Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Shama Churn Kandu v. *Khettromoni Dasi. from the High Court of Judicature at Fort William in Bengal; delivered 9th December* 1899.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD HOBHOUSE.
LORD MORRIS.
LORD DAVEY.
LORD ROBERTSON.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The principal question in this Appeal is whether probate of the will of Modhu Soodhun Kundu who died on the 9th October 1892 ought to be granted. The Appellant was the applicant for the probate and in his petition for it presented to the District Judge on the 20th January 1893, he stated that he was the adopted son of Modhu Soodhun and one of the executors mentioned in the will. He also stated that another will had been executed by Modhu Soodhun on the 4th October 1892 which was revoked by the later will and was filed in Court. The application was opposed by Nistarini Dasi the widow of Modhu Soodhun in a petition put in on the 31st January 1893, in which she denied the genuineness of the second will, refused to admit the first will and also asserted that Shama Churn the Appellant was not the

adopted son of the deceased. On the 23rd February Nistarini presented a petition withdrawing her objections. Thereupon on the 27th February 1893 the Respondent who is one of the daughters of the deceased, filed a petition of objection denying the genuineness of the will, asserting that Shama Churn was not the adopted son and that the withdrawal by Nistarini was the result of collusion and praying to be made a party to the suit. The District Judge having refused to do this the will was proved in common form, and probate granted. The Respondent appealed to the High Court which set aside the decision of the District Judge and remanded the matter in order that she might have an opportunity of contesting the case and that the will might be proved in solemn form. On the 25th June 1894, the District Judge decided in favour of the will; he found that it was executed by Modhu Soodhun and that he was then of sound and disposing mind. As to the adoption of Shama Churn he said :—

"I have mentioned that an allegation was made by the "objector denying that Shama Churn was the adopted son of "Modhu Soodhun in order to show that it was not probable the "deceased should have executed such a will. Evidence was "given that Shama Churn was treated by Modhu Soodhun as "an adopted son, was spoken of as an adopted son by Modhu "Soodhun when giving evidence. Not a particle of testimony "to support the objector's allegation was given. Though "two sons-in-law, a cousin, and a servant of Modhu Soodhun "were examined not one of them was asked a single question "whether Modhu Soodhun had adopted Shama Churn. The "alleged improbability therefore fails."

The evidence in the Record fully supports this opinion.

On the 29th July 1895 the High Court on the appeal of Khettromoni reversed the decree of the District Judge and ordered the application for probate to be dismissed.

The first witness examined in support of the will was Sri Narain Babu the writer of it. His

evidence was that Tincowri Banerji another witness was sitting near Modhu Soodhun and repeated what he had said although the witness could hear it himself; that at the time of the will being written out Modhu said "There are " Rs. 6,000 due to me on a mortgage. Of this " sum Rs. 2,000 are to be given to Kedar Nath, " Prio Nath, and Bhut Nath each": that just then someone came in and said that Bhut Nath was dead and someone asked what was to be done with the Rs. 2,000 allotted to Bhut Nath. Modhu Soodhun said " Let Rs. 1,000 " be given to his widow and Rs. 1,000 to his " mother." The witness said he made provision accordingly in the will, he forgot whether it had already been written in the will, that Bhut Nath was to get Rs. 2,000 or whether this had only been mentioned by Modhu Soodhun, he could not say without looking at the will. Now the second paragraph of the will contains a gift of Rs. 2,000 to Bhut Nath and the ninth the gifts of Rs. 1,000 each to his mother and widow. Tincowri Banerji deposed that Sri Narain wrote the will and he asked questions and Modhu Soodhun " made " known the terms of the will," that he said Rs. 6,000 would be given to his three nephews, this was written and then the document was read over and Modhu Soodhun signed it and after him the witnesses. Someone said "Let " the will remain in Tincowri's keeping" and so it was given to him and he took it. He went on to say that afterwards Kedar said to him " what is written in the will is false," he said " How is that," Kedar said " My brother is dead " and he has been given Rs. 2,000" (Bhut Nath having shortly before died of cholera). Tincowri said "He did not know of your brother's death. " If you wish I will enquire from Modhu " Soodhun to whom he wishes that Rs. 2,000 to " be given. Then three or four of them went " and said 'Your nephew is very ill, if he dies " 'to whom should his money be given?' He

" thought for a long time perhaps a quarter of an " hour and said ' Let Rs. 1,000 be given to his " ' wife and Rs. 1,000 to his mother.' Then this " was inserted in the will. This was after the " will had been executed. There was a space and " the provision was inserted. There was no sig- " nature of the testator or the witnesses." The District Judge who had the will before him was satisfied with this evidence and accordingly excluded this addition to the will from the probate. No doubt there is a discrepancy between the evidence on this point of Sri Narain and that of Lincowri. But Sri Narain may have forgotten the exact circumstances under which the ninth paragraph was inserted or may have been over zealous in his desire to support the whole will. At any rate the District Judge accepted Lincowri's version and on that basis their Lordships cannot agree with the learned Judges of the High Court who thought that the discrepancy between the second and ninth paragraphs, had not been satisfactorily explained and that it was a circumstance to excite suspicion. Peari Mohun one of the attesting witnesses deposed to the execution of the will and said that " Modhu Soodhun was all " the time in his senses." Kedar Nath Kundu, a pleader, one of the nephews of the testator to whom the Rs. 6,000 were given who was present during part of the time when as he said " Sri " Narain was writing and Tincowri was asking " Modhu and then telling Sri Narain what to " write " added that " Modhu Soodhun was in his " senses. He seemed to understand everything " that was said to him and he was able to give " replies." The District Judge says in his judgment that it was clear to him that Kedar Nath was an unwilling witness. In his evidence he appears to have been dissatisfied with what he took under the will and being one of the executors was unwilling to join in the application for probate.

The case of the Respondent against the will was that no will was executed. The effect of the evidence of the six witnesses called in support of it is that during the morning when the will was said to have been executed Modhu Soodhun was in an unconscions state, unable to sign a will and that no will was made. The District Judge who saw the witnesses has found that the will was executed by the deceased and that he was of sound disposing mind when he executed it.

The judgment of the High Court reversing this decision appears in the conclusion of it to be founded upon what is said by Lindley L.J. in *Tyrrell* v. *Painton*, L.R. (1894) Prob. Div. 151, that whenever circumstances exist which excite the suspicion of the Court and whatever their nature may be it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document. In this case the suspicion if there was one would be that on the morning when the will was said to have been made the deceased was in an unconscious state and unable either to sign the will or to understand what he was doing, that is, that the witnesses in support of the will were not telling the truth. If they were their Lordships do not see anything to excite suspicion. The question was simply which set of witnesses should be believed. The District Judge saw them and the remarks in his judgment show that he observed their demeanour. The High Court had not that advantage. In their Lordships' opinion the probate was rightly granted and the decree for it should not have been reversed. It is not necessary to decide the other questions raised in the Appellant's case. Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court and order the Appeal to it to be dismissed with costs. The Respondent will pay the costs of this Appeal.