitted to be the collateral male heirs of Ramjee living at the date of his widow's death. The Appellant is the niece of Choteh Bebee, her brother's daughter. She is said to have been from her infancy adopted by her aunt, and treated as a daughter. But the word "adopted" must here be taken in its popular, and not in its technical sense. It is not now contended that the adoption was of that kind which, according to Hindoo law, would create between Choteh Bebee and the Appellant the relation of parent and child for all religious and legal purposes, or give to the latter any right of inheritance. The question in this case is, whether

the property in dispute on the death of Choteh Bebee descended to the Respondents as the collateral heirs of her husband then living, or passed, under a deed of gift alleged to have been executed by her shortly before her death, to the Appellant. That property is partly moveable, and partly immoveable. The latter is situated in the districts of Tirhoot, Behar, Shahabad, and Benares, and the deceased was domiciled at Benares. Therefore, the law by which the succession to the whole is governed is that of the Western schools.

The issues recorded in the cause were, whether Mussumat Choteh Bebee was competent to bestow the property in gift or not; and if she was, whether the deed of gift relied upon by the Defendant (now the Appellant) is valid or not. This appears at page 7 of the Record. Between the date, however, at which the issues were recorded and that of the trial a change took place in the constitution of the Court of the Principal Sudder Ameen of Benares, in which the cause was pending; and Mr. Smith, by whom it was tried, in his Judgment, at page 77, says: "The disposal of the case rests on two important issues. 1st. Whether the property which was the subject of the gift to the Defendant was joint ancestral or not? 2nd. Whether the alleged deed of gift is or is not a *bond fide* instrument?" The first of these questions, as will hereafter be shown, is by no means identical with the first recorded issue. Mr. Smith, however, having decided it in favour of the Appellant, appears to have considered that the necessary consequence from his finding was, that Choteh Bebee was legally competent to alien the property; and further found that she had duly executed the deed of gift. He, therefore, dismissed the Respondents' suit, with costs. There was an appeal to the Sudder Court of Agra, and that Court, confining its attention to the second of the recorded issues, and after taking further evidence as to the *factum* of the alleged deed of gift, came to the conclusion that the instrument was forged, and on that ground alone made a Decree in favour of the Respondents. The present Appeal is against that Decree.

Their Lordships, reverting to the recorded issues, will consider them in their inverse order. They will first consider whether the evidence in the cause

can be taken to have established that the alleged deed of gift was duly executed by Choteh Bebee.

The case set up by the Appellant is the following. In 1858, Choteh Bebee undertook a pilgrimage to Juggurnath. She was accompanied by the Appellant, the Appellant's brother Balkishen, Nathoo Ram, a priest, and Bunsee, a menial servant. On her return homewards from the shrine, and a few days before she reached Midnapore, she was attacked with dysentery, and arrived at Midnapore very ill, and despairing of recovery. The instrument itself expresses that she had no hope of getting home alive. It was prepared by Hurry Doss, a Pleader in the Judge's Court of Midnapore, and by his nephew and clerk, Deenbundhoo Muttye. It was written in Bengalee, a language foreign to the person by whom it purported to be executed; a language which it is admitted she did not understand. It was executed at the door of the catcherry of the Registrar of Deeds, to which place both Choteh Bebee and the Appellant were taken in separate palanquins, and there registered. The Appellant (Record, p. 23) says, "After the registry was effected we returned home, and left the station." Balkishen says that Choteh Bebee remained at Midnapore about two days after the deed was executed and registered. All the witnesses who speak to the fact seem to agree that she died about thirteen or fourteen days after the execution of the deed at a place called Gobind Chuttee, distant about seven days' march from Midnapore, and that her body was there burned.

We have now to consider the evidence given to prove this transaction more minutely; and first it may be well to see what evidence there really is that the person who put her hand to the instrument was Choteh Bebee.

The subscribing witnesses to it are Balkishen, Nathoo Ram, Bunsee, and four Bengalis, viz., Tarachund Muduk, Modhoo, a chowkeedar, Sree Chedum Surma, or Sirdar, and Deenbundhoo, who was concerned in the preparation of the deed. The first three of the Bengali witnesses may be at once disposed of. Neither their subscriptions nor the testimony of such as have been examined can add anything to the credibility of the transaction. Tarachund almost admits that he was called out of



the crowd about the door of the cutcherry to become a subscribing witness, without previous knowledge of the parties or of the transaction. He says (p. 87) that Chedum Surma, elsewhere called Chedum Sirdar, and Modhoo the watchman, were unable to write, and he does not know who signed for them; whilst Balkishen, at p. 69, says "Those witnesses who could write signed for themselves, and those who could not Deenbundhoo signed for them." Chedum Sirdar does not seem to have been examined, and Modhoo was probably a witness of the same class with Tarachund; for his statement that he, a village watchman, had been admitted into the presence of Choteh Bebee, or had been requested by her to sign the deed, is utterly incredible. Besides the evidence of the subscribing witnesses, we have that of Hurry Doss and Shamchund Ghose, who took upon themselves to identify Choteh Bebee to the Registrar. But it is obvious that they could only speak to her identity from information derived from those who travelled in her company, or from the person spoken of as the Chowbey. He was the only resident in Midnapore who it is pretended had ever seen or known Choteh Bebee before this transaction. He was a Pundah, a sort of priest, who had migrated to Midnapore from the upper provinces, and there dealt in sweetmeats. His name is not given, and he appears to have been known only as the Chowbey-Hulwai, an appellation which expresses both his *status* as Brahmin and his occupation as confectioner. What was the extent of his previous acquaintance with Choteh Bebee does not appear. Balkishen (p. 69) says, "She knew a Chowbey of Muttra at Midnapore. On going to Juggernath she saw the Chowbey, who kept a shop, but did not halt at Midnapore; she halted further on." But whatever was the extent of his acquaintance the Chowbey neither attested the deed nor appeared before the Registrar to identify her, nor gave evidence in the cause. When the examination of the additional witnesses took place at the instance of the Sudder Court he had disappeared from Midnapore and could not be traced. There is therefore no evidence of the identity of the person who signed the deed with Choteh Bebee except that of the Appellant, her brother, their dependent the priest, and a servant. This might have been corroborated

by satisfactory evidence of the handwriting; but from the evidence on that point and a comparison of the Nagree signature on the deed with the admitted signature of Choteh Bebee upon other documents, the Sudder Court has come to the conclusion that the former is a forgery. The testimony too of the Kobiraj or native doctor, if forthcoming, might have afforded some slight corroboration of the story. He could at least have proved that he was called in to attend a woman dangerously ill of dysentery, and have shown in what state of body or mind his patient was.

Again, there is no evidence, except that of the four persons above mentioned, of the time and place of Choteh Bebee's death. Their testimony on that point might have been corroborated by that of the police authorities of the station where she is said to have died. But that corroboration is wanting.

We will next consider the evidence touching the preparation and execution of the deed. It seems clear that Hurry Doss, the Pleader, was called in on the night of the arrival of the party at Midnapore. He is the person called Sreedhur Moonshee by the Hindustani witnesses. There is a good deal of discrepancy in the evidence as to the manner of calling him in. He himself says that Balkishen and Nathoo Ram called on him, and said he had been recommended to them by the Chowbey. Shamchunder Doss, who seems to have been hanging about the house where the pilgrims put up, professes to have directed them to Hurry Doss. Bunsee says, "the Chowbey sent for Sreedhur Moonshee." Nathoo Ram's evidence is to the same effect; and Balkishen says that he "and the Chowbey went to Sreedhur Moonshee, who sent for the writer" (Deenbundhoo). These discrepancies, however, are not of much importance. It is clear that Hurry Doss went to the house, where the woman alleged to be Choteh Bebee was, on the night of her arrival; and, though the evidence is not altogether consistent on that point, that he took Deenbundhoo with him.

Hurry Doss being the professional person responsible for the preparation of the document, it is to his evidence that we naturally look for a true account of that part of the transaction. His statement is to this effect: "I found Choteh Bebee lying down. She said, 'Are you a vakeel?' I said, 'I am.' She

said, 'All my property I wish to make over in gift to Thakoor Deyhee, my niece'—who was then sitting by her. I asked what estate (talooqua), and what property, that a rough copy might be prepared. She said, 'To-night I am not at all well, but to-morrow morning I will have it all written out.' I then returned that night to my house. The next morning I sent Deebundhoo to take a list, and ascertain what she wanted to have written. He went, and took down all particulars. I said the whole of the property was to be made over, and that she had no stamp paper. I then drew out a deed of gift in the Bengalee language, and I sent Deebundhoo with it to Choteh Bebee to be read to her, and ascertain whether it was what she wanted. Deebundhoo returned, and said she had agreed to what I wrote. The next day I had it all clearly written out on stamp paper, and brought it to the cutcherry. Choteh Bebee and Thakoor Deyhee also came in palkees to the Court, and I then read out to Choteh Bebee the contents of the hibbenamah, and she signed it with her own hand. Choteh Bebee was then taken in a palkee before the Registrar, the door of the palkee was opened, and the Nazir questioned her by the Principal Sudder Ameen's orders, and she admitted that she had executed the deed. I received back the hibbenamah after registry, and the next day took it to Thakoor Deyhee through Balhishen.

From this statement it is to be inferred that on the first evening nothing was expressed but a general intention to make a gift of the whole property; that on the following morning the Pleader obtained more particular instructions through Deebundhoo; that he then, in his own house and with his own hand, drew up the draft deed, and sent it by Deebundhoo to be explained to the woman; that on the following day he had the engrossment made on stamp paper in his own house, and took it thence to the Court-house, where he met the two women in their palkees: that he read over the fair copy to the woman said to be Choteh Bebee outside the Court, who executed it there; that she was then taken in her palkee before the Registrar, and to him or his Nazir acknowledged her signature. One would have expected that this account would have been confirmed, at least by the clerk Deebundhoo.



bundhoo, in all its material particulars. This, however, is not the case. His statement is that on the night when, according to Hurry Doss, Choteh Bebee was too ill to give full instructions, he remained behind and took down from her dictation what he calls a list containing the names of her husband and her father; that the rough copy of the deed was drawn out the next day, and was clearly written out and taken to her by him. In another part of his evidence he says that Hurry Doss prepared the rough copy of the deed in her house; that Choteh Bebee explained to him what she wanted done, and that he (the witness), at Choteh Bebee's request, wrote the copy out clearly on paper. (This probably means the copy on stamp paper.) He says that on the same day (being the day after the evening on which Hurry Doss was first called in), the two women came to the eutcherry, and that the deed was then and there executed and registered. He does not state how, or by whom, the Bengalee instrument was explained to her. The testimony of the Hindustani witnesses, on the whole, tends to confirm the statement of Deenbundhoo rather than that of Hurree Doss. Both Nathoo Ram and Balkishen say that both the draft and the fair copy of the deed were written and explained by Deenbundhoo at Choteh Bebee's house. They do not speak to the fair copy having been explained to her by Hurry Doss at the eutcherry when it was executed. They say that the deed was written and executed on the same day, viz., that following the evening of Choteh Bebee's arrival at Midnapore. Bunsee, however, states that the fair copy on stamp paper was written at the eutcherry, and that the deed was written after remaining three days at Midnapore.

Here, then, their Lordships have to deal with an instrument avowedly taken *ex capite lecti* from a woman stricken with a mortal disease, and in expectation of death; that woman being one of a class which the law regards as in need of especial protection. Whatever strictness is required in the proof of a testamentary disposition, is, at least, equally required here. The document is written in a character and language which, if in the fullest possession of her faculties, she could neither read nor understand. The accounts given by the witnesses of its preparation and explanation are inconsistent

and unsatisfactory. If it were even established that the person who put her hand to the paper were Choteh Bebee, the proof would still fall short of that which ought to be given to support such a transaction—proof that she really knew what she was about, and intended to make this disposition of her property.

Again, the circumstances of the execution are, in their Lordships' judgment, extremely suspicious. This sick and almost dying woman is said to have been carried down on the afternoon of an August day, and deposited at the door of the catcherry. Whilst lying there she has the instrument explained to her, for the first time, by the person chiefly responsible for its preparation, through the half-opened doors of her palanquin. She executes it, and some of the witnesses of her act are picked up then and there out of the crowd. One witness says that the deed itself was fairly copied at this time and place; several, and that is far more credible, that an additional copy for registration was then made. After all this ceremony is gone through she is carried into Court, and questioned by the Nazir.

Now, she might certainly have executed the deed in the privacy of her own house. Nor does she seem to have been bound, by the Acts and Regulations touching registration, to appear personally before the Registrar in order to have it registered. She might have sent it for that purpose by a duly authorized representative, with one or more of the witnesses, who could speak to her execution of it.

Appearance in a public Court, even under the protection of a palanquin, is a thing repugnant to the feelings and habits of a Hindoo woman of Choteh Bebee's position, even when she is in perfect health. The same feeling might not operate on one who personated her, or on one who sought to profit by the fraud. And the extraordinary publicity resorted to on this occasion seems more likely to have been designed to give a colour to a false transaction than to have been an incident in a regular one.

Considering, then, the whole evidence and the startling improbabilities of the case set up, their Lordships are of opinion that the Appellant has failed to establish the validity of the deed of gift on which she relies. It is not necessary to say that



on this evidence she and her witnesses must be taken to have been guilty of conspiracy, perjury, and forgery. It is sufficient to say that the proof falls very far short of what is required to support the affirmative of the issue, which she was bound to prove.

If the Appellant were suing to recover possession of the property from the Respondents by virtue of the deed of gift, the conclusion to which their Lordships have come would of course determine the cause. That, however, is not the nature of the suit; and the Respondents, being the Plaintiffs below, have to show a title to the relief which they claim. The object of their suit, as stated in the plaint, was to be confirmed in the possession of the various parcels of immoveable property which are therein specified; to recover certain moveable property which seems to have been under attachment; to have the deed of gift cancelled and set aside; and to avoid the title which the Appellant was then understood to claim by virtue of adoption. The first things to be determined are the status of the family and the nature of the property.

The Respondents alleged in their plaint that the family of the common ancestor Subuj Ram, including Bence Ram and Ramjee, had continued to be undivided. But the evidence, and above all the indisputable fact that Choteh Bebee was in possession of the greater part of the property in dispute as heiress of her husband for upwards of thirty years, seem to their Lordships to support the finding of the Principal Sudder Ameen—that Ramjee was not a member of an undivided family, of which the Respondents, whatever be their status *inter se*, are or represent the other coparceners; Bence Ram having separated from his co-heirs, and taken as his share of the ancestral estate the villages in Tirhoot, which form the first parcel of the immoveable property that is the subject of this suit. Their Lordships also accept as true the history which has been given by the learned Counsel for the Appellant of the acquisition of the other parcels of immoveable property.

The state of the family and the nature of the property having been thus ascertained, the only question is, whether the Respondents became entitled to the possession of it on the death of

Choteh Bebee as the next heirs of her husband. The Appellant's supposed title by adoption has been abandoned, and the validity of the deed of gift has already been disposed of. It is difficult, however, to deal with the remaining question without adverting to the arguments which have been addressed to their Lordships in support of Choteh Bebee's power to dispose of the property, since the right of the husband's collateral heirs depends in some degree on the nature of the widow's estate.

The learned Counsel for the Appellant—whilst they admitted that, by the law as it prevails in Lower Bengal, the estate of inheritance which a Hindoo widow takes in the property of her husband, dying without male issue, is limited in its enjoyment; that she cannot alien such property, whether moveable or immoveable, except for certain defined purposes, and subject to certain restrictions; and that it passes on her death to those who are then the next heirs of her husband—have nevertheless contended that this is not the law of the Western schools, and have attempted to show that at Benares and in the other Provinces governed by the Mitacsbara the widow's estate in her husband's property is absolute; that she has full power to dispose of it; and that, if she fails to do so, it is after her death subject to a different course of succession from that which obtains in Bengal.

The opinion of the Pundit taken by the Sudder Court, and set forth at page 91 of the Appendix, does not support this contention in its integrity. He admits the right of the widow to alien moveable property, whether ancestral or not, and the immoveable property acquired by her husband or herself, with the proceeds of the former's share in the ancestral estate; but he denies her right to dispose of her husband's share in immoveable ancestral property, and states that on her death it devolves on her husband's next of kin. He does not show that, if she does not exercise her alleged power of disposition over property of the two other classes, that does not also pass on her death to her husband's heirs.

The learned Counsel for the Appellant relied mainly on arguments drawn from the 1st and the 11th sections of the 2nd chapter of the Mitacsbara, and on the supposed confirmation of them by Sir

Thomas Strange. The first of these sections deals with the right of the widow to inherit the estate of one who leaves no male issue. It states the various conflicting authorities on the subject—some favourable, others adverse to the widow's right; it weighs and contrasts them, and comes ultimately to the conclusion embodied in the 39th Article, viz.: "Therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently re-united with them, dies without male issue." It need hardly be observed that the rule thus stated merely affirms the widow's right of succession, with a qualification unknown to the law of Bengal—viz., that her husband was not at the time of his death a member of an undivided family. The text is wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. It may also be conceded that nothing on these points is to be found in the rest of that portion of the *Mitaeshara* which has been translated by Mr. Colebrooke, and published under the title of "The Law of Inheritance from the *Mitaeshara*." It is not, however, a necessary consequence from these circumstances that the Benares school recognizes in the widow an absolute power of disposition over the estate which she has inherited from her husband, or her absolute interest therein. We have not the whole *Mitaeshara*. Mr. Colebrooke, in his Preface, page iv, states that his work includes only an extract from that celebrated treatise, comprising so much of it as relates to inheritance. The widow's disabilities, which depend in a great measure upon the notions which the Hindoo legislators entertained of the infirmity and necessary dependence of the sex, may be dealt with in other parts of the work. It is certain that upon other subjects the *Mitaeshara* cites with approbation Menu, Catayana, Nareda, and others, upon whose dicta the limitation of the widow's enjoyment of her husband's estate, and of her power over it, chiefly depends; and that these authorities are received by the Western schools as well as by that of Bengal. Accordingly Sir Thomas Strange (vol. i. p. 246) states clearly that such limitations are, with some slight variations, common to all the schools.

A more plausible argument in favour of the Appel-



lant's contention may be derived from the eleventh section of the 2nd chapter of the Mitacshara, if the words "also property which she may have acquired by inheritance," which occur in the 2nd article of this section are taken (as they are taken by Sir Thomas Strange and others), to include property inherited from a husband. For it may be said that there can be no distinction between different portions of a woman's stridhun, or separate property: if she can dispose of part of it she may dispose of the whole; and further, that the whole must pass on her death, according to the law which regulates the succession to stridhun. Sir William Mc Naghten, however, in his "Principles and Precedents of Hindu Law," vol. i, p. 38, lays down broadly that there is such a distinction. He says: "In the Mitacshará, whatever a woman may have acquired, whether by inheritance, purchase, partition, or finding, is denominated woman's property, but it does not constitute her *peculium*. And he then proceeds to show what is that *peculium*, or stridhun proper, according to Menu.

Certain it is that whilst no decided case has been cited in support of the Appellants' contention, there are many to show that according to the Benares and other Western schools, the power of a widow over property inherited from her husband is limited, and that on her death it passes to his heirs. The case of Keerut Sing v. Koolahul Sing (2 Moore's I. A., p. 331), where the property in dispute was situate in the district of Benares, is directly in point. To the same effect are the cases at pp. 32 and 189 of the second volume of Mc Naghten's "Principles and Precedents." Several of the cases set forth in the appendix to the tenth chapter of Sir Thomas Strange's work, with the remarks of Mr. Colebrooke and others thereon, also support this view. (See 2 Strange, pp. 402, 407, 408, 439.) The "Vivada Chintamani," which has been recently translated by Baboo Prosunno Coomar Tagore, and is of high authority in the Mithila school, and in the district of Tirhoot, where some of the lands in dispute are situate, expressly shows that the widow has no power of disposition over the immoveable property of her husband, and that his heirs take it on her death. (See pp. 261 to 263.) The doctrine has been assumed as incontestable in the more recent cases like that of

the Collector of Masulipatam *v.* Cavalv Vencata Narainapah (8 Moore, 528). The result of the authorities seems to be, that although according to the law of the Western schools the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, she is, by the one law as by the other, restricted from aliening any immoveable property which she has so inherited; and that on her death the immoveable property, and the moveable if she has not otherwise disposed of it, pass to the next heirs of her husband. There is no trace of any distinction like that taken by the Pundit between ancestral and acquired property. In some of the cases cited the property was not ancestral.

Again, supposing that any of the property claimed in this suit were of the nature of stridhun, and passed as such, the Respondents would seem to have a better title to it than the Appellant. The devolution of stridhun from a childless widow is regulated by the nature of the marriage. There is nothing here to show that Choteh Bebee was not married according to one of the four approved forms. In that case her stridhun would, according to the Mitacshara (chap. ii, sec. xi, art. 11), go to the Respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 Strange, pages 411 and 412, and the comments of Mr. Colebrooke and others thereon. Upon this record, however, it seems admitted that the whole of the property in dispute was either inherited from the husband Ramjee or the fruit of its accumulations.

Their Lordships, then, are of opinion that Choteh Bebee had no power of disposition over the immoveable property inherited from her husband, whether ancestral or acquired. Whether she had any such power over his moveable property, it is unnecessary to determine; since it has been found that no valid disposition of either kind of property has, in fact, been made. And this being the case, their Lordships are of opinion that, as between the parties to this record, the right to the possession of the whole of the property in dispute, on the death of Choteh Bebee, passed to and became vested in the Respondents.

The Decree impeached is, therefore, substantially

right. Whether it is altogether right in point of form may be doubted. It contains (see page 98) an order that the Respondents should recover from the Appellant the possession of the immoveable property, with mesne profits from the date of the institution of the suit; whereas the Plaintiff seems to admit that the whole, or a large portion, of such property was at that date in the Respondent's possession, and made no demand for mesne profits. The error (if error there be) appears only in the formal Decree—not in the Judgment upon which it is founded. The recommendation which their Lordships will humbly make to Her Majesty is, that the Decree of the Sudder Court be varied, and that it be thereby decreed that the Respondents (the Plaintiffs) be confirmed in the possession of so much of the immoveable property in the Plaintiff mentioned as was in their possession at the date of the institution of the suit; and be declared entitled to the moveable property; and that they do recover from the Defendant (the Appellant) so much (if any) of the said immoveable property as was in her possession at the date of the institution of the suit, with the mesne profits of such last mentioned property from the said date, together with the costs of suit in both Courts. Their Lordships, however, are of opinion that notwithstanding the variation of this Decree the Appellant must pay the costs of this Appeal.

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