

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Jumona Dassya Chowdhrani v. Bamasoon-  
dari Dassya Chowdhrani from the High  
Court of Judicature at Fort William, in  
Bengal; delivered 10th February 1876.*

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Present:

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal against the decree of the High Court of Calcutta, which, reversing a decree of the Subordinate Judge of Zillah Rajshahye, dismissed the Plaintiff's suit.

The suit was brought by a Hindoo widow, Jumona Dassya, against her daughter-in-law, Bamasoondari Dassya, who was sued in her own right, and also as the guardian of Giris Chunder Moozoomdar, whom she had adopted under an authority alleged to have been executed by her deceased husband. The object of the suit, which may be taken to be a suit between Jumona Dassya and the infant adopted, was to set aside that adoption, and to have it declared invalid. Jumona was the widow of Guru Pershad, who died in the year 1851. He left, besides his widow, two sons, Goyind Chunder and Gopal Chunder, and three daughters. On his death-bed he executed a wasuitnamah, the effect of which was to constitute his widow the guardian of the two sons, and manager of his property during their minorities, with a direction that, on their attaining majority, the elder should take a nine annas share, and the younger only a

seven annas share of his estate. Govind Chunder, the eldest son, died in the year 1853. He had, according to the custom of Hindoos, been married in his father's lifetime, whilst yet a child of tender years, to another child some years younger than himself. It is alleged on the part of the Defendants that on his death-bed, the day before his death, he executed a document authorising his widow to adopt a son; and the truth of this allegation is the principal question in the cause.

If the adoption stands good, the adopted son is not only entitled as actual possessor to the share of Govind Chunder, his adoptive father; but upon the death of Jumona, will, if then living, become entitled to take the share of the other brother, who died unmarried, and whilst still a child, in preference of the sisters of his father. On the other hand, if the adoption is invalid, Jumona, if she survives Bamasoondari, will become entitled on the death of the latter to the share of her eldest son.

This contingent interest is the only *locus standi* which she has in the present suit; although the desire to strengthen the future and contingent claims of her daughters may have been an additional motive for bringing it.

Various questions were raised in the suit which are now of no moment. The only substantial issues are, first, whether Govind Chunder did execute the alleged authority to adopt; and, secondly, if he did so, whether he was by reason of his age capable of executing such a document.

Their Lordships think it will be desirable, in the first place, to come to a clear conclusion upon a question which has been very much disputed in the cause, namely, the age of Govind Chunder at the time of his death, because it is one which bears upon both the issues to be now determined. It bears of course directly

upon the latter of them, and it bears indirectly upon the former, inasmuch as the older Govind Chunder was, the more probable is it that he would desire to execute such a document as that in question.

The contention in the present suit is, that although Bamasoonderai was, at the time of her husband's death, 11 or 12 years old, he was only between 13 and 14; that there was not a difference of more than two years between them. That there can be any doubt now as to the age of Bamasoonderai, is, their Lordships think, impossible. It is true that, immediately after her son's death, Jumona, in a report made to the Collector, appears to have stated that her daughter-in-law was not more than eight or nine years old, and that the age of her son was 12 years; admitting, therefore, that there was a difference of three or four years between them. In a subsequent proceeding, that is in her written statement filed in the Act IV. case, in 1854, she expressly stated that the age of her son was greater by four years than that of the Plaintiff. Hence, we have a clear admission on her part that there was a difference of some four years between the ages of Bamasoonderai and her husband, although she may have sought to make them both younger than they really were by throwing back the age of the former to eight or nine years. The question, however, of Bamasoonderai's age was solemnly tried and determined between her and her mother-in-law in the suit of 1860. The horoscope of Bamasoonderai was then produced, and the finding of the Judge made it perfectly clear that she must have been, at her husband's death, of the age of 11 or 12 years. The result of that suit, no doubt, has been the *consensus* of the witnesses on both sides in the present suit as to the age of Bamasoonderai. But the effect

of the admission of Jumoona remains, and there is no reason why we should come to any conclusion other than that the difference of age between Bamasoondrai and her husband was that which was originally stated. Their Lordships, moreover, think there is great force in the observations of Mr. Justice Kemp, a Judge admittedly of large experience as to native usages and customs upon this point. He thinks that Hindoo marriages are usually arranged so that there is a difference considerably more than one or two years between the age of the husband and wife; and their Lordships think this is probable and reasonable. The foundation upon which marriages between infants, which so many philosophical Hindoos consider one of the most objectionable of their customs, is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. Therefore, it is to be expected, both for physical and moral reasons, that marriages should be arranged so that the husband, when called upon to receive his wife for permanent cohabitation, should have attained the full age of adolescence, and also the age which the law fixes as that of discretion.

Their Lordships, therefore, upon the evidence, have no difficulty in coming to the conclusion that Govind Chunder was, at the time of his death, of the age of 15 or 16, and, therefore, of an age which, according to the law prevalent in Bengal, is to be regarded as the age of discretion.

Their Lordships will now proceed to consider the question as to the *factum* of this instrument.

The story told by Bharut Chunder Roy, the father of Bamasoondarai, and therefore the most important witness on that side, is in effect this, that the day before the execution of the instrument he had a conversation with Govind, and represented that he ought to execute a deed of permission to adopt a son; that Govind assented to this; that the witness afterwards communicated what had so passed to Jumoona, and that she finally said, "Then, my child, write and give permission to adopt a son." A good deal of criticism has been applied to the reasons for giving a power to adopt which Bharut Chunder says he assigned on this occasion. Their Lordships think that the more plausible construction to be put on what he swears he then said is that he had had in view the supposed spiritual advantages which his daughter might derive from having an adopted son; advantages which seem to be considered of some value, though not perhaps of the same value that they are to an adoptive father. It is then sworn that on that day the draft of the deed of permission was begun, but that it was not finally finished until the next day. There is some obscurity as to the preparation of this draft, and the actual giving of instructions for it by Govind Chunder. And if this were a case in which a will was propounded, giving benefits to various parties and making a disposition of property, as to which it would be necessary to satisfy the Court that the testator fully knew what he was about, the evidence would be extremely defective. But when the question is only as to the mode of carrying out a permission to adopt, to which the party had signified his assent, the defect in the evidence becomes less material. It is, however, an observation that may fairly be made for the Plaintiff that there is not such satisfactory

evidence as to this draft as their Lordships might expect to find. The lapse of time since the transaction may in some degree account for this. According to the case for the Defendants this draft was fair copied on the day preceding the death of Govind Chunder, upon a stamped paper purchased on that day at Nattore, a place which appears to be at the distance of 10 or 12 miles from the family house where the deed was executed. This fair copy is said to have been made by a person other than the person who wrote the draft. The latter is said by some of the witnesses to have been one Bagchi, and the writer of the fair copy is said by all the witnesses who depose in favour of the instrument to have been Ramnarain Sircar.

Bharut Chunder further states that this fair copy was executed by Govind Chunder, and that Jumoona then went into the inner apartments, and brought out Bamasoonderai, to whom the completed instrument was delivered by Govind Chunder. The witnesses for the Plaintiff, on the other hand, whilst they contend that no such transaction ever took place, assert that Govind Chunder was on that day speechless and incapable of doing what he is said to have done; that Bamasoonderai was not in the house, but was then living at her father's house; and that, although sent for, she was unable to come for want of a palki.

In this conflict of evidence, their Lordships are not able to form a confident opinion as to the credibility of one set of witnesses as opposed to the other; and they have not in this cause the advantage of having a clear expression of opinion by the Judge of first instance as to the demeanour, and consequent credibility, of those witnesses when produced before him. His judgment, which was in favour of the Plaintiff, proceeds first upon the assumption that it was

impossible to purchase the stamped paper at Nattore, and to have the deed engrossed and executed upon the same day; next, upon the general improbability of the transaction; and further upon certain appearances upon the document in connection with the signatures of Ramnarain Sircar, and other subscribing witnesses. He, no doubt, also intimates his belief in the testimony given for the Plaintiff to the effect that on the day in question Govind Chunder was speechless.

The learned Judges of the High Court have dealt with two of the above points. They seem to have satisfied themselves, and their Lordships are not prepared to impugn their conclusion, that the stamped paper on which the document propounded is written, might, though purchased on the morning of the day of execution, have reached the house in time to have the document engrossed and executed, as it is said to have been engrossed and executed. They, having the original before them, were further of opinion that the appearances which have been referred to were not such as to excite any grave suspicion touching the genuineness of the document. They also, with better means of judging than their Lordships can have, came to the conclusion that the witnesses for the Defendant were of a more respectable and independent class than the witnesses produced by the Plaintiff.

There are two disputed facts relating to the transaction which, if established, would go far to prove the Defendant's case. The first is the presence of Bamasoonderai. Their Lordships agree with the High Court in thinking that the story told by the Plaintiff's witnesses in order to account for the alleged absence of Bamasoonderai is anything but satisfactory. The young man is shown to have been ill for several days. It is sworn on the other side that Bamasoonderai

was living in her husband's house, and had been there a month at least, or two months, previous to his death. Her age renders that probable; but even if from any accidental cause she happened, when her husband was taken ill, to have been at her father's house, their Lordships think that the suggested want of conveyance, considering the apparent position of the family, is wholly improbable, and a story which the learned Judges of the High Court were justified in disbelieving. They therefore believe that Bamasoonderai was present on that occasion; and that is a fact which necessarily affects most materially the credit due to the Plaintiff's witnesses.

Then, again, there is the alleged concurrence of Jumoona. Jumoona has not been examined as a witness in this cause. The reason why she was not examined can hardly be the prejudice of natives of position to appear as witnesses, since she produced as her witnesses upon the point of Govind's age her own daughters. She was the most important witness in her own case, both upon the point of the age of her son, and upon her alleged consent to the execution of the document. That the document, if executed at all, should have been executed without her consent, is, their Lordships think, in the highest degree improbable. It is well known what the position of a mother in a Hindoo family is; what influence, although she may not be concerned at all in the management of the property, she exercises over the family; what respect is paid to her opinion. Nor is the influence of a mother likely to be least when her son, a youth, is dying in the house. Then, again, the relation of this lady to Govind was not merely that of a Hindoo mother to her son. She was, under the will of her husband, invested with the management of the property during the minority

of her son, who was still in law a minor. In fact, to all intents and purposes she must have been at that time the mistress of the house. Her alleged concurrence was thus a point which it was most material for her to contradict by her own testimony given in the cause, and subject to the test of cross-examination.

Their Lordships, in making this observation, are not insensible to the nature of the suit. It is one in which she, upon a remote and contingent interest, an interest which will probably never accrue to her, comes into Court, not only to destroy the title of a person in possession of an estate, but to destroy his civil *status*; and therefore a more than ordinary burden of proof lies upon her.

A good deal has been said as to what took place after Govind Chunder's death. It is perfectly clear that the existence of this document was asserted by Bamasoonderai and those who acted for her as early as 1854, when she made an application under the Act of 1841. Afterwards she tried to get possession of her husband's share of the property; and an Act IV. proceeding was commenced in the same month of August 1854. From the schedule of deeds which forms part of the proceedings in that case, it appears that the document was then actually produced and filed in Court. On the other hand, Jumona seems then, and indeed from the time at which she made her report of her son's death to the Collector, persistently to have disputed the existence of a valid authority to adopt. If, therefore, she really concurred in the alleged transaction, there must have been a subsequent quarrel very shortly after Govind's death. Originally Bharut Chunder and she must have been upon good terms, since she is expressly enjoined by her husband's wasuitnamah to have regard to his experience, and to consult him

upon all matters of importance. It is not improbable that a rupture took place when, at his instigation or under his influence, his daughter first asserted her right to the possession of her husband's share of the property, which she clearly did before August 1854, and that thereupon the mother determined to set her face against the alleged right to adopt. But if she honestly repudiated the document, there is no evidence of a quarrel, and that is a circumstance in favour of her. Weighing the whole evidence as to the execution of this document, and considering how important the testimony of Jumoona was, and that in omitting to give it she has at least failed to produce the best evidence in her power in support of her own case, their Lordships are of opinion that they have not sufficient grounds, whatever doubts they may entertain as to certain parts of the evidence for the Defendant, for interfering with the finding of the High Court. They desire to state that in coming to that conclusion they do not rely upon the evidence which has been given on the part of the Defendant, to the effect that Jumoona, as late as 1865, when the ceremonies of the adoption were performed in the family house, was present, and made gifts to the adopted son. This fact is not spoken to by Bharut Chunder himself. It is not spoken to by two independent witnesses who have no concern with the dispute as to the execution of the authority to adopt, and only come to depose to the performance of the ceremonies; it is in itself highly improbable, considering the hostility in which the parties had previously been; it is opposed to the evidence of the family priest, who says that Jumoona positively forbade his taking part in those ceremonies; and it is only to be accounted for by the ingenious suggestion of Mr. Bell, of a subsequent reconciliation and a

second rupture subsequent to that; all which is mere speculation. Their Lordships do not positively affirm that the Defendant's witnesses who depose to this fact have forsworn themselves; they only say that it has not been proved to their satisfaction, and does not at all influence their judgment.

The only remaining point is that taken by Mr. Doyne, to the effect that although Govind Chunder may have been of the age of discretion according to the Hindoo law, as prevailing in Bengal, he was still a minor under Regulation 26 of 1793, and that under the 33rd section of the prior Regulation 10 of 1793 he could not make the adoption without the consent of his guardian. The last-mentioned enactment prohibits a disqualified proprietor from making an adoption, except with the sanction of the Court of Wards; and it has been determined by the Sudder Court in the case cited—a case which afterwards came here, though not on the same point—that the prohibition applies equally to an authority to adopt and to an actual adoption. But the words of the 33rd section of Regulation X. of 1793 would seem to confine its operation to persons who are under the guardianship of the Court of Wards. And we have the judgment of Mr. Justice Mitter, to the effect that where a minor is not under the Court of Wards, but has attained years of discretion according to the Hindoo law, he is capable of executing such an instrument as this. If then the case actually turned upon this point, their Lordships' opinion would have been that Govind Chunder was not incapacitated from executing this instrument by reason of his not having attained the age of 18 years. If, however, the consent of Jumoonah was, as their Lordships think they must take it to have been, given to the execution of the instru-

ment, the particular objection thus taken by Mr. Doyne would not arise.

Their Lordships have dealt with this case as if the question were one fairly open for trial between the parties. They give no opinion as to what the effect of a decree in such a suit may be, whether one in favour of the adoption is binding against any reversioner except the Plaintiff, or whether, on the other hand, a decision adverse to the adoption would bind the adopted son as between himself and anybody except the Plaintiff. All their Lordships can do on the present occasion is to say that Jumoona has not made out her right to have this adoption declared invalid, and they must humbly advise Her Majesty to affirm the Judgment under appeal, and to dismiss this Appeal with costs.