

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kali Das Mullick v. Kanhya Lal Pundit (and on his decease Behari Lal Pundit) and others, from the High Court of Judicature at Fort William, Bengal, delivered 23rd July 1884.

Present :

LORD WATSON.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

On the 13th of June 1841 Roma Sundari Dasi, widow of Srinath Bromho, executed an ikrarnama, which was in the following terms :—

“ To the most respectable Srimoti Ruttonmoni Dasi, widow of the late Ram Cumar Brohmo, mother of the late Srinath Bromho, inhabitant of Kona, purgana Havelisuhur.”

“ This ikrarnama, executed in 1248 (1841-42) by Roma Sundari Dasi, widow of the deceased Srinath Bromho, inhabitant of Kona, purgana Havelisuhur, at present residing in Chitpur, in the district of 24-Purganas, showeth :—

“ That the taluqs comprised in the mouzahs mentioned in the annexed schedule, which were purchased in my husband's name, and which are recorded in my name in the collectorate sheristas of the districts of Cuttack and Puri, are under your control, with all rights appertaining thereto; and you have been performing the deb-seba, and have been entertaining religious mendicants, and have been celebrating the dole and durgotshub festivals (which were originally instituted by my deceased husband and father-in-law), by residing in the house at Kona. In order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control, I put a stop to my interest (in those

taluqs) and withdraw my enjoyment thereof, and I make them over to you, with this promise, that you may remove my name from the Collector's sherista in respect of the taluqs named in the schedule, and you may have your name substituted for it; that you should have undisputed possession in the mofussil; that you should take the lowajima papers and the arrears of rent from the amlas and officers appointed by me; that you should appoint men who are under your control to the offices of amlas, and through them you should collect rents from the tenants in the mofussil; that you should perform the above-mentioned sebas, and should provide for your support. I have no right or claim to the taluqs. If I advance any claim at any future time, such claim should be rejected. I have nothing to do with the profits and loss of the taluqs. You cannot claim anything from me. I have no claim against you. Wherefore, in health of body, in the enjoyment of my senses, and in calmness of judgment, I execute this ikrar. I shall never act in contravention of the terms of this ikrar.

"The 2nd Assar of the above-mentioned year (13th June 1841).

"Schedule of the Taluqs.

	Mouzahs.
" Taluq Sautrapuri, &c. - - -	19
Purchased Bhati mehal - - -	1
Mehal Lakhraj resumed - - -	1
Taluq Berhampur - - -	1
	<hr/>
	22
" Taluq Jharieswurpur - - -	1
Taluq mouzah Bangalpur, zilla Puri - -	1
Mouzah Durgadaspur - - -	1
	<hr/>
	25 "

Srinath Brohmo was the son of Ram Cumar Brohmo and Ruttonmoni Dasi, and the taluqs mentioned in the schedules had been dedicated by Ram Cumar and Srinath to the service of two idols. Srinath died in 1838, having survived his father, the date of whose death did not appear. On the 24th of December 1864 one Banchhanidhi Moharana, having obtained a decree against Ruttonmoni on the 25th of February 1862, and having applied for a sale of a ten-annas share of the zemindary of the taluq Sautrapur, which was the share of Ruttonmoni Dasi by virtue of the ikrarnama, the same was publicly sold, and the Respondent Kanhya Lal Pundit became the purchaser for Rs. 17,800

of the rights and interests of Ruttonmoni therein, as appears by the sale certificate dated the 27th of January 1865. Ruttonmoni died on the 16th of February 1867. On the 1st of February 1876 Roma Sundari and Tarini Churn Brohmo, who was then the presumptive heir on the death of Roma Sundari, executed a deed of gift to Krishna Mohini Dasi, the wife of the Appellant, which is in the following terms :—

“ This deed of gift, executed by Roma Sundari Dasi, widow of the late Srimoti Bromho, inhabitant of Kona, purgana Habilisubur, in the district of 24-Purganas, at present residing in Dandmal Sahi in Puri, and by Tarini Churn Brohmo, son of late Bhoyrub Chunder Bromho, inhabitant of Kastodanga, purgana Rajnuggur, sub-district Ranaghat, in the district of Nuddea, showeth :—

“ That, on the death of my husband, I, Roma Sundri Dasi, got possession by right of inheritance of his ancestral zemindaries, and the zemindaries which were recorded in his own name, and of the houses, &c. In order to pay off the debts incurred by my husband and father-in-law, I sold taluq Juggurnath Prosad, &c., of purgana Burjang, and taluq Rambhila of purgana Randia Orgura, and taluq Mowajib appertaining to purgana Senawut, pertaining to Balasur district, to Monmohini Dasi and Khettermoni Dasi and Doyamoni Dasi, and other taluqs to other persons. By this means I paid off the debts. As I am residing in this holy city, I made over to my mother-in-law, the late Ruttonmoni Dasi, under the ekrarnama, dated 2nd Assar 1248 (14th June 1841), taluq Santrapur and the purchased mehal dihi, and resumed mehal lakhraj pertaining to it, and taluq Berhampur, and taluq Jhareswurpur, and taluq Durgadaspur, &c., situate in the district of Cuttack, in order to provide thereby for the seba of my husband's ancestral idols, viz., Lukhi Narain and Sridhur, and for the maintenance and religious ceremonies of my mother-in-law, the late Ruttonmoni. Accordingly my mother-in-law performed the seba of the idols and other duties till her death, which occurred in Falgun 1273 (February and March 1867). On her death those properties reverted to us. But as those zemindaries, &c., were in disorder during my mother-in-law's lifetime, after her death Rungomoni Dasi, the wife of the late Hurihur Bromho, paid from her own funds for the seba of the above-mentioned idols. But she too is now unable to discharge those duties. And I am residing in this holy city of Puri. And I, Tarini Churn Bromho, am also unable to keep up the seba of the idols ; hence the seba of the idols has been interrupted. You are a near relation of ours. You are willing to undertake the seba of the idols. We too are pleased with you. We give the idols to you. We give, of our own accord, taluq Santrapur

and taluq Berhampur, zemindaries, and the brick-built dwelling-house, and garden and lands and jamas, &c., in Kona, as described in the annexed schedule, to you, and execute this deed of gift. From this moment you should keep the idols under you, control, take possession of the zemindaries, &c., collect the rents, recover the zemindaries and other properties, with mesne profits, from persons from whom they may be due since the death of the late Ruttunmoni Dasi, who was the mother-in-law of Roma Sundari Dasi, and the grandmother (by relation) of Tarini Churn Bromho, pay the revenue in the Collectorate, and the rents to the zemindars, and spend Rs. 1,200 a year, or Rs. 100 a month, for the sheba of the idols. From this day we appoint you as the seba of those idols. You, your sons, grandsons, and your heirs may keep up the seba of the idols, and enjoy and possess the properties named hereinafter. But you and your sons, grandsons, and other heirs will not have the right to alienate those properties by sale or gift. If at any time we or our heirs claim these properties, such claim should be rejected."

The idols given by this instrument were handed over to the grantee. But as regards the land, Kanhya Lal Pundit was at this time in possession, claiming to be so by virtue of his purchase on the 24th of December 1864, and when Krishna Mohini Dasi attempted to take possession she was prevented by his servants. She died on the 4th of November 1878. having made her will, whereby she appointed her husband, the Appellant, and one Behari Lal Mittre her executors, and directed that the Appellant should, during his life, perform the worship of the two idols and manage the entire estate. On the 23rd of November 1878 the Appellant alone proved the will, and on the 18th of December 1878 he brought a suit to recover possession of the ten annas share of the taluq Santrapur against Kanhya Lal Pundit as the principal Defendant, but also making Roma Sundari and the minor sons of Tarini Churn, who had died, Defendants. Roma Sundari, by her written statement, admitted the Plaintiff's claim, and said that she and Tarini Churn, who was her reversionary heir, as also of her husband, made an absolute gift of the zemindari in claim, and

the ancestral deb-seba to Krishna Mohini Dasi. She was also examined as a witness and cross-examined, when she identified the deed of gift and asserted the fact of conveyance to Krishna Mohini. Kanhya Lal in his written statement set up various grounds of defence, including the Law of Limitation, and also that "Roma Sundari" "was never in possession of the disputed property; hence the deed of gift executed by her" "is of no use, and is invalid."

The Subordinate Judge of Cuttack held that the possession of Kanhya Lal was adverse to Ruttonmoni, and through her also to Roma Sundari, and that Art. 144 of Act XV. of 1877 was applicable, and as the possession commenced more than 12 years before the suit was brought it was beyond time. On this ground he dismissed the suit, but in case the Appellate Court might take a different view of the question of limitation he gave his opinion that Ruttonmoni, under the deed, only acquired a life interest, and that on her death the property would revert to the creator of the trust.

The High Court at Calcutta on appeal held that the "grant must be deemed to have been at" "any rate of all the estate in the talooks of" "which Roma Sundari could dispose," and that as she was still alive Ruttonmoni's interest "had" "not expired." On this ground they affirmed the decree. The objection in the written statement that Roma Sundari was never in possession of the disputed property, and that the deed of gift was consequently invalid, was not noticed by either Court.

The questions in the present appeal are clearly stated in the reasons at the end of the Respondents' case.

"1. Because the deed of gift, which is the basis of the Plaintiff's title, is utterly invalid,

inasmuch as the donor was out of possession, and no possession was ever given to the donee.

“ 2. Because the interest of Ruttonmoni, under which this Respondent (Behari Lal, the representative of Kunhya Lal, who has died pending this appeal) was in possession, was and is a valid and subsisting interest as against Roma Sundari and the Appellant, who claims under her.

“ 3. Because the suit was barred by the law of limitation.”

Their Lordships will first consider the second question. That depends upon the construction of the ikrarnama.

The rule laid down in the Indian Succession Act must not be applied to it, because it is not a will, nor the rule laid down in the Transfer of Property Act, because that was not in force until a later date. It is not necessary to decide whether the Transfer of Property Act enacts what was unquestionably the law before. The rule of law was that indefinite words of gift were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument to gather the intention. It is a question to be decided when it arises, whether the framers of the Act have not, consciously or otherwise, so expressed themselves as to lay down a more positive rule in favour of absolute gifts. In this case the intention must be collected from the whole of the instrument. The words, “ I put a stop to my interest (in those taluqs), and withdraw my enjoyment thereof, and I make them over to you,” must be read in connection with the words which precede them,—“ In order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control.” It appears to their Lordships that the indefinite

words of gift must be limited by the purpose of the gift, and that it was Roma Sundari's intention that Ruttonmoni should take the property only for her life.

It will be convenient to consider next the question of limitation. The learned Counsel for the Respondent relied upon Articles 134 and 144 of Act XV. of 1877. The former applies to suits to recover possession of immoveable property conveyed or bequeathed in trust, or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration. Their Lordships intimated in the course of the argument that the purchase at the sale in execution of the rights and interests of Ruttonmoni could not as between the purchaser and Roma Sundari be considered to fall under this article. Art. 144 gives 12 years from the time when the possession of the Defendant becomes adverse to the Plaintiff. During Ruttonmoni's life possession was not adverse to Roma Sundari (the Plaintiff's title began long after), and the suit was brought on the 18th of December 1878, within 12 years of her death.

It remains to consider the third question. In the Respondents' reasons it is broadly stated that the deed of gift was utterly invalid, inasmuch as the donor was out of possession, and no possession was ever given to the donee. But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor or a person claiming under her. The donor is a Defendant, and affirms the validity. The person who disputes it claims adversely to both. Several authorities were quoted in support of the Respondents' contention, and it is necessary to see how far they are applicable to such a suit as the present. *Harjivan Anandram v. Naran Haribhai*, 4 Bombay H. C. R., A. C. J., 31, was

cited to show that a gift of land was not complete by Hindu law without possession or receipt of rent by the donee. It came before the High Court on a special appeal. The suit was to recover two bighas of land from the Defendant, who held it as tenant. The Assistant Judge on appeal from the Moonsiff found that the land in dispute had been given to the Plaintiff by one Bapu, but that the gift had never been completed by a transfer or delivery of the property, and the donor Bapu then denied the gift altogether, and he held that the gift never having been completed the promise to give was null and void. It would seem from the statement of the defence that the tenant had continued to pay rent to the donor. The High Court affirmed the decree. It is not necessary to set out here the authorities which were quoted. It is sufficient to say that, with the exception of the passage from the *Mitakshara*, they all show that the reason for delivery being necessary is that the gift may not be resumed. This appears very clearly from the text of *Yajnyawalkya*, Dig., Book 2, v. 32, where it is said, "Let the acceptance be public, especially of immoveable property, and delivering what may be given and has been promised, let not a wise man resume the donation." The last sentence of the passage in the *Mitakshara* is omitted in the report, but if the whole is read in connection with the preceding clauses of the section it seems to have reference to the comparative strength of a title with possession and a title without it. The case differs most materially from the present, where the donor has done all she can to complete the gift and is a party to the suit and admits the gift to be complete. Another of the cases cited is *Girdhar Parjaram v. Daji Dulabhram*, 7 Bombay H. C. R., A. C. J., 4. There the Plaintiff brought a suit to compel the

Defendants to pull down a partition wall which they had built between their property and the Plaintiff's, and to restore certain ground which they had encroached upon. The Plaintiff alleged that he had purchased the ground by a deed of sale. It was found that the Plaintiff bought the house and land in question after the supposed encroachments were made, and they were sold to him according to measurements in a former bond which was not before the Court. The High Court quoted the judgment of this Board in 12 Moore, I. A., 306 (which will be presently noticed) as applicable to the case, but they decided it on the ground that the Plaintiff had given no evidence to show what was the extent of the land which the deed of sale purported to transfer to him, and there was nothing to prove that the old boundaries included the site in dispute. The head note to the report takes no notice of this, and represents the case as decided upon the ground that, by Hindu law, it is requisite that the vendor should, at the time of sale, be in possession of the property sold. It was clearly not decided upon that ground, and the inaccuracy of the head note has led to the case being treated as an authority for what was not decided in it. These cases have been noticed somewhat fully on account of the judgement of the Bombay High Court in *Kachu Bayaji v. Kachoba Vithoba*, 10 Bombay, H.C.R., A.C.J., 491, which was quoted for the Respondent. There, in a suit to recover possession of a house and land, it was held that by Hindu law a change of possession is necessary to complete the sale of it, and that it could not be supplied where the vendor had no possession to deliver. The judgement contains the following passage:—"It is perfectly

“ this transaction (the sale), the house was not in
 “ possession of the Defendant Magan. The
 “ vendor therefore sold what he could not sell
 “ according to Hindu law, as laid down in Harjivan
 “ Anandram and Naran Haribhai. The texts
 “ there cited make a transfer of possession equally
 “ necessary to the completion of a sale as of a
 “ gift, and the delivery of possession of things
 “ having a material existence is regarded by the
 “ Hindoo law as essential to their legal transfer.
 “ Such appears to be the principle of the decision
 “ in *Girdhar Parjaram v. Daji*.” There appears
 in this to be a misapprehension as to both cases.
 In the former, the question was whether a gift
 was complete without delivery. No law was laid
 down as to a sale, and only one of the texts cited
 mentioned a sale. That is the passage from the
Mitakshara. As to the latter case, it has been
 shown what the true ground of decision was.

Their Lordships will now consider the two
 judgements of this Committee upon which the
 Respondents' Counsel relied. In *Raja Sahib
 Rolad Sen v. Baboo Budha Sing*, 12 Moore,
 I. A., 306, it is said :—“ They (the Judges of the
 “ Sudder Court) seem to have ruled that the
 “ effect of the execution of a bill of sale by a
 “ Hindu vendor is, to use the phraseology of
 “ English law, to pass an estate irrespective of
 “ actual delivery of possession, giving to the
 “ instrument the effect of a conveyance operating
 “ by the Statute of Uses. Whether such a con-
 “ struction would be warranted in any case is, in
 “ their Lordships' opinion, very questionable. It
 “ is certainly not supported by the two cases
 “ cited in the judgement under review, in both of
 “ which actual possession seems to have passed
 “ from the vendor to the purchaser. To support
 “ it the execution of the bill of sale may be

“ treated as a constructive transfer of possession.
 “ But how can there be any such transfer, actual
 “ or constructive, upon a contract under which
 “ the vendor sells that of which he may never
 “ establish a title? The bill of sale in such a
 “ case can only be evidence of a contract to be
 “ performed *in futuro*, and upon the happening
 “ of a contingency, of which the purchaser may
 “ claim a specific performance if he comes into
 “ Court showing that he has himself done all
 “ that he was bound to do.” The suit was
 brought by the purchaser against the vendor, and
 their Lordships held upon the facts that the
 purchaser had not done this, and that the contract
 had become incapable of being performed ac-
 cording to the true meaning and intent of the
 contracting parties.

In the other case, *Ranee Bhobosundree Desseah v. Issurchunder Dutt*, 11 Bengal L. R., 36, the
 suit was based upon a deed executed by Jogessur
 Ghose in favour of the Plaintiff. In the judge-
 ment, their Lordships, after quoting what was
 said in the former case, say :—“ Having regard
 “ to this case and to the provisions which have
 “ been referred to of the deed, their Lordships
 “ are of opinion that it did not operate as a
 “ present transfer of the property, but as an
 “ agreement to transfer so much of it as might
 “ be recovered in a suit to be instituted to which
 “ both Jogessur Ghose and the Plaintiff were to
 “ be parties.”

Neither of these decisions is applicable to the
 present case. The ground of them is that the
 Plaintiff was not entitled under the terms of
 the contract of sale to possession. In this case
 the Appellant is under the terms of the gift, and
 according to the construction which their Lord-
 ships have put upon the *ikrarnama*, entitled to

possession, and their Lordships see no reason why a gift or contract of sale of property, whether moveable or immoveable, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give to the donee or purchaser a right to obtain possession. This appears to be consistent with Hindu law. On the principle contended for by the Respondent, so long as he prevents the true owner from taking possession, however violently or wrongfully, that owner cannot make any title to a grantee. Mr. Mayne earnestly contended that what is said in the books about the completion of a gift by possession is founded on a public policy relating to land and analogous to the feudal rule requiring investiture or livery of seisin. But the texts relate to moveables as well as to land ; and, with one not very clear exception, they relate to intended gifts which it is contemplated that the donor may take back until they are perfected. They appear to rest on a principle which has nothing to do with the feudal rules, and the European analogy to which is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case, the donor has, in fact, done all she could, and, as she still desires to support her gift, there is no question of compelling her to do more. The Respondent has failed on all the grounds, and the Appellant is entitled to possession of the property in suit with mesne profits. Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of both the Lower Courts, and to decree that the Plaintiff is entitled to possession of the property in suit, together with all the costs incurred and to be incurred in the

Lower Courts, and to remit the case to the High Court to pass such a decree for mesne profits as it may consider the Plaintiff to be entitled to.

The Respondent, Behari Lal Pundit, will pay the costs of this appeal.
