

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Cali
Chunder Chowdhry v. Shib Chunder Bhadoory
and others, from the High Court of Judicature, at
Fort William in Bengal ; delivered December 8th,
1870.*

Present :

SIR JAMES W. COLVILLE.

LORD JUSTICE JAMES.

LORD JUSTICE MELLISH.

SIR LAWRENCE PEEL.

THIS is an action brought to recover a talook, called No. 396. Sakeer Mamood, and both the Plaintiffs, who are Respondents in this Appeal, and the first Defendant, who is the Appellant, claim by deeds under the same owner, viz. Godadhur Toee. A kobala under which the Plaintiffs claim was the first executed in point of time. It was not a kobala executed to the Plaintiffs themselves, but was executed to Kedar Nath Lahoory, who is the third Defendant, and who subsequently executed another kobala to the Defendants. But it was objected on the part of the first Defendant in the Courts below, and also before us, that, at the time when Godadhur Toee executed that kobala, under which the Plaintiffs claim, he had no right or title to the property in question at all. It appears to be admitted on all hands in the Court below that, if he had no title to the property at the time he executed that kobala, his subsequently becoming entitled as heir would not make the kobala good.

Now, the question whether he had any title to the property at the time he executed that kobala appears entirely to depend upon this,—whether Hurree Coomar Toee, who was the original owner

of the property had adopted Beny Chunder as his adopted son during his lifetime ; because, if he had so adopted him, then Beny Chunder was the heir of Hurree Coomar, and became entitled to the property on Hurree Coomar's death, and as Beny Chunder did not die until after the execution of the first kobala by Godadhur Toee, under which the Plaintiffs claim, if the adoption of Beny Chunder was good, then that kobala was bad, and the Plaintiffs have not made out their title.

The whole question, therefore, turns on whether there was a good adoption of Beny Chunder by Hurree Coomar. The two Courts, the first Court before which the case was heard, and the Court of Appeal, have come to different conclusions on the question. The Judge of the first instance—although he mentions other grounds, which their Lordships do not think tenable for his decision—came to the conclusion that the adoption was good. He believed the evidence of it, and believed that the documents relating to it were genuine documents. On the other hand, the Principal Sudder Ameen came to the conclusion that the adoption never had taken place at all; he disbelieved the witnesses who spoke to it, and seems to have come to the conclusion that all the documents which were produced in support of it were forgeries.

Now, their Lordships have carefully examined the evidence on the one side and on the other, and they are of opinion that the evidence in favour of the adoption very greatly preponderates. The adoption is proved by a considerable number of apparently respectable persons, and the documents necessary to constitute an adoption are produced and proved by the attesting witnesses. It will be right, however, to examine the reasons given by the Principal Sudder Ameen for refusing to believe that the adoption had taken place. In the first place, it is said that there are not sufficient members of the family and persons of the same caste called as might have been expected. The answer to that appears to be very clear, viz. that it is admitted on all hands that Hurree Coomar had in fact no relations whatever, except this Godadhur Toee, who was a very distant relation, and therefore it is impossible that others should have been called. Then, another objection that is

made is that the priest of the family, who appears to have been the person who is alleged to have performed the ceremony, when called as a witness denies that there was any adoption at all. It appears, however, that this very priest is himself a witness to the deed of gift, and he denies that that deed was a genuine deed, and says that he himself, in fact, was a party to the subsequent fabrication of it; his story being that the adoption was a thing which had not taken place at all in Hurree Coomar's lifetime, but was only thought of after his death. Their Lordships are of opinion that no weight whatever ought to be given to the evidence of a witness who himself comes and says, not only that the deeds were forged, but that he himself had been a party to the making of them. Then it is said that the barber also gives evidence against it. Whether the witness who is supposed to be the barber was the barber or not, does not at all clearly appear. He does not himself say that he was a barber, he only says that he was a ryot who had the means of knowing, and who knew something about it, because, he says, he occasionally went to the house. But then it is a very strong confirmation of the truth of the adoption that, with one exception, all the witnesses who are called against the adoption, and profess to say there was no adoption, admit that this boy, Beny Chunder, was, some say one year and some two years before Hurree Coomar's death brought to Hurree Coomar's house, and there lived with him, and was brought up, in fact, as his son,—one of them says with a view to adoption. Now, no doubt, that does not of itself make an adopted son, or make him the heir, but when you find a larger body of witnesses who appear to have had quite as much or better knowledge of the facts, come and say that the ceremonies of adoption were actually performed, and that they were present at them, and that the deeds were genuine deeds; then the fact that these witnesses who deny the adoption are obliged to admit that the boy was being brought up in the house during Hurree Coomar's lifetime very strongly confirms their evidence.

It is said also that the deeds were not registered. If they had been registered it would have been more clear, but it appears to be such a common

thing not to register deeds, that their Lordships cannot think the mere circumstance of their not being registered is any ground why the adoption should not be believed. Then, indeed, the Judge who disbelieves the adoption himself, refers to the Waseatnamah, which was executed by the widow, appointing the guardians, as a genuine instrument. If that is so, it is the strongest evidence of the adoption, for it in terms recognizes the adoption as having been made.

It is important also to consider on which side the possession went, because if the adoption was recognized soon or immediately after Hurree Coomar's death, and between his death and the death of the adopted son, and the adopted son was the party in possession, and not the alleged heir, that is very much in favour of the adoption. Now the great weight of evidence clearly is that the adopted son was in possession. There was an inquiry before the Magistrate, which resulted in the adoption being recognized; the guardians of the infant took possession; they gave a lease of the property to the third Defendant, under which he took possession, and under which possession has, in fact, been kept up to the present time. Therefore, the possession has gone along with it, and though Godadhur Toee certainly seems to have executed this kobala to the party under whom the Plaintiffs claim, he did not, as far as their Lordships can see, during the life of the adopted son, take any other step whatever. It is proved by two witnesses that the purchase-money which he was to receive was not paid at the time, whether it has been paid afterwards is left in a great deal of doubt, and that circumstance tends to show that he was not the real owner in possession but a person who was merely selling a possible title.

Under these circumstances their Lordships are of opinion that although, no doubt, it may be desirable carefully to examine cases of possible fraud, yet that instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing, on a mere possible suspicion of perjury and forgery.

There was an appeal to the High Court purely

on points of law, but those points have not been argued before their Lordships,—in fact, they have been abandoned.

Their Lordships will therefore recommend Her Majesty to affirm the decision of the High Court dismissing the special appeal; to allow the appeal so far as it relates to the decree of the Principal Sudder Ameen, to reverse that decree, and to declare that in lieu thereof a decree should be made dismissing the appeal from the Court of First Instance with costs; to declare further that any costs which the Appellant may have paid in India other than the costs of the special appeal be repaid to him, the Appellant to have the costs of this appeal except so far as they have been increased by appealing against the decree of the High Court.

