Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kamala Naicker v. *Pitchacoty Chetty, from the High Court of Judicature at Madras; delivered 21st December* 1865.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THIS is an Appeal against a Decree of the High Court of Judicature at Madras, reversing the Decree of the Civil Court of Madura, pronounced in favour of the Appellant.

The suit was instituted in the Civil Court by the Respondent, for the purpose of obtaining undisturbed possession of a lease of the Zemindary granted to him by the Appellant, the Zemindar.

The lease, which is dated the 17th September, 1851, recites that the Appellant had leased out to the Respondent the whole of the Zemindary for a period of ten years from Fusli, 1267 (answering to the year 1857), and had fixed the amount of lease at 19,000 rupees per annum. It then directs that out of the 19,000 rupees the lessee should pay the pesh kist of the Zemindary at 13,961 rupees 8 annas 6 pice, and certain other expenses, amounting in the whole to 16,469 rupees 8 annas 6 pice, and that out of the amount to be realized during the ten years at 2,530 rupees 7 annas 6 pice, after deducting the 16,469 rupees 8 annas 6 pice, 3,000 rupees which the lessor states "I have up to this day borrowed from you under the bonds executed to you by me and its interest" should be paid (for

this is clearly what was intended, although the sentence is not complete); and it then proceeds thus: "that if I can afford to pay the same before the lease of the Zemindary shall take effect in Fusli, 1267, you should receive the principal and interest; that I should also pay the said amount if demanded by you; that even if the said debt may be thus discharged, still you would, without any objection whatever, enjoy the lease of the said Zemindary for the said ten years, in consideration of the assistance you have done to me; that as you have at my request agreed to lend me 18,000 rupees, in order to discharge my debts, and you should, after getting possession of the said Zemindary, lend me 5,000 rupees in Fusli, 1267, 5,000 rupees in the following Fusli, and 5,000 rupees in the next following Fusli; and should credit for these sums, and the said sum of 3,000 rupees (in the event of its not being paid before the lease takes effect), the aforesaid annual residue 2,530 rupees 7 annas 6 pice; that in the event of my not requiring the said loan, you should deduct the said sum of 3,000 rupees and its interest from the amount to be realized by you for the debt at 2,530 rupees per annum, and pay me the remainder annually." The Appellant, on the same day, executed two bonds to the Respondent, one for 2,000 rupees and the other for 1,000 rupees. The bond for 2,000 rupees is in these terms, "To meet the costs of suit now instituted by me, and the demand of Ramakrishna Setti by means of precept, &c., I have up to this date borrowed of you the sum of 2,000 rupees. For this sum of 2,000 rupees and the interest thereon, at 1 per cent. per mensem, I have rented out to you my Zemindary for a term of ten years from Fusli, 1267, and executed a lease specifying the amount of the rent to be 2,530 rupees 7 annas 6 pice per year; therefore you should credit this rent amount towards the principal and interest in question. If you require the said principal and interest before the said Zemindary is put in your possession in Fusli, 1267, I shall pay them, and I shall also discharge the said debt if I could get coin. Although the debt may be discharged as aforesaid, yet there is no objection whatever in your enjoying the lease of the said Zemindary, under the terms of the lease, for a term of ten years from Fusli, 1267." The

bond for 1,000 rupees recites the execution of the bond for 2,000 rupees, and in all other respects is exactly similar. In addition to these securities the Appellant on the same day (the 17th September, 1851), issued an order to the inhabitants of the villages in his Zemindary, reciting the lease to the Respondent from Fusli 1267 to Fusli 1276, directing them "to continue to pay during the said Fuslis to the said Settiar (the Respondent), or his agents, all sorts of revenue, and place themselves under his orders."

Upon the arrival of the term at which the Respondent became entitled under the lease to the possession of the revenue of the Zemindary, he sent the above order of the Appellant to the inhabitants of the villages, but found that the Appellant had issued a counter order directing them to send to himself the collections and accounts.

The Respondent thereupon instituted his suit in the Civil Court of Madura, praying for a Decree adjudging the Defendant not to interfere with and prevent his enjoyment of all the incomes of the Zemindary.

The Plaintiff in his plaint recites that having obliged the Defendant by lending him 3,000 rupees on the 17th September, 1851, in relief of the distress which he had been subject to, he has leased out to him the whole of his Zemindary, and then sets out the stipulations in the lease, and after stating the takid or order to the inhabitants of the villages of the same date, he alleges that he had sent a copy of the Defendant's takid with his own takid to the villagers who had admitted them, but that Defendant had sent a counter order and had thus prevented him from holding according to the terms of the lease, and he prays for a Decree in the terms above-mentioned.

The Defendant by his answer alleges that the Plaintiff, a merchant, has with a view of defrauding the Defendant and getting the agreement in question from him by holding out to him hopes of pecuniary and other assistance, executed separate documents to the Defendant's men, and having thus gained them over and caused them to persuade the Defendant, has thus fraudulently obtained the agreement in question.

That the sum of 3,000 rupees which is said to

have been advanced to the Defendant by the Plaintiff for the agreement in question was never paid. That the Plaintiff has entirely omitted to mention in his plaint the stipulations of the documents passed respecting the same, and the documents passed in pursuance thereof in regard to certain other transactions, as also the stipulation of these documents by which the Plaintiff is bound to do certain acts.

The Plaintiff in his replication denies that the lease was obtained by holding out any hopes to the Defendant, or by executing any documents to the Defendant's men as alleged in the answer. And as to the 3,000 rupees not having been paid, he states that the Defendant has not only executed a bond for the sum of 3,000 rupees which is said in the plaint to have been lent to him by the Plaintiff, but has also acknowledged his (Defendant's) receipt of the same in the said lease.

And lastly, the Defendant by his rejoinder states "that about seven years' ago the Plaintiff with a view of obtaining a lease of the Defendant's Zemindary, and breaking his friendship with Mr. Fondclair, who had obtained an Izaradar and had held dealings with him at the time, caused the Defendant to institute a suit against that gentleman, and held out to him hopes of pecuniary assistance for that suit, for the precept to which the Defendant was then liable, and other necessary expenses. That the Plaintiff has also caused the Defendant's men and friends (whom he gained over) to persuade the Defendant, and having thus obtained the lease has executed separate agreements to them, giving them certain shares in the said lease as follows, viz., one eighth share for the Defendant's manager, Muttaya Pillai, in the name of his younger brother Mayandiya Pillai; one thirty-second share for his rayasam (clerk) Subbramaniya Pillai, in the name of his brother-in-law Sankaralingam Pillai; five thirty-second shares for his friend Varadaya Naikar; and five thirty-second shares for Kalaryar Kovil Chellama Ayar, a friend of both the parties, in the name of his son Aiyairayar. These particulars came to the Defendant's notice lately.

"That the Plaintiff obtained two bonds from the Defendant (on the date of the said document) for the sum of 3,000 rupees, which he required at the time,

but paid him only 500 rupees at the time. With the aid of this money, the Defendant instituted a suit against the said gentleman in No. 4 of 1851, on the file of this Court for 23,000 rupees. The Plaintiff has subsequently paid to the Defendant only 52 rupees on one occasion, and 500 rupees on another occasion, and has executed to him an agreement of the 25th November, 1851, to the effect that if he should fail to pay the rest of the amount within five days, he would return the lease and bond, and receive back the amount advanced by him. The Plaintiff, who failed to pay the money within the said time, having been demanded about the same, has stated in the presence of certain mediators that he would, according to his younger brother's advice, return the said lease, &c., and that the said sum of 1,000 rupees and odd should be paid back. Accordingly, the said amount was ready, and the Plaintiff was searched for, but he could not be found The Plaintiff having failed to give any pecuniary assistance according to his positive promise and concealed himself, the Defendant was obliged to pay 1,000 rupees and odd for Madura Ramakristna Chetti's precept through Mr. Fonclair, and to withdraw the said suit No. 4; and the Defendant's grove of tamarind trees and karamal (tanks), which can yield 5,000 rupees per annum, were sold at auction."

From the singularly loose and inexact character of the pleadings, it is scarcely possible to discover what were the precise questions intended to be raised between the parties, and no copy of the issues is to be found amongst the printed proceedings.

It is clear, however, that two of the main questions of fact to be tried were:—

1st. Whether the lease of 17th September, 1851, was obtained by undue influence; and,

2nd. Whether the document of the 25th November, 1851, was a genuine document.

Another question arose as to the payment of the 3000 rupees by the Plaintiff to the Defendant, which, although not decisive of the suit, has yet an important bearing upon the genuineness of the document upon which the case principally, if not altogether, depended. The Plaintiff rested the proof of his case entirely upon the lease of the 17th September, 1851, and the two bonds of the same date executed by the Defendant, in which the advance of the 3,000 rupees

before their execution is distinctly admitted, and also upon the order to the inhabitants to pay to the lessee or his agents, after the commencement of the lease, the whole revenue of the Zemindary.

The Defendant in support of the allegation in his rejoinder, produced a document dated the 25th November, 1851, and purporting to be attested by three witnesses, and to have been engrossed by one Appavaiyar of Madura. And he called five witnesses to prove its execution. Of these, two were the persons whose names appeared as attesting witnesses, the third name being that of a person who was proved to have been dead several years, and another was Appavaiyar, the alleged writer of the document. All these five witnesses swore to the execution of it by the Plaintiff in their presence. In addition to this evidence, four of the witnesses stated in almost the same words, that " the Plaintiff did not act up to the conditions of the agreement. That as soon as the term of the agreement had expired, the Defendant sent for the Plaintiff and asked him to receive back the money and return the lease and the bonds. That the Plaintiff said in a week he would send for and return the documents and receive back the money."

Upon the case thus presented the Civil Judge of Madura dismissed the suit on the ground that the alleged lease was an executory contract, and being without consideration could not be enforced, and also that the transaction was void for maintenance.

Upon appeal to the High Court of Judicature the objections taken by the Civil Judge were overruled, and the case remanded to him to be disposed of upon its merits generally. It is perhaps unnecessary to consider the objections upon which the Civil Judge originally disposed of the case. They were very slightly alluded to in the argument before their Lordships, and are not entitled to any weight. On the return of the case to the Civil Judge, he decided upon the merits in favour of the Appellant. He thought there was no cause to question the truth of the evidence and genuineness of the document of 25th November, 1851, that the lease of the zemindary was cancelled by it, and he therefore decreed that the Plaintiff's suit be dismissed. Upon appeal the High Court of Judicature reversed this Decree, and gave judgment that the Plaintiff was entitled to

specific performance of the lease, and to the possession and enjoyment of the zemindary under the terms of such lease.

Before proceeding to examine the grounds of this Decree, their Lordships cannot refrain from animadverting upon the inaccurate and inartificial character of the pleadings in this case.

The Plaintiff's right of action depended entirely upon the lease, which entitled him to possession of the zemindary; and if that possession had been usurped by the Zemindar the Plaintiff ought to have brought ejectment. The prayer of his plaint seems rather to be for an injunction to restrain the Zemindar from collecting the revenue of his zemindary, against the terms of his own authority to the Plaintiff. But the High Court of Judicature appear to treat the suit as one for specific performance, which it could not be if, according to their opinion, the lease was not an executory contract. It is most desirable that such laxity of pleading should be discountenanced, as it imposes additional difficulties in the decision of a case like the present, where the utmost precision and accuracy were necessary in order to bring the parties to distinct issues.

It is evident that the whole case ultimately resolved itself into the proof of the genuineness of the document of the 25th November, 1851.

This question is involved in considerable difficulty. On the one side there is the positive testimony of five witnesses, who swear to the execution of the document; and on the other, there is negative evidence of the strongest character arising from the great improbability of its ever having been executed. It must, however, be borne in mind that the onus of displacing the Plaintiff's case rested upon the Defendant, and in support of his Appeal he ought to be able to show that the evidence he produced was so unsuspicious and satisfactory that the High Court of Judicature were not justified in making a Decree against him.

The Plaintiff's evidence consisted merely of the lease of the 17th September, 1851, and of the contemporaneous bonds, and the authority from the Zemindar for the collection of the revenue. The Defendant rested his defence on three grounds: 1st, that the lease was fraudulently obtained by the Plaintiff by means of bribing the Defendant's

servants and friends to exert their influence to persuade him to grant it; 2ndly, that the whole of the 3,000 rupees, the consideration for the lease, was not paid, but only 1,052 rupees by three payments; and, 3rdly, the Agreement of the 25th of November, 1851, by which the Plaintiff agreed to return the lease if he did not make payment of the residue of the 3,000 rupees within five days, which he failed to do.

With respect to the allegation of the improper and fraudulent mode in which the Plaintiff obtained the lease, it is unnecessary to say more than that the Civil Judge thought it was not supported by the evidence.

The question as to whether the whole of the 3,000 rupees was advanced requires a little more consideration. The Plaintiff relied entirely upon the estoppel arising from the statement of the advance of that sum in the lease and the bonds.

The Defendant proved that the Plaintiff paid only 500 rupees on the date of the execution of the bonds, and that when the agreement of the 25th November, 1851, was executed, a further sum of 500 rupees was paid. If the genuineness of the agreement of the 25th November, 1851, were established, it expressly states that 1,052 rupees only had been paid. It is difficult to reconcile the mode in which the Plaintiff conducted his suit with the idea that he had really paid the 3,000 rupees to the Defendant. He is a merchant at Madura, keeping books, as a matter of course, in which all his transactions would be entered. He might have presented himself as a witness, have proved the advance of the 3,000 rupees, and have vouched the entries in his books in support of his evidence. This course of proceeding would not only have established the honesty of his case, but have gone very far to show that the agreement of the 25th November, 1851, with its statement of the advance of only 1,052 rupees, could not have been signed by him.

But notwithstanding the prejudice which arises to the Plaintiff's case from his not appearing as a witness to facts peculiarly within his knowledge, and especially to disprove his signature to the document of the 25th of November, 1851, that document is still exposed to all the improbabilities which surround it on every side. The Defendant's

case represents the Plaintiff as so anxious to procure the lease in question that he bribed the Defendant's servants and friends to assist him in his endeavour to obtain it; and yet, succeeding in his object, as having agreed a little more than two months afterwards to surrender the right which he had acquired by such improper means, upon non-payment of a sum of 1,948 rupees within five days, and as having been unable to raise such a comparatively small sum to save this valuable interest from forfeiture.

It is a circumstance worthy of remark that the lease was registered immediately after its execution, but the alleged document of the 25th November, 1851, was never registered at all. Now although it might not have been one which it was absolutely necessary to register, yet when a lease was recorded which so seriously affected the interests of the Zemindar, it might have been expected that an instrument which five days after its execution had actually put an end to the lessee's right to the lease, would have been placed upon the register as a matter of ordinary prudence and precaution.

One circumstance of improbability suggested by the High Court of Judicature must be dismissed as having arisen from a misapprehension of the facts.

They say, "The lease in issue was on a stamp, the instrument to cancel it is on unstamped paper; and it is highly improbable that the precautions taken in this respect to fortify the lease should not have been adopted to strengthen and place as far as possible beyond question an instrument obtained to make void the lease, if such instrument were genuine." The fact, however, is that both the lease and the instrument were originally without stamps, and upon both the penalty was paid for stamping them to render them admissible in evidence.

But a further improbability arises from the circumstance that after the Defendant had obtained this instrument, and the terms of it had not been complied with, he allowed the lease and the bonds to remain in the Plaintiff's possession for upwards of six years without any attempt to obtain them from him, except what he states in his rejoinder, "That the money he was to pay back was ready, and the Plaintiff was searched for and could not

be found." There is no evidence of this alleged fact, and it is highly improbable that the Plaintiff, who was carrying on business at Madura, should have eluded the Defendant's search during so many years. But if he was thus continually endeavouring to escape the fulfilment of his undertaking, it is the more extraordinary that the Defendant should not have instituted a suit against him to compel him to deliver up the lease and the bonds upon payment back of the money he had received, and which he alleges that he was ready to pay.

But all these improbabilities are as nothing in comparison with that which arises from the conduct of the Defendant in the present suit. The object of this suit is to obtain a Decree to enable the Plaintiff to collect all the revenue of the Zemindary, to which he claimed to be entitled under the lease granted to him by the Defendant.

If the Defendant's case founded upon the document in question was a true one, he had a short and conclusive answer to the Plaintiff, and it is not unfair to presume that it would at once have been brought forward. It is not pretended that there is any distinct allusion to such a document in the Defendant's answer, but certain vague and doubtful expressions are relied upon as showing that it must have been in existence at this time, although not specifically mentioned. But if this were the case, it is most unaccountable that the Defendant should have left this complete answer to the Plaintiff's case to the last stage of his pleadings, and even then have introduced it almost incidentally as part of a narrative of the transactions between them.

One other circumstance may be mentioned as prejudicial to the notion of this being a genuine document. The Defendant himself put in evidence a bond dated 1st September, 1856, executed by Mutta Pillai to the Plaintiff for the payment of a sum of 250 rupees within ten months, from the profits derived from one eighth share of the zemindary, and from the income of his own lands. The lease of the zemindary was to commence in 1857, and Mutta Pillai would then be put in possession of his share. Mutta Pillai was the manager of the Defendant, and it is hardly possible to believe that if the document in question had ever been executed it should have been unknown to him, and that he should have been

dealing with an interest in 1856 which had ceased to exist in 1851.

All these strong improbabilities the Defendant had to overcome before he could fairly expect that reliance would be placed upon witnesses, however numerous, to the execution of a document upon which his own conduct had thrown so much suspicion. All the facts were within his own knowledge, and yet he did not tender himself as a witness to strengthen the evidence which both from the station of the witnesses produced by him, and from the general character of their testimony, is extremely untrustworthy. No satisfactory explanation was even attempted of any of the extraordinary circumstances accompanying and following the supposed agreement, and the effect of them is not to be weakened, much less avoided, by the observation of the Civil Judge, that "there is no accounting for a native's acts." Their Lordships think that the High Court of Judicature were warranted in their conclusion, that "upon consideration of all the circumstances affecting the credibility of the witnesses and the whole of the evidence, together with the probabilities and improbabilities of the case, the document had not been proved to be a genuine and binding instrument."

In adopting this view their Lordships are anxious to preserve to the Appellant all the rights which arose to the Zemindar out of his dealings with the Respondent. Although the Respondent may be entitled to possession under the lease, yet it may be at least questionable whether the transaction did not operate merely as a security for money advanced, and agreed to be advanced, and whether the Zemindar would not have been entitled to redeem. Again, the unwillingness of the Respondent to appear as a witness, knowing that it was not only asserted that he had not advanced the full sum agreed upon, but also that he was charged with imposition and fraud, makes it extremely doubtful whether the Zemindar ever received the whole amount of 3,000 rupees. Their Lordships will therefore humbly recommend to Her Majesty that the Decree of the High Court of Judicature in favour of the Respondent for possession of the Zemindary under the terms of the lease be affirmed with costs, but with a declaration that it is

to be without prejudice to the claim for redemption (if any) to which the Appellant may be entitled, and to any question which may be raised as to the amount actually advanced to the Zemindar by the Respondent.