

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Imrit Konwar and another v. Roop Narain Singh, from the High Court of Judicature at Fort William in Bengal; delivered March 15th, 1879.

Present :

SIR JAMES W. COLVILLE,

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE Plaintiffs in this case, who are the Appellants, are the daughters of Baboo Perdip Narain Singh, who died on the 1st May 1857 without male issue. They sued as his heiresses in reversion after the death of Mussumat Baneshur Konwar, his widow, who died on the 27th November 1873. The lands in respect of which the suit was brought are situate in the district of Tirhoot, in which the Kritima form of adoption is allowed. The Defendant claimed as the adopted son of Perdip Narain under the Kritima form. In his written statement, after alleging the adoption, he proceeded to state that Perdip Narain established him, the Defendant, as the proprietor of his entire estate, and with his consent directed that Mussumat Baneshur Konwar should hold possession of the entire estate during her lifetime, and enjoy the profits thereof, with this limitation, that she should have no power to transfer or give away the property, and that after her demise the ancestral and moveable property should be put into possession of the Defendant, and the self-acquired property should pass to his daughters, and that after this he gave some instructions as to

the marriage of his daughters. The Defendant was about 18 years of age at the time of the alleged adoption. If he was not adopted, the Plaintiffs are the undoubted heiresses by birth of Perdip Narain. They ought not to be disinherited except upon clear proof of the adoption.

The Subordinate Judge of Tirhoot, who in the first instance heard the case, disbelieved the evidence in support of the adoption, and decreed for the Plaintiffs. The High Court, upon appeal, considered that the reasons given by the Subordinate Judge were unsatisfactory, and reversed his decision. The question for the determination of their Lordships is whether there are sufficient grounds for setting aside that reversal. The Subordinate Judge considered that the adoption as set up by the Defendant was improbable and also inconsistent with the acts and conduct and statements of the Defendant.

Perdip Narain was a cousin of Odit Narain, the father of the Defendant. They had originally been joint in estate, and had held ancestral property, but they had some years previously to Perdip Narain's death separated. Perdip Narain had held his share of the ancestral estate, and was also in possession of self-acquired property. One of the grounds upon which the Subordinate Judge considered that the case of the Defendant was inconsistent with his former statements was that in a petition of the Defendant he had stated that the family had been re-united, and that on Perdip's death he, the Defendant, had succeeded to the estate by survivorship, the deceased having left no son; that he came into possession of the estate, and was in fact in possession of it from the time of Perdip Narain's death, and that his widow was never in possession. The learned Judges of the High Court, after examining the petition referred to, considered that the Subor-

dinate Judge was wrong in his construction of it, and that the Defendant did not allege that the family had been re-united. Their Lordships are not prepared to say that the High Court were wrong in their construction of the petition. The learned Judges of the High Court made no remark as to the contradiction between the statement of the Defendant in that petition and the allegation in his written statement that the widow held possession to the time of her death. The Subordinate Judge also relied upon the delay which, according to the Defendant's allegation in his written statement, occurred between the death of Perdip Narain and the Defendant's obtaining possession, he not having obtained possession upon the death of Perdip Narain, but only upon the death of the widow. The Subordinate Judge remarked that if the Defendant had been the adopted son he would have taken possession on the death of the adopting father. The High Court in commenting upon that part of his judgment remarked that the delay was explained by the very nature of the adoption set up by the Defendant, and the arrangement said to have been made by Perdip Narain at the time that the widow, notwithstanding the adoption, was to remain in possession of the whole property during her lifetime. In that respect their Lordships think the High Court were correct. There was no improbability in the case as set up by the Defendant, arising from the fact of his not having acquired possession immediately upon the death of Perdip Narain.

The reasons above referred to, however, were only two of the grounds upon which the Subordinate Judge considered that the adoption set up by the Defendant was improbable and inconsistent with former statements made by the Defendant.

It appeared that a suit had been brought by

one Mussumat Bibi Wasihan against Perdip Narain and Odit Narain. Odit Narain died on the 30th September 1854, and upon his death Mussumat Deo Soondur Konwar, his widow, presented a petition to the Court in which the suit was pending in appeal, by which she represented that her husband Odit had died, and that the Defendant was his heir. She was quite correct in that respect, for the Defendant was the son and heir of Odit Narain. She prayed that the Defendant might be made a party in the appeal case. Thereupon the usual istaharnamas were published. Subsequently Perdip Narain died, and on the 4th June 1857 a petition was filed by the Appellant in that suit, Bibi Wasihan, in which she stated that Perdip Narain, the second Respondent, was dead, and that Roop Narain, the present Defendant, was his heir. In consequence of that petition istaharnamas were again published. Afterwards, on the 31st July 1857, Baneshur Konwar, the widow of Perdip Narain, filed a petition to the effect that her husband died on the 22nd Bysack 1264, corresponding with the 1st May 1857, leaving her, the petitioner, and two minor daughters, and that Roop Narain Singh, the nephew, who was separate in mess, had no concern with the heirship of the deceased. After that, on the 24th October 1857, the Defendant filed a petition to the effect that he was the kurtapoottra of and nephew in joint mess with Perdip Narain, and that Baneshur, his widow, could not be his heiress. A refutation of that statement was filed on behalf of the widow. Up to that point, therefore, the widow of Perdip claimed on behalf of herself and her daughters, and Roop Narain claimed as the heir by virtue of an unconditional adoption. There was then a conflict between the widow of Perdip Narain and the Defendant as to whether the Defendant was the heir by

adoption or not. Nothing had been said by the Defendant with reference to his having been adopted upon a condition or subject to an arrangement according to which the widow was to enjoy the whole of the property for her life. Such being the nature of the dispute between the widow and the Defendant, a compromise was come to between them, and a petition was presented on behalf of each of them, admitting that the Defendant had been adopted upon condition that the widow was to enjoy the property for her life without a power of alienation, and that after her death the daughters were to take the self-acquired property, and that the Defendant was to succeed to the ancestral estate, and that the names of both should be inserted in the Appeal in the place of Perdip Narain. That compromise was acted upon by the Court. It was stated by one of the Plaintiff's witnesses that the compromise on the part of the widow was extorted from her. He said (Record, p. 48), "A compromise was made between Mussumat Baneshur and Bachoo (another name for Roop Narain); Jee Lal Sing and other persons, naming them, including Baboo Dain Sing, were present. Baboo Dain Sing said to Baneshur, the widow, 'Do make compromise with Bachoo Sing on this condition, that during your life the property will remain in your possession, and after your death the property will come into the possession of Bachoo Sing.' Thereupon the Mussumat said, 'I do not agree to it.' Then they said, 'If you will not compromise in this way we will drive you out of the house.' Then the Mussumat, according to their instruction, made the compromise and acknowledged the kurtapoottra." Another witness, at page 52, line 10, said, "There was a dispute between Mussumat Baneshur Konwar and Bachoo Sing

“ regarding the heirship. Bachoo declared him-
“ self as heir of Perdip Narain Sing, and
“ Mussumat Baneshur Konwar called herself as
“ heir. At last there was a compromise between
“ the said Mussumat and Bachoo Sing. The
“ compromise was effected in these terms,—that
“ during her life the Mussumat shall remain in
“ possession of the properties, and that after the
“ death of the Mussumat the ancestral properties
“ are to come into the possession of Bachoo Sing,
“ and the purchased properties into the posses-
“ sion of the daughters of Perdip Narain Sing.”

The Subordinate Judge found as a fact that the compromise was obtained from the widow by extortion, and he must therefore have believed the witnesses for the Plaintiffs. The High Court remarked upon that finding that the daughters never set up the case of extortion (see p. 19 of the Record). They said, “ With regard to this
“ solehnama (referring to the petition of the
“ widow) the Subordinate Judge says that it
“ was not Baneshur Konwar’s free act and deed,
“ and that she had no right by it to prejudice
“ the rights of her daughters. The first point
“ has been made the subject of much argument
“ before us, but it was certainly never the
“ Plaintiff’s case that their mother had been
“ coerced into filing this solehnama. The plaint
“ is absolutely silent on the subject of coercion,
“ and all that the Subordinate Judge had to go
“ upon so far was the statement of two of the
“ Plaintiff’s witnesses to the effect that the
“ relatives of Perdip urged Baneshur Konwar
“ strongly to file the compromise, and threatened
“ her in case of refusal.” It is true that the daughters did not set up that the compromise had been obtained by extortion, but they said that the widow had repudiated it. They stated in their plaint, page 3, par. 2, that the solehnama, that is, the petition of compromise put in on

behalf of the widow, was obviously in excess of her power, and is in every way illegal, and that the Defendant could not by virtue thereof assert any right with respect to the whole or any part of the property, nor could such document be adduced in evidence as against them. They further stated that the widow herself, previously to and after the date of the solehnama, repudiated the pretension of the Defendant, and that the Defendant also, not being satisfied with the solehnama, raised objection against it, and that his right and the basis of his right as set forth in the solehnama were entirely false and groundless.

The Defendant in his written statement stated that the allegation of the Plaintiffs that the Mussumat filed the solehnama at the instigation of and in collusion with him, the Defendant, was devoid of truth and incredible.

It is clear that the daughters could not be bound by a compromise made by the widow under any circumstances. Even if the compromise had been made by the widow voluntarily, it was not against her interest, for she was to remain in possession of the whole property for her life in the same manner as if the adoption had not been made. If, instead of coming to a compromise and making mutual concessions, Roop Narain had continued to assert his claim as heir by virtue of an unconditional adoption, as he had done up to the time of the compromise, and the widow had continued to assert that no adoption whatever had been made, the widow might have been examined as a witness in support of her assertion. It should be remarked that the adoption set up in the suit, and attempted to be proved by some of the Defendant's witnesses, is not an absolute adoption as originally set up by the Defendant, but an adoption subject to a condition or arrangement to the

same effect as that stated in the compromise. One of the grounds upon which the Subordinate Judge thought that the adoption set up by the Defendant in the compromise and in his written statement was improbable was that there was no writing, and certainly it appears to their Lordships to be very improbable that Perdip Narain should have adopted the Defendant upon the condition that the widow should enjoy the property for life, and that his daughters should take his self-acquired property after her death, without a single line in writing as evidence of the arrangement. Such a conditional adoption without a writing to support it would, like a nuncupative will, require very strong evidence to establish it.

In referring to the reason given by the Subordinate Judge, with reference to the improbability of the adoption, in consequence of the absence of any writing to support the condition or arrangement as to the possession of the property, the High Court were entirely silent.

In support of the allegation of the Plaintiffs that both the widow and the Defendant repudiated the compromise, it was proved that the widow on the 13th June 1862, long after the date of the compromise, applied for a mutation of names, upon the ground that she was the widow and heiress of her deceased husband and in possession of the property.

Her application was not on the ground of a condition annexed to an adoption according to which she was to enjoy the property for life, but upon the ground that she was the widow and heiress. In support of that application she filed a varasutnamah dated the 30th May 1862, under the seal of the Kazi, upon which he declared upon the deposition of two witnesses that Perdip Narain left as his heirs only Mussumat Baneshur, his widow, and two minor daughters,

and that the widow was in possession of the property left by her husband. Thereupon a petition of objection was filed on behalf of the Defendant, in which an absolute adoption was again set up, without referring to any condition or arrangement by which the widow was to enjoy the property for life; and in that petition it was stated that the Defendant had performed the funeral ceremonies sradh pind-dun, &c. ; that the widow had never had possession of the estate, and that she got her maintenance and necessaries from him, and that she should get them during her life. The petition went on as follows: "The insertion of name depends upon possession, and the Mussumat aforesaid is not in possession of a single bigha or cottah of the disputed lands. Therefore, according to the orders prevalent in Court, the name of a person who is not in possession cannot be entered in the milkiut and malgoozari column to which effect there are many orders of the Zillah and Sudder. Secondly, the claim of the petitioner cannot on any account be entertained on the basis of this verasutnama, inasmuch as at the time of the roobookar I will produce a great deal of evidence to prove the non-possession of the Mussumat petitioner." That allegation, which the Defendant made in 1862, is utterly at variance with the petition of compromise which he had previously filed, and with the allegation in his written statement in the present suit, paragraph 4, in which he says: "Mussumat Baneshur Konwar, in accordance with the expressed desire of the ancestor, held possession of the entire estate to the last day of her life."

Many witnesses were called on behalf of each of the parties to the suit. Some of those examined on the part of the Defendant proved an unconditional adoption, corresponding with that

set up by the Defendant previously to the compromise; others an adoption subject to a condition or arrangement corresponding with that stated in the compromise. Several witnesses on behalf of the Plaintiffs stated that no adoption was made. With respect to the Plaintiffs' witnesses, the High Court said their evidence is purely negative; but it is to be remarked that if the evidence of Ram Narain Sing and of some of the other witnesses of the Plaintiffs is to be believed, the adoption could not have taken place without their knowledge. There were other inconsistencies, as regards the raising of money for the payment of the expenses of the marriages of the daughters, the performance of the *shradh*, and other matters to which it is not necessary to refer minutely. The Subordinate Judge alluded to the fact of the Defendant's not having offered himself as a witness, but the High Court made no remark upon that subject, confining themselves merely to criticising the reasons which the learned Subordinate Judge gave for disbelieving the individual witnesses of the Defendant. Looking to the inconsistent statements made by the Defendant from time to time, the conflict in the evidence of the witnesses, the improbability of such a conditional adoption as that set up by the compromise, and also by the Defendant in his written statement without any writing in support of it, their Lordships are of opinion that the Defendant ought to have been called as a witness and offered himself for cross-examination, and that in his absence the Subordinate Judge had good reasons for believing the evidence on the part of the Plaintiffs instead of the witnesses examined on the part of the Defendant. The Defendant himself was about 18 years of age at the time when the alleged adoption took place, and must therefore have had a recollection of the facts connected with the

adoption if it had taken place. Looking at all the circumstances, their Lordships think that there were no sufficient grounds for reversing the judgment of the Subordinate Judge of Tirhoot, and consequently they will humbly advise Her Majesty to allow the Appeal, and to reverse the decision of the High Court. The Respondent must pay the costs of this Appeal.

