

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Konwur Doorganath Roy v. Ram Chunder  
Sen and others, from the High Court of  
Judicature at Fort William in Bengal;  
delivered Thursday, 30th November 1876.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is a suit brought by the Appellant Konwur Doorganath Roy to set aside certain alienations of two thirds of an ancestral mehal called Gopejan, made by his grandmother Rani Rashmoni, on the ground that the mehal had been dedicated to the worship of an idol Radha Mohun Thakoor. The respondents are the successors of the original grantees, or persons deriving title from them. To show the position of Rashmoni at the time she made the alienations in question, and that she may have acted not merely as the widow and heiress of her deceased husband Roy Bijoy Krishna, an anumati-patra has been put in, which gave her, undoubtedly, special powers. The anumati-patra, or so much of it as is material, is as follows :—“ You are my wife. “ You have no children born to you. I am “ now very ill in body. I have no hope of life. “ On my death there will be no one to perform “ the ancestral debkisti (worship of the gods), “ &c., and offer the jolpinda (funeral cake and “ libations of water) of my ancestors. For the “ observance of all these rites, and of the “ jolpinda to the ancestors, as well as the

" preservation of the zemindaris, lakiraj, de-  
 " wuttur, &c., I in my sound mind give you  
 " permission on my death to keep possession  
 " of my zemindaris, dewuttur, &c., recording  
 " your own name in the Collectorate Sherishta,  
 " to remain in enjoyment of the profits, and  
 " to defray the expenses of the deb kirti during  
 " your lifetime, and to adopt one or two sons  
 " born in the family of true Brahmans. On  
 " your death, that adopted son will succeed  
 " to all properties; and on the said adopted  
 " son attaining his majority, you will, if you  
 " should desire it, get his name recorded in the  
 " Zemindari Tahoot, and surrender the entire  
 " management to him;" and then there is  
 this statement: " Now I am a debtor to mahajuns  
 " (creditors). Some mehals of the zemindari  
 " are in mortgage on account of those debts.  
 " If there should be no other means of liquida-  
 " ting the debts, you will either sell a small  
 " portion of the zemindari or make conditional  
 " sale of it, as appears necessary, and liquidate  
 " the debts."

Now, undoubtedly, there is a reference to  
 dewuttur property in this document, but this  
 document itself creates no endowment; and it  
 is necessary for the Plaintiff to show *aliunde*  
 that there was an existing endowment in favour  
 of this particular idol to which the word  
 dewuttur may be referred.

With regard to the position of Rashmoni under  
 the anumati-putra, it would seem that she took  
 a life interest in the properties, and that power  
 was given to her by it to adopt a son. It  
 must, of course, be admitted that this document  
 gave no authority to Rashmoni to alienate the  
 estate; but she had, as the manager of the  
 estate, power, if it were dewuttur dedicated to  
 the idol, to alienate so much of it as was  
 necessary to keep up the temple and worship

of the idol; and if it were secular, to alienate it if it became necessary to do so to preserve the rest of the family estate.

That being her position, she made the two alienations in question. The first is a mourussi mokurruri pottah, which she granted to two persons, Nimai Soondur Roy and Ram Soondur Sen. This pottah describes the estate thus; Turruf Wargopjan alias Gowaljan, which is admitted to be the estate Gopejan, "the patrimonial dewuttur " rent free land of Bijoy Krishna Roy, my late " husband, the boundaries of which are on the " east the Ganges," and so on, "is the dewuttur " property of the Sri Sri Iswar Radhamohun " Thakoor of Raninuggur, which is in my posses- " sion and enjoyment as shevait of the idol." Then the grantor notices the fact that 120 beegahs, or one third of that mehal, had been decreed to Bhagiruthi Debi, the widow of one of her husband's brothers, Ram Krishna Roy. "With the exception of 120 beegahs of mathan " land decreed in the suit of Bhagiruthi Debi, " widow of the late Ram Krishna Roy, the eldest " brother of my late husband, the remaining " lakheraj lands," and so on. The document proceeds: "Now the temple of the Sri Sri Iswar " being broken, and necessary repairs and various " other things being requisite for the service of " the idol, I have given you a settlement as a " mourussi mokurruri talook of the entire lak- " heraj zemindari rights in the said mouzah at a " fixed premium of Rs. 325, for a consideration " of Company's Rs. 1,900, which I have received " in cash and in full weight." That is the substance of the document.

The other document is executed by Rashmoni in favour of Soondur Krishna Sen, one of the family of one of the grantees of the mokurruri. It is a bill of sale of the proprietary right to the extent of Rs. 300 of the mokurruri rent, and it

says: "Deducting the land of the said decree, " the remainder is my own right," referring to the decree in favour of Bhagiruthi, " a mourussi and " mokurruri talook, representing the entire right " in the lakheraj zemindari, was given in settle- " ment of Nimai Soondur Roy, inhabitant of " Naharpara, and Ram Soondur Sen, inhabitant of " Koridha, at an annual jumma of Rs. 325, ex- " clusive of collection charges, on the 18th of " Cheyt of the year 1254. They hold possession " of the property as a mourussi and mokurruri " talook, and are paying the fixed jumma. " I, agreeably to the instructions of my late " husband, have commenced building the " temples of Sri Sri Iswar Radhamohun " Thakoor Jeo, and others, but being in want " of means, am unable to carry out the instruc- " tions of my husband. I have voluntarily, " in my sound senses, sold to you for Company's " Rs. 1,700 my own entire share of 14 annas, " 15 gundabs, 1 cowri, 2 kags out of 16 annas of " the said mourussi mokurruri mouzah, the " jumma of which is Rs. 300."

Mr. Leith, on the part of the Appellant, undertook to satisfy their Lordships that this mehal of Gopejan had been dedicated to the idol, and therefore it was incompetent for Rashmoni to make these alienations.

Now, apart from the admissions contained in the mourussi pottah and the bill of sale themselves, their Lordships are clearly of opinion, in accordance with the view of the High Court, that the evidence fails to show that this land was so dedicated.

Mr. Leith opened his case by an endeavour to show a deed of foundation or endowment of the idol by the gift of this estate from Rajah Mahanund, who was the father of Rajah Bijoy Krishna, the husband of Rani Rashmoni.

It may be convenient to state here the position

of the family so far as it is material to the present case. Rajah Mahanund, who, it is said, was the founder of this endowment, died in 1805 or 1806. He had a son Bijoy, who left a widow, Rashmoni, giving her the anumati-patra, to which reference has already been made. She, it appeared, lived until February 1870. She exercised the power of adoption given to her by her husband, and adopted Krishna Chunder, who married Rani Prosunnomyi Debi. He also had no son; and he also gave to his wife a power of adoption, which she exercised in favour of the Appellant, Konwur Doorganath Roy. It appears that Rajah Bijoy had two brothers, and one of them married a lady of the name of Bhaguruthi Debi, who in the year 1855 brought a suit against Rashmoni, and obtained the decree already mentioned, to recover one third of the mehal of Gopejan.

If the deed of endowment from Rajah Mahanund were satisfactorily proved, and it were an endowment which dedicated this mehal to the service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favour of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case.

The proof of this deed of endowment, which is said to have been executed by the Rajah Mahanund, when it comes to be investigated, is of the most unsatisfactory description. First, the existence of such a deed at all is not clearly made out; and so far as the document, the rubicari of a former suit, is relied upon as

showing its contents, the description there given is so obscure that it is impossible to say whether the whole of the mehal of Gopejain was included in the supposed dedication or not.

First, with respect to the nature of the proof; what is relied upon as evidence of the deed is a rubicari of a proceeding in a former suit brought by a creditor against Rashmoni in the year 1840. It appears that in that suit certain property was attached, and that Rashmoni, in order to get rid of the attachment, set up that the property so attached was dewuttur property dedicated to the idol Radha Mohun Thakoor. It appears from the rubicari that this deed was put forward by a man called Bhuttacharjya, who was the tasildar of Rani Rashmoni. Neither the deed itself nor a copy has been produced in the present suit. No witness has been called who ever saw it; and it is to be observed that though Bhuttacharjya was called as a witness in the suit brought by Prosunnomoyi on behalf of the present Appellant to set aside these deeds during the lifetime of Rashmoni, and which was dismissed, because it was considered to be incompetent to institute it during the lifetime of Rashmoni, he was not asked any question about this deed.

The state of the case then is this: No evidence has been given of the existence of such a deed, except the mention of it in the rubicari; no witness has been called who ever saw it. The man who produced it in the creditor's suit, when called in Prosunnomoyi's suit, does not refer to it; and the only search which has been proved is a search made by some clerk in the sherista of the zemindary,—a young clerk who was not likely to have any knowledge of the deed, and who simply says that upon search he did not find it there.

In that state of things their Lordships think it is very doubtful whether secondary evidence

of the deed should be permitted at all; but if it be allowed, then they are to judge of the effect of the secondary evidence, and to determine in the first place whether it satisfies them that such a deed really existed at all. Now from the circumstances which have been already pointed out, they are by no means satisfied that such a deed ever did exist. That a document of the kind was put forward by Bhattacharjya on behalf of Rashmoni in the creditor's suit is proved by the rubicari; but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

But assuming that a deed did exist, and that it was to the effect which is referred to in the rubicari, their Lordships find that the question what property was included in it is left in considerable obscurity. It appears that the property which had been attached was a brick-built house and garden. The rubicari states, "It appears from a perusal  
 " of the whole of the papers of the record, that  
 " for the payment of the money due to the  
 " Plaintiff, the brick-built house and garden,  
 " &c., belonging to the Defendant, were under  
 " attachment. After issue of notice of auction  
 " sale, the objector above-mentioned filed a  
 " petition, stating, among other matters, that  
 " the properties which were assigned by Raja  
 " Mahanund Roy, father-in-law of the Defen-  
 " dant, for the worship of the idol Radha  
 " Mohun Thakoor, &c., established by the Raja,  
 " cannot be sold or transferred by his heirs."  
 It appears that there was an order that the sale should be stayed, and that the objector should file proofs of his statement. The rubicari states,  
 " Accordingly the objector filed the She-  
 " vaitnama of the 5th of Aughran 1202  
 " under seal and signature of Raja Mahanund,  
 " accompanied by an isumnuvisi containing the

“ names of four witnesses.” Then, “The object has also filed a copy of the nikas paper of the year 1213, bearing the seal and signature of the Collector, to prove that the properties of the deb-sheva, as aforesaid, are part and parcel of the lakheraj mouzah Gowaljan.” That appears to be this mouzah Gopejan. This is the only phrase which can be relied upon as showing that the entire mehal was included in the supposed endowment. But the passage is in itself obscure. The literal reading of it is that the brick-built house, garden, &c., which had been devoted to the idol, were part and parcel of the lakheraj mouzah Gowaljan. It is quite consistent with that statement that these parcels had been taken out of that lakheraj mouzah and devoted to the idol.

Therefore, in addition to the insufficiency of the proof to satisfy their Lordships with reasonable certainty that such a document really existed, there is so much obscurity in the language that it is impossible to say that if it did exist it included the whole of this mehal.

If that document is out of the case, there is very slight evidence indeed of any such endowment. The case then rests, independently of the admissions in the deeds, upon the evidence of the dewan and mooktear and one or two other witnesses that the rents of this mehal Gopejan were applied to the worship of this idol. But that evidence is extremely vague and extremely loose. The mokhtar says in several places that the rents were applied to the worship of the idols, and it is plain from all the evidence in the case that there were several idols belonging to this family, and no doubt the rents of some of the family mehals were applied to sustain their temples and worship. But supposing it to be taken that the rents of this mehal were applied during the period that the witnesses



speak of, to the worship of the idol Radha Mohun, that fact is by no means sufficient to establish the onus which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. Very strong and clear evidence of such an endowment ought to exist. In the present case there is no proof that priests were appointed. If any had been appointed, they might have been called. There is no production of accounts showing that the rents were separately collected and applied for the worship of this idol. For anything that appears, the rents may have gone into the general body of the accounts relating to the estates of this family, and there is really no document whatever upon which the finger can be placed to show that an endowment was made, other than that rubicari to which reference has already been made.

Besides the weakness of the proof of endowment on the part of the Plaintiff, strong presumptions that there was none arise from other facts and circumstances in the case. It is said that the application of the rents of this particular mehal for a certain period to this idol is some evidence that the family were aware that the rents were properly and by right so to be devoted; but if the conduct of the family is to be regarded, there is, on the other side, the strongest indication, from what occurred in the suit brought by Bhagirathi, the widow of the eldest brother of Bijoy, that the family understood that there was no such endowment. That suit was brought by Bhagiruthi to recover from Rashmoni one third of the mehal in question. She did not claim it as property to which she was entitled as joint shebait, but she *claimed* it as one third of the family estate to which she, as widow of one of the brothers, was entitled. That

is her claim. Rashmoni does not set up as a defence that the mehal was dewuttur property devoted to this idol, that she was the shebait, and entitled, at all events, to the possession and the management of it,—she sets up no case of that sort,—but allows a decree to be passed against her in favour of Bhagiruthi to recover one third of the mehal, and in that decree the property is described, not as dewuttur, but as bromuttur property.

Now if this mehal had been really dedicated to the idol, it would no longer have been a partible estate. Rashmoni would, as shebait, have been entitled to the possession of it, and to the management and disposition of the revenues; and all that Bhagiruthi could have been entitled to would have been ~~to~~ a share in the surplus revenues, if there should have been a surplus, after due provision had been made for the worship of the idol.

Therefore there is not only weakness of proof on the part of the Plaintiff, but a very strong presumption, arising from the conduct of the parties in the suit in question, that this was not dewuttur property such as it is alleged to be on the part of the Plaintiff.

Supposing the case had rested there, their Lordships feel no doubt whatever that the judgment of the High Court was perfectly right. But it does not rest there, and it now becomes material to consider the terms of the mourussi pottah and of the bill of sale. Mr. Leith, in his reply, very properly relied on them as being the strength of his case. If they are to be used as evidence only, then this evidence must be weighed with all the other evidence in the case, and so weighing it, their Lordships are not satisfied that it turns the scale in favour of this property being dewuttur. But the statements in these deeds are relied upon by the Plaintiff as an

admission which estops the parties to them from asserting that these lands were not dewuttur. But if the statements are relied on in this way, they must be taken as a whole; and so taking them it would appear that, granting the lands were dewuttur, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol. The mokurruri was granted, according to the statement, because the temple was out of repair, and money was wanted to restore it. The sale of part of the mokurruri rent was granted in consideration of money stated to be required for the completion of the temple which it was stated was already in course of erection. If, therefore, the statements in these deeds are taken as a whole, the alienations they contain were justifiable, assuming the property to have been dewuttur land.

What, then, is the Plaintiff's position? These deeds are 30 years old, and he comes into Court to set them aside upon the ground that they were collusive; and if he could have shown that the representation, although made, was not believed by the grantees, and that they colluded with Rashmoni to put a pretended consideration on the face of the deeds, he might have succeeded. But there is no evidence whatever of any such collusion. There is nothing to show that the original grantees did not believe the statements appearing upon the face of the deeds; indeed if they had made inquiry they would have found that the fact agreed with the statement, for it appears upon the evidence and upon the finding of the subordinate judge that the temples were out of repair. If, then, the temples were out of repair, and if Rashmoni offered this mokurruri pottah to raise money for the purpose of doing the repairs that the temple required, the purchaser who *boná fide* took it upon that repre-

sentation would clearly be entitled to keep his purchase. It may be that Rashmoni did not intend to apply the money to the purpose for which she professed to require it. It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did. But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colourable one, he could not be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose. She, as the manager of this estate, had the same right, or an analogous right to that of the manager of an infant heir; and that was defined in very plain language in the case in 6th Moore, page 423, "The power of the  
 " manager for an infant heir to charge an  
 " estate not his own is under the Hindoo law,  
 " a limited, and a qualified power. It can  
 " only be exercised rightly in a case of need,  
 " or for the benefit of the estate. But where,  
 " in the particular instance, the charge is one  
 " that a prudent owner would make in order to  
 " benefit the estate, the *bonâ fide* lender is not  
 " affected by the precedent mismanagement of  
 " the estate; the actual pressure on the estate,  
 " the danger to be averted, or the benefit to be  
 " conferred upon it, in the particular instance,  
 " is the thing to be regarded. But, of course,  
 " if that danger arises or has arisen from any  
 " misconduct to which the lender is or has been  
 " a party, he cannot take advantage of his own  
 " wrong to support a charge in his own favour  
 " against the heir, grounded on a necessity  
 " which his wrong has helped to cause. There-  
 " fore the lender in this case, unless he is shown  
 " to have acted *malâ fide*, will not be affected  
 " though it be shown that with better manage-

" ment the estate might have been kept  
 " free from debt. Their Lordships think that  
 " the lender is bound to inquire into the  
 " necessities for the loan, and to satisfy him-  
 " self, as much as he can, with reference to  
 " the parties with whom he is dealing,  
 " that the manager is acting in the particular  
 " instance for the benefit of the estate. But  
 " they think that if he does so inquire, and acts  
 " honestly, the real existence of an alleged  
 " sufficient and reasonably credited necessity is  
 " not a condition precedent to the validity of  
 " his charge; and they do not think that under  
 " such circumstances he is bound to see to the  
 " application of the money." That passage was  
 adopted in a very late case before this Board,  
*Prosunno Kumari Debya v. Golab Chand Baboo*,  
 in the 2nd Law Reports, Indian Appeals,  
 page 151. In that case a shebait had incurred  
 debts, and mortgaged the property of the idol  
 for the purpose of the necessary sustentation  
 of the worship of the idol;—and this tribunal  
 held that the position of the shebait was analo-  
 gous to that of a manager of an infant, and  
 that he had the same authority, which in both cases  
 arises from the necessity of the case, to raise money  
 for the benefit of the estate. Here it cannot be  
 said the grant of a mokurrui pottah was an  
 improvident way of raising money, if it were  
 necessary to do it at all. It still left a rent  
 for the sustentation of the idol; and if the  
 transaction be *bond fide*, the subsequent sale of  
 part of the rent was justified by the imperious  
 necessity of finishing the temple which had been  
 commenced.

On these grounds, therefore, their Lordships  
 think that, assuming the purchasers to be bound  
 by the representations in the deeds, there being  
 no evidence that they did not put entire faith in  
 them, the grants cannot now be impeached.

It was objected on the part of the Plaintiff that this answer had not been put forward by the Defendants, and undoubtedly they have relied more strongly upon the defence that the land was not dewuttur land at all. But several paragraphs in the written statements were pointed out, in which the case was made. It is no doubt alleged in these paragraphs that the money was wanted for two purposes, for the sustentation of the worship of the idol and the repairs of the temple, and also for the payment of Government revenue. But their Lordships think that there is enough in those statements to allow of the present answer to the estoppel being made on the part of the Respondents, and it is to be observed that in the suit brought by Prosonnomoyi during the lifetime of Rashmoni, in which the original grantee, Sen, was a party, he there set up the defence in a perfectly correct form, namely, that the representation made was that the money was wanted for the repairs of the temple, and that he advanced it for that purpose.

But assuming the facts to be as alleged in the statement of defence, their Lordships are still of opinion that the Plaintiff could not succeed on this plaint in setting aside the deeds; because if part of the money only was required for the repairs of the idol, or was represented to have been so required, and this was *boná fide* believed in by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose. It would then come to this, that too much of the idol's property may have been granted, and that a less quantity of land than that included in the grants would have sufficed to raise the money required for the temples; but that would not be a sufficient ground for setting aside the deeds altogether. The Plaintiff in that case should have offered to reimburse the *boná fide* purchasers so much of the money as had been legitimately advanced.

Their Lordships, in making these last observations, do not wish it to be understood that this is the case which appears upon the facts; they make these observations with reference only to the pleadings, and to indicate that, supposing that technical objection could have been made to the pleadings, it still would not have availed the Appellant in the present appeal, because even so his suit in the present form could not have been sustained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this Appeal, with costs.

