Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tacoordeen Tewarry v. Nawab Syed Ali Hossein Khan and others, from the High Court of Judicature at Fort William in Bengal; delivered 6th March 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGU E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

This was a suit brought by the Respondents against the present Appellant, Tacoordeen Tewarry, for a confirmation of their possession of certain mouzahs; and their plaint, which declared that their suit was for that confirmation, also prayed that it might be done after a reversal of a summary proceeding, and, which is the most important part of their prayer, after setting aside a fraudulent and fabricated deed of sale set up by the Appellant. The deed which is sought to be impeached is of the date of the 23rd of July 1861. The Respondents are the heirs of Mussumat Koodrutonissa, a purdanusheen lady, who some time before her death seems to have had some dispute with her relatives, and went to reside in the town of Patna. The Appellant, Tacoordeen Tewarry, was living in Patna; and in the course of the evidence given in this suit it was stated by the witnesses on the part of

the Plaintiffs that Mussumat Koodrutonissa went to live in his house, that she died there, and that he had acted on several occasions as her mooktear. The deeds which are impeached are a deed of sale of the mouzahs from the lady to Tacoordeen Tewarry, professing to be made in consideration of a sum of Rs. 39,501, (a large part of which, namely Rs. 17,960, is stated to have been paid to a creditor of the lady,) and a mooktearnamah for the execution of that deed.

When the case came before the Principal Sudder Ameen, evidence was gone into on both sides; on the part of the Plaintiffs to show that they were in possession of the property, and also to impeach the validity of the deeds on the ground that they were forged and fabricated, and that there had been no real sale from the lady to the Appellant. The Appellant went into evidence to show that he had been in possession of the property subsequently to the date of the alleged deed during the lifetime of the lady, and had continued in possession up to the time of the suit, and also to show that the deeds were really executed, and that the consideration money had passed. Upon a review of the evidence on both sides, the Principal Sudder Ameen came to the conclusion that the Plaintiffs were in possession of the property, and that the deeds were fabricated; and he made a decree confirming the Plaintiffs in the possession; and directing that the deeds should be set aside. The Appellant appealed to the High Court, and that Court disagreed with the Principal Sudder Ameen as to his finding upon the possession of the property. They thought that upon the whole of the evidence the Respondents had not proved their possession, and in fact that the possession was with the Appellant. Being of that opinion, they reversed

so much of the Principal Sudder Ameen's decree as confirmed the Plaintiffs in their possession, holding that they had no possession which could be the subject of confirmation. The High Court then went into the consideration of the substance of the dispute; namely, whether the deeds were genuine deeds or not. In approaching that question they seem to have assumed that they could only deal with it by way of declaration, and they came to the conclusion that they had power to declare the title to the estate, but could not give any substantive relief. Their Lordships think that they erred in coming to that conclusion; the plaint prayed that the deeds might be set aside, which is a prayer for substantive relief, and the Principal Sudder Ameen was quite right, when he came to the conclusion on the facts that the deeds ought to be set aside, in making a decree to that effect. However, the form in which the High Court considered the question does not really alter the substance of their decision. They, after a full and careful review of the evidence, came to the same conclusion as the Principal Sudder Ameen; namely, that these deeds had not been executed by the lady.

It was contended by Mr. Bell that the High Court ought not to have thrown the onus of supporting the deeds upon the Appellant; and perhaps the mode in which the High Court treat this question may not be strictly correct. In a suit for setting aside deeds, some evidence ought to be given by the Plaintiff, in order to impeach the deeds he seeks to set aside; but the Court seem to have regarded this suit as if it were an action of ejectment brought by the Appellants as the heirs of the deceased lady, in which, having proved that they were her heirs, the burden was thrown upon the Appellant to show a better title. But although the Judges do

not quite correctly state the principle of fixing the onus, their judgment is substantially right, because the Plaintiffs did not put their case before the Principal Sudder Ameen simply upon their title as heirs, and throw it upon the Appellant to prove a better title, but they did, by evidence, challenge the validity of the deeds. They called witnesses to show the circumstances under which this lady lived, and to challenge proof of the consideration having passed which the deed alleges to have been given. It may be that the evidence is weak, but the Appellant accepted the onus which that evidence *primâ facie* cast upon him; and he went into his whole case, and gave the evidence that he thought would best support it. Upon a review of that evidence, the High Court came to the conclusion that it was utterly insufficient to establish the validity of the deeds under the circumstances of the case.

Now the circumstances of the case are, that this lady was a purdanusheen, living apart from her relations; whether in the house of the Appellant or not, may not be distinctly proved, but certainly in a place where she was without those natural advisers which a lady, when she was going to part with apparently the whole of her property, ought to have around her. She, whilst thus alone and unprotected, is supposed to have made a deed in favour of a person who, on some occasions, acted as her man of business. According to the principles which have always guided the courts in dealing with sales or gifts made by ladies in such a position, the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bonâ fide* one, and fully understood by the lady whose property is dealt with. So far from giving satisfactory

evidence on these points, the Appellant has failed to produce that which clearly was within his power, and which ought to have been given even in an ordinary case of a sale that is at all impeached. It is alleged that the deed of sale was executed by the lady herself, and also by a mooktear called Mookondee Lall, who had a mooktearnamah from her for that purpose. The mooktearnamah is filed, and appears upon this record; but Mookondee Lall, the mooktear who is supposed to have executed this deed, is not produced as a witness. Again, the execution of the mooktearnamah is supposed to have been verified by the nazir and three witnesses, the nazir having afterwards reported to the Principal Sudder Ameen who registered the document. The nazir and those three witnesses have not been called. And, further, the writer of the deed of sale himself, who was present, according to the evidence, at the time when the deed was executed, is also kept out of the witness box. The deficiency of this important evidence is attempted to be supplied by the testimony of witnesses who say they were present at the execution, but who, as compared with those who would have been the authentic witnesses of the transaction, are not at all fit to be relied upon. Their Lordships also agree with the High Court that there is not trustworthy evidence of the payment of the purchase money, either by satisfying the alleged claim of a creditor of the lady, or otherwise.

The case on the part of the Appellant was attempted to be supported by the evidence of proceedings which had taken place in the lifetime of the lady in rent suits, and in a suit in which there was a contest between the lady and her relatives, Documents in those suits referred to the sale; and authenticity is endeavoured to be given to the transaction in consequence of the

lady herself having recognised it. But there is an entire absence of satisfactory proof that those documents, which are said to contain confirmatory evidence of the transaction, were executed by the lady, or that, if she did execute them, their contents were known to her.

On the whole, therefore, their Lordships entirely agree with the substance of both the decisions below, that these deeds are not genuine, and ought to be set aside.

Their Lordships think that the decree of the Principal Sudder Ameen was correct in form as well as in substance. The High Court, acting on their opinion that they could only make a declaration of title, whilst professing to confirm (except as to the possession) the Principal Sudder Ameen's decree, really vary its terms, by inserting a general declaration that the Plaintiffs are the rightful owners of the property, instead of the specific order that the deeds should be set aside. They reversed the decision of the Principal Sudder Ameen with regard to the possession,—a reversal in which their Lordships concur,—and added what follows in their formal decree, "and that so much of the decree of the "said court as declares that the said Plaintiffs "are the rightful owners of the said property be "confirmed." Their Lordships think that as the plaint had prayed for substantive relief, namely, that the deeds should be set aside, the more correct form of decree is in the terms of that prayer.

Their Lordships will, therefore, humbly advise Her Majesty to vary the decree of the High Court by striking out so much thereof as purports to confirm the decree of the Principal Sudder Ameen, and to order that in lieu thereof so much of the last-named decree as ordered the deed of sale and the mooktearnamah to be cancelled and set aside be affirmed.