

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Moulvie Mahomed Shumsool Hooda and
others v. Shewukram, alias Roy Doorga
Pershad, from the High Court of Judi-
cature at Fort William in Bengal; delivered
15th July 1874.*

Present :

SIR JAMES W. COLVILLE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

IN this case a Hindoo widow lady, of the name of Rance Dhun Kowur, in the year 1854 sold an estate to the Defendant by a conveyance, in which she purported to give him an absolute title, what we should call in this country an estate in fee simple. Her grandson, on coming of age a great many years after, brings a suit for the purpose of having it declared in his favour that this lady had only the power to grant a life estate, and that after her death he was entitled to an estate in remainder.

The question depends upon the construction of a petition presented by Roy Hurnarain to the Collector in the year 1830, which has been treated by both sides in this litigation, and by both Courts, as in the nature of a testamentary instrument. The state of the family of Roy Hurnarain at the time of his presenting this petition was this: There were living only the before-mentioned Rance Dhun Kowur, the widow of his son

Roy Kalika Pershad, and her two daughters by that son, Bebee Shitaboo and Bebee Dularee, who at that time (1830) appear to have been unmarried. That being the state of the family, Hurnarain makes this, which must be now considered as a testamentary instrument. He first recites that the property of which he is about to dispose was ancestral property; he recites the death of his son Roy Kalika Pershad, and the death of his own wife, and he recites that the widow of his son, Ranee Dhun Kowur, was alive, that she has no heirs except her two daughters, Mussumat Bebee Shitaboo and Bebee Dularee, her daughters by his son, who would be her heirs. He then uses expressions which, if they stood alone, would, in their Lordships' opinion, show that he intended to make an absolute gift to Ranee Dhun Kowur. The expressions are these: "and my wife too died before, only Mussumat Ranee Dhun Kowur, widow of Roy Kalika Pershad, my deceased son above mentioned, who too, excepting her two daughters born of her womb, Mussumat Bebee Shitaboo and Bebee Dularee, has no other heirs, is my heir." And then he further goes on to say, "except Mussumat Ranee Dhun Kowur aforesaid, none other is nor shall be my heir and malik." He proceeds, however, to again refer to the daughters of Ranee Dhun Kowur, whom he had before mentioned, it can scarcely be assumed without some purpose, for he goes on to say, "Furthermore, to the said Mussumat Ranee, too, these very two daughters named above, together with their children, who, after their marriage, may be given in blessing to them by God Almighty, are and shall be heir and malik." There is, indeed, another translation of this document which has been referred to in another case, but inasmuch as this translation appears to have been agreed to by

the parties, their Lordships think they must adopt it.

It has been contended that these latter expressions qualify the generality of the former expressions, and that the will, taken as a whole, must be construed as intimating the intention of the testator that Mussumat Ranee Dhun Kowur should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. In other words, that she should take an estate very much like the ordinary estate of a Hindoo widow. In construing the will of a Hindoo it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindoos with respect to the devolution of property. It may be assumed that a Hindoo generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindoo knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. Having reference to these considerations, together with the whole of the will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in India, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should not take an absolute estate which she should have power to dispose of absolutely, but that she took an estate subject to her daughters succeeding her in that estate; whether succeeding her as heirs of herself or succeeding her as heirs of the original testator is immaterial. It would appear that the testator uses the word "heir" as signifying the person who is to take immediately in succession to another; that he applies it to the Ranee as

the person who is to take in immediate succession to him, and to the two daughters as the persons who are immediately to succeed to the Ranee; and their Lordships think that, viewing the will as a whole, when he uses the expression "except Mussumat Ranee Dhun Kowur aforesaid, none other is nor shall be my heir and malik," it may be fairly construed as meaning that she shall take a life interest immediately succeeding him, without that interest being shared by her daughters or by any other person.

On the whole, therefore, although undoubtedly there is some difficulty in construing this testamentary document, their Lordships are of opinion that the Indian Courts have been right in construing it as not giving an estate of inheritance to the Ranee which she was able absolutely to alienate. If that be so, her daughters under this will take after her, and the question has been raised whether they take as joint tenants or tenants in common. The High Court appear to suppose that they would take as joint tenants, but inasmuch as one of these daughters died before the testator, this question becomes immaterial, because in either case the Plaintiff would be the heir and would be entitled to institute this action.

It follows that the Ranee could not convey to the Defendant, who must be taken to have been a *bonâ fide* purchaser, having paid the full value, (although he does not appear to have made any inquiries as to whether or not the Ranee did possess a power, unusual in Hindoo ladies, of making a conveyance of an estate in fee simple,) an estate beyond her own life, and that the Plaintiff is entitled to a decree to the effect that after her death the property belongs to him.

But then comes the question as to what terms

this decree in his favour shall be subject to. The Court below in India were of opinion that he should only be entitled to recover the property after the Ranee's death on payment of the full purchase money. The High Court varied the decree so far as to declare that he should be entitled to it upon the payment of a mortgage upon the property for 14,000 rupees, which appears to have been an existing mortgage at the time of the conveyance in 1854. A further question, however, has been raised on the part of the Appellants. The Appellants say, that assuming this mortgage to have existed, and that there were some debts due at the time of the conveyance on the part of the testator, that then the widow would be enabled to convey an absolute estate. Their Lordships cannot subscribe to the proposition as so stated. They apprehend the law to be this: that Ranee Dhun Kowur, who may be considered as very much in the position of a Hindoo widow, might have sold the estate absolutely if it could have been shown (and the burden of showing this is upon the purchaser) that to convey such an absolute estate was necessary in order to pay the debts of the testator, and was for the benefit of his estate generally. In their Lordships' opinion there is no such proof whatever in this case. It appears that the testator possessed an income of somewhere about a lac of rupees, minus the Government revenue of 20,000 rupees, leaving him an income in round numbers of about 8,000*l.* per annum. He is shown at the time of his death to have owed a certain debt of 9,000 rupees, which was subsequently increased to 22,000, and was paid off in another way; therefore we have nothing to do with that. He is also shown to have owed a debt of 10,000 rupees at the time of his death, that is 1,000*l.* A man with an income

of 8,000*l.* a year is shown on his death to have owed a sum of 1,000*l.*, and it is pretended that 16 years afterwards a necessity arises for selling a considerable portion of his real estate, to pay this debt of 1,000*l.*, plus some 400*l.* which had been subsequently contracted by the Ranee. The mere statement of these facts appears altogether to dispose of the contention that this estate could have been sold for the necessary purpose of paying the testator's debts, and when we add that both Courts have found that the fact was not so, their Lordships think it unnecessary further to dwell upon this point.

The only question that remains, then, is whether the Plaintiff is entitled to the decree of the High Court as it stands, or whether he is entitled to it without the burden of paying off the 14,000 rupees. On the whole their Lordships are of opinion that the judgment of the High Court was right; that this mortgage of 14,000 rupees subsisting upon the estate at the time of the sale, and having been paid by the purchaser, it is equitable that, when the Plaintiff reclaims the estate, credit should be given to the purchaser for the payment of the mortgage, which otherwise the Plaintiff himself would have to meet.

For these reasons their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty that both appeals should be dismissed, and that there should be no costs. But in order to render the intention of the Court more clear, their Lordships will recommend that the following words be added to the declaration: "and to be put in possession of the said property after the decease of Mussumat Ranee Dhun Kowur on payment to the said Defendant of the sum of 14,000 rupees."

The Appellant will have his costs of the application for leave to enter his cross-appeal paid out of the deposit; the remainder will be repaid to the Appellant's agent.

