

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Ranee
Khujooroonissa v. Mussamut Roushun Jehan,
from the High Court of Judicature at Fort
William in Bengal; delivered 18th May
1876.*

Present :

SIR JAMES W. COLVILLE.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS case, which fills a great mass of printed paper and has occupied much time, finally resolves itself into a few points not attended with any very great difficulty. In order to make those points intelligible a short history of the whole case appears to be necessary. Rajah Deedar Hossein died in 1841, possessed of half of the large Zemindary of Soorjapore. He left five sons and five daughters. According to the contention of the one side he left five widows; according to the contention of the other side he left one wife and four concubines. Enayut Hossein, his eldest son, possessed himself of all the property of the deceased Rajah by virtue of two documents which he set up, and which will have to be referred to subsequently, one being a deed of gift as it is called, and the other a will, both dated the 18th November 1839, about two years before the death of the Rajah.

The first document purported to convey to Enayut one-third of the Zemindary. The will may be shortly described as giving to Enayut Hossein a third of what remained, burdened with a trust of a somewhat indefinite character for pious uses, but with a bequest of the residue

after those pious uses had been satisfied to the beneficial use of Enayut himself. Enayut was put into possession of the whole of the landed property, and it was directed that the other children were not to be enabled to sell or dispose of their shares in any way. Enayut was to pay them certain annuities, which he does not appear to have done, and it was only of the personal property that a division was directed in accordance with the Mahomedan law. By virtue of these documents Enayut took possession of the property of his father, and appears to have reduced the other members of the family to a state of poverty. He struggled for some time to obtain mutation of names, in pursuance of these documents. The mutation was opposed by other members of the family, but was finally obtained in 1844 upon Enayut giving security. After that time some abortive suits were instituted by different members of the family *in formâ pauperis*; but the first proceeding necessary to notice at all at length, is a suit instituted by Khoobunissa, who was the widow of Nuzeroodeen, the third son of Rajah Deedar Hossein, in 1852, as guardian and protector of her infant daughter Roushun Jehan (the present Plaintiff), to set aside both the deed and the will, and to obtain possession on behalf of her daughter of a 14 annas share (the daughter's share) of the property of Nuzeroodeen. She appears to have also brought a suit for the other two annas on her own behalf.

This suit came to be heard before Mr. Loch, who was the judge at Purneah in 1855. His decision was to the effect that both the documents, the deed and the will, were in fact executed by the Rajah Deedar; that the deed was valid, but that the will was invalid because it had not obtained the consent of the heirs other than Enayut, which according to his view of the

will was necessary by the Mahomedan law. Enayut Hossein appealed against that decision, and Khoobunissa would have had an undoubted right to her cross appeal but for what subsequently transpired. Pending this suit, which was decided in 1855, Enayut Hossein had instituted a cross suit against Khoobunissa for the purpose of carrying into effect an alleged compromise to which he said she was a party, he alleging that she had received some 31,000 rupees and had executed a document compromising the suit in his favour. This she denied. Issues were raised upon it, and this case came on for trial in August 1856, rather more than a year after the other decision. But on the 30th August of that year, a compromise, which in some respects may be undoubtedly called a real compromise, was come to. Khoobunissa then filed a document, in which she declared that she would not any longer contest the questions between her and Enayut Hossein; that she had received certain money from him and agreed altogether to his terms, and in that document there was a statement that her daughter Roushun Jehan assented to this compromise. Roushun Jehan was also represented as a party to the transaction, and as asserting herself to be of age. That compromise was given effect to by Mr. Loch; it was also given effect to by the Sudder Dewanny Adawlut Court, which dismissed the appeal and gave a decree in the terms of it in December 1856.

Roushun Jehan, the present Plaintiff, in 1859 married Syud Ahmed Reza, a member of the other branch of the family, who possessed the half of the pergunnah Soojapore other than that which was held by Deedan Hossein; and in 1860 she filed a suit, in which she asserted that she was no party to and had no knowledge of the compromise between Enayut and her mother,

and that it was effected by fraud and collusion on the part of both of them. She prayed that that compromise might be set aside, and she prayed in substance for a review of the judgment of Mr. Loch, so far as it was against her. She made also three further claims; the first to a share derived by her father from his brother Edoos Hossein, who had died before him; the second to a share in right of her grandmother, Bibee Loodhun, whom she alleged to have been a wife of Deedar Hossein. She thirdly claimed that there should be added to the whole Zemindary property a portion which Enayut Hossein had recovered by a decree of this Board against the Rezas, in respect of the right of his grandmother Rancee Sumree. It may be as well at once to dismiss this part of the case, by stating that it is not now denied on the part of Enayut that he recovered this sum, not in his own right, but as a trustee for all the other members of the family.

This suit appears to have been deplorably dealt with in the inferior Courts of India. It came first before Mr. Beaufort, who framed a certain number of issues, and proceeded as far as deciding the issues in bar. Then it came before Mr. Birch, who upset all that Mr. Beaufort had done, and dismissed the suit altogether in a summary manner, on the ground that the cause of action was not stated with sufficient precision. The High Court set this mistake right by remanding the cause to be retried; whereupon it came before Mr. Simson, who had succeeded Mr. Birch. Mr. Simson, who seems to have very imperfectly apprehended the nature of the suit, framed an issue, which by no means decided it, and after his trial (if it can be so called) of the case, it came before the High Court again, and was again remanded. This occurred in January or February 1864,

when a very careful and luminous judgment was given by the Chief Justice Sir Barnes Peacock and another member of the Court, which it is now necessary more particularly to refer to. The High Court, after stating that the case had not been properly tried or even apprehended, remanded it for the following issues to be tried, in addition to the one laid down by Mr. Simson, which was as to the validity of the deed.

“ 1. Was the Plaintiff of age according to
 “ the Mahomedan law, independently of Re-
 “ gulation XXVI. of 1793, at the time when
 “ the alleged compromise was effected? 2.
 “ Did the Plaintiff execute the documents
 “ which purport to have been executed by
 “ her, or any and which of them? 3. If so,
 “ was she induced to execute the same
 “ by means of fraud or misrepresentation?
 “ 4. Was the compromise a fair one and
 “ beneficial to the Plaintiff? 5. Did the
 “ Plaintiff receive any portion of the money
 “ alleged to have been paid by the Defendant
 “ or any portion of the profits of the putnee
 “ talook? 6. Did the Plaintiff's mother Khoo-
 “ bunissa receive the money? 7. Were all or any
 “ and which of the receipts, alleged by the De-
 “ fendant in his written statement to have been
 “ executed by the Plaintiff, executed by her?
 “ 8. Was the decree in the Zillah Court of
 “ Purneah of the 30th August 1856, establishing
 “ the receipt for the 31,400 rupees, obtained by
 “ fraud or misrepresentation? 9. Was the
 “ decree of the Sudder Court of the 10th
 “ December 1856, founded on the alleged com-
 “ promise, obtained by fraud or misrepresenta-
 “ tion? 10. If not, was it binding on the
 “ Plaintiff as carrying out an arrangement
 “ beneficial to her, which her mother, as her
 “ guardian, was competent to enter into?”

The High Court proceed to say, “These are

“ the issues which we consider necessary for
“ a proper determination of the Plaintiff’s
“ right to set aside the decree of the Sudder
“ Court. It appears to us that this appeal is
“ in the nature of a bill for a review of judg-
“ ment, and therefore when the decree is set
“ aside by virtue of a regular suit, the same
“ rights will arise as if the Court upon review
“ of judgment had set aside its own decree.”
Then they go on to say : “ The above issues will
“ apply of course to the Plaintiff’s claim only
“ so far as affects that portion of Deedar
“ Hossein’s property which was the subject of
“ the former suit, but they do not apply to the
“ shares which belonged to her uncle and her
“ grandmother, or to the share of the property
“ recovered by the Defendant by the decree
“ of the Privy Council. These are wholly
“ distinct matters from that at issue before Mr.
“ Loch, and therefore as to them we think it
“ proper to lay down the following issues to be
“ tried by the judge.” Then come six more
issues : “ 1. Did the father of the Plaintiff
“ survive her uncle Edoe Hossein, and is the
“ Plaintiff entitled to recover any and what por-
“ tion of the share, if any, of her uncle Edoe
“ Hossein of the estate of the Plaintiff’s late grand-
“ father Rajah Deedar Hossein? 2. Did Edoe
“ Hossein receive the allowance given by his
“ father’s will, or assent to the will? 3. Did
“ the Plaintiff’s grandmother, Mussamut Bibee
“ Loodhun, alias Saemah, succeed to any and
“ what portion of the estate of Rajah Deedar
“ Hossein? 4. Did Bibee Loodhun take the
“ allowance as alleged in the Defendant’s
“ written statement? 5. Is the Plaintiff en-
“ titled to recover any and what portion of
“ Bibee Loodhun’s share, if any, of Rajah
“ Deedar Hossein’s estate? 6. Is the Plaintiff
“ entitled to recover any and what portion of

“ the one anna eight gundas share of the
 “ Zemindary of Seorjapore, recovered by the
 “ Defendant under decree of the Privy Council
 “ dated the 11th July 1859 ? ”

All the first ten issues which related to the validity of the compromise in the suit which was heard before Mr. Loch, and came before the Sudder Dewanny Adawlut, were decided by the Judge, Mr. Muspratt, before whom this case came on its remand, in favour of the Plaintiff. With respect to the latter issues, the learned Judge found against the Plaintiff upon the question of Edoos Hossein surviving his brother Nuzeeroodeen, her father, and he found against her on the question of her right to succeed to any portion of the property of her grandmother Bibee Loodhun. The case came on appeal before the High Court, who gave a very elaborate judgment in January 1866. The High Court agree with the learned Judge of the Zillah Court in his finding on all the ten issues relating to the compromise, and there being two concurrent findings upon these issues, which are questions of fact, their Lordships are by no means disposed to disturb them. Indeed, it has scarcely been argued that, giving effect to the rule on this subject, they should be disturbed.

The High Court next came to the conclusion, that the compromise being set aside, owing to fraud and collusion on the part of Enayut Hossein, Enayut Hossein's right of appeal against Mr. Loch's judgment was not revived, whereas the right of appeal on the part of the Plaintiff Roushoun Jehan was revived. From that finding their Lordships differ. It appears to them that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the Plaintiff is to be allowed to be heard to appeal

against so much of the decision of Mr. Loch as is against her, Enayut Hossein ought to be heard to appeal against so much of the decision as is against him. The High Court further affirm the decision of Mr. Loch on the subject of the will, which was in favour of the Plaintiff, but they reverse his decision so far as it concerns the deed which was against her. Further they reverse the decision of Mr. Muspratt upon the two questions of the right of the Plaintiff to succeed to Edoos Hossein, and of her right to succeed to her grandmother. The case, therefore, reduces itself to four questions,—first, the validity of the deed; secondly, the validity of the will; thirdly, the survivorship between Edoos and Nuzeroodeen; and, fourthly, the Plaintiff's right to succeed to her grandmother.

The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with. There is no question of the execution by Rajah Deedar Hossein of this deed giving one-third to his son Enayut on the 10th November 1839. The deed was either—to use English expressions—a deed of gift simply, or a deed of gift for a consideration. If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of

delivery, or, in other words, by what is termed in the books a seisin on the part of the donee. In their Lordships' judgment there was no delivery of this kind. Even assuming that although the estate was under attachment, a sufficient seisin in it remained to the donor which he could impart to the donee, still it appears by the evidence of Mr. Perry, which is treated as trustworthy on both sides, that in point of fact Rajah Deedar Hossein remained in receipt of the rents and profits of the property until his death. Therefore if the deed were a mere deed of gift there was not that delivery of possession which was necessary to give it effect by Mahomedan law. A question which was touched upon, though not much argued, viz., whether the doctrine of Mahomedan law relating to "confusion of gifts" applied, appears not to arise, as there was no delivery of possession.

But it was contended that this was a deed of gift for a consideration, and therefore that the delivery of possession was not necessary. But it was conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, viz., an actual payment of the consideration on the part of the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in presenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount it must be actually and *bonâ fide* paid.

Upon the subject of consideration there is the evidence of Mr. Perry, who was present at the time of the execution of the document, who says

that the Rajah admitted that at some previous time he had received the consideration. There is the evidence of Enayut Hossein himself, who speaks to having paid the consideration, although he does not condescend to any particulars, and there is the evidence of one or two other witnesses, who speak of the consideration being given at the time of the execution, which appears scarcely reconcileable with the evidence of Mr. Perry. But the whole transaction must be looked to. Mr. Perry speaks, as far as his knowledge is concerned, of the deed remaining in the possession of Rajah Deedar Hossein, although no doubt there is some evidence to the opposite effect. But it is certain that no proceeding was taken for obtaining mutation of names for more than 12 months after the execution of the deed. A petition was presented on the 16th of March 1841, purporting to be on the part of the Rajah, and requesting a mutation of names, and there was another by Enayut on the 3rd of May of that year. But, on the 19th of June of that year, the Rajah Deedar presented a petition altogether repudiating the transaction, declaring that he had received no consideration money whatever, that it was not intended that any transfer should take place until after his death, and praying that the mutation of names should not be effected. On being questioned what his real wishes were, he still persisted in declaring his wish that Enayut should not be substituted for him in the books of the collectorate. It is true that on the 19th November 1841 a petition was laid before the collector, purporting to come from Deedar Hossein, in which he set up the transaction, declaring that he had received the consideration money, and desiring that the name of his son should be entered, but that was several days after he was dead. He died on the 15th. The petition was dated on the 14th, received on the

19th, and the collector very properly declined to act upon it. No evidence was given as to the state of the Rajah when he executed this petition, so shortly before his death, (if indeed he did execute it,) although Rajah Enayut Hossein and Heera Lall, the mokhtar who was concerned in it, either of whom could probably have given information on the subject, were not examined as witnesses in the cause.

Taking into consideration all these circumstances, their Lordships have come to the conclusion, that the transaction set up on behalf of the Defendants was not a real one, that no real consideration passed, that there was no intention on the part of the Rajah to part with the property at once to his son, but that both father and son were endeavouring to evade the Mahomedan law, by representing that to be a present transfer of property which was intended only to operate after the father's death. Their Lordships therefore agree with the High Court in their view of the effect of the deed.

The next question arises as to the will. It was found as a fact by Mr. Loch that the heirs had not consented to this will; and with that finding their Lordships are satisfied. But it was argued by Mr. Cowie, first, that the will did not require confirmation; secondly, that at all events so much of it as gave one third to Enayut Hossein for pious uses was not in contravention of Mahomedan law, and was therefore valid without confirmation. The effect of the will is, in the first place, to declare Enayut Hossein the executor and representative of Deedah, and to direct him to look after the Zemindary, and so forth. Then follows this passage: "I divide the remaining two thirds now under my possession, uninterfered and unconcerned by any one else, into three portions.

" One portion to be laid out as the executor
 " may think proper for the testator's welfare
 " hereafter, by charity and pilgrimage, and
 " keep up the family usage, namely, the
 " expenses of the mosque and tazeeadaree of
 " the sacred martyrs, and for the comfort of
 " the travellers, the surplus amount to be ap-
 " propriated by himself the executor." Then
 it goes on to say, from the other two thirds
 " he shall keep everyone by his good conduct
 " and affection contented and satisfied. It is
 " also necessary for all persons having rights,
 " heirs, and friends connected with me to obey
 " the said executor and consider him my
 " representative." Then further: "None of
 " the heirs have power to sell or divide
 " the landed property mentioned in the will."
 This will, in its general scope, appears to their
 Lordships to be in contravention of Mahomedan
 law. With respect to the limited contention,
 that it may be supported with respect to the
 devise of the one-third share, it appears further
 to their Lordships that that devise, considering
 the vague character of it, and that the beneficial
 interest is left to Enayut Hossein after he has
 devoted what he may deem sufficient to certain
 indefinite pious uses, is in reality an attempt to
 give, under colour of a religious bequest, an
 interest in one third to Enayut Hossein, in con-
 travention of Mahomedan law.

The survivorship between Edoe and Nuzeeroo-
 deen is a question made by no means clear on
 either side. Mr. Muspratt appears to have de-
 cided it almost, if not entirely, upon the ground
 that Enayut Hossein put in certain proceedings
in formâ pauperis, the petition to sue and
 other documents, purporting to have been
 executed by Edoe in 1845. If he did then
 execute them, undoubtedly he had survived

his brother, who died in January or February 1844. There appears to have been oral evidence on both sides; on the one side, that Edoe lived until 1845, on the other, that he died some time in 1843, a few months before his brother. The judgment of the High Court appears to be in effect that after a very careful consideration of these documents, after directing various searches for the originals, of which attested copies were produced, which searches proved fruitless, they have come to the conclusion that these documents are not genuine. Their Lordships do not feel that sufficient is laid before them to satisfy them that the High Court were wrong in that decision. These documents being rejected as fabricated, the Court say in substance that they credit the testimony of the Plaintiff rather than that of the Defendant, who had shown himself capable of fabricating documents, and that they do not in this question believe witnesses who on other parts of the case had not been believed.

Under these circumstances, whatever might have been their Lordships' view if the case had come before them as a tribunal of first instance, they do not think that sufficient ground has been shown for reversing the decision of the High Court.

There remains the question of the right of the Plaintiff to succeed to Bibee Loodhun, and that depends upon whether Bibee Loodhun was merely a concubine or a wife. It is an undisputed fact that Nuzceeroodeen, the son of Bibee Loodhun, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasions recognized by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise

some presumption that his mother was his father's wife. That such a presumption arises under such circumstances appears to have been laid down in a case which has been referred to, *Khajah Hidayut Oollah v. Rai Jan Khanum*, in the 3rd Volume of Moore's Indian Appeals, page 295, in which Dr. Lushington, who delivered the judgment of this Board, makes this observation (page 318): "The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such marriage having taken place." In this case there is no evidence that Bibee Loodhun was a woman of bad character, or that her connection was merely casual. She appears to have lived in the house at all events up to the death of the Rajah.

The same doctrine was laid down rather more strongly in a recent case, which came before this Board on the 20th March 1873. In the case of *Newab Mulka Jehan Sahiba v. Mahomed Ushkurree Khan*, a case from Oudh, and a Sheeah case, their Lordships say: "This treatment of the daughter by the Appellants"—that is to say, the treatment of the daughter as a member of the family,—"affords a strong presumption in favour of the right of her mother to inherit from her." The question there was whether the mother, who was said to be a slave girl, inherited from her daughter, whom she survived, the same question which would have arisen in this case if Bibee Lodhun had survived her son Nuzeroodeen. Their Lordships go on to say, after noticing various acts of acknowledgment of the legitimacy of the child:

—“After these acknowledgments, Mulka Jehan
 “ and the Appellants who act with her ought
 “ in their Lordships’ view to have been prepared
 “ with strong and conclusive evidence to rebut
 “ the presumption raised by their own acts and
 “ conduct; and in the absence of such evidence,
 “ they think the presumption must prevail.”

It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of Nuzeroodeen raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted. The evidence chiefly relied upon for that purpose is the will of the Rajah, in which undoubtedly there is this expression: “For the maintenance
 “ of four female servants monthly, 75; annually
 “ 900,” and Bibee Loodhun does appear to have been one of those female servants there mentioned. At the same time, it is to be observed, this expression occurs only in the schedule; whereas in a part of the will preceding that schedule there is this expression: “The shares
 “ of the executor and of the sons, daughters,
 “ and wives of the testator and other claimants
 “ from the estate fixed annually at,” so and so; and the subsequent provision for the maintenance of every female servant appears to be an expansion of that paragraph in which they are spoken of as wives.

But further, there is the undoubted acknowledgment by Enayut Hossein himself of Bibee Loodhun being a wife, inasmuch as when Khyroonissa the principal wife brings a suit against him, Enayut Hossein objects, on the ground that Bibee Loodhun, one of the other wives, is not joined.

Under these circumstances it appears to their Lordships that there is evidence not only from the acknowledgment of Nuzeroodeen’s legitimacy by the family, but from

the admission of Enayut Hossein, that Bibee Loodhun was a wife, and not merely a servant. It is indeed alleged that she was what is called a temporary wife, and among the Sheeah sect there appears to be a power of taking a mere temporary wife. But it is to be observed that there is no evidence of hers being what is called a temporary marriage, and indeed the witnesses who seek to impugn the marriage on the part of the Defendant speak of Bibee Loodhun not as a temporary wife but as a mere servant. The question, therefore, seems to be not whether she was a temporary wife in the sense attached to that term in Mahomedan treatises, but whether she was a wife or whether she was a mere servant. On the whole their Lordships concur with the finding of the High Court. The evidence preponderates that she was a wife and not as a mere servant, though no doubt a wife of an inferior order.

A question further arose as to the amount of the share which the Plaintiff would be entitled to, assuming that Bibee Loodhun was a wife, and it would certainly seem that her share would only be a fifth of an eighth, that is, a fortieth share; whereas she appears to have received something more by the decree of the Court. But it is to be observed that this in a great measure is a matter of detail, and possibly a clerical error or miscalculation, which might have been set right on an application to the High Court, and that in fact the High Court did invite applications for the purpose of remedying errors of this kind.

The result is, that with the exception of the slight variation of amount in the case of the claim of Mussamut Bibee Loodhun, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this Appeal with costs.