

(1879) 12 PRI CK 0003

Privy Council

Case No: None

Indromoni
Chowdhrani

APPELLANT

Vs

Behari Lal Mullick, For
Self and As Guardian
of Haran Krishna
Mullick

RESPONDENT

Date of Decision: Dec. 11, 1879

Citation: (1880) 5 ILRPC 770 : (1879) 7 IndApp 24

Hon'ble Judges: James W. Colvile, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

Jambs W. Colvile, J.

1. This suit was brought by the Plaintiff, the widow of one Gopal Lall Mullich, to recover possession of property which formerly belonged to his nephew, Gocool Chunder, who died in November, 1841. Her case is that upon Gocool Chunder's death the property claimed descended to his widow Brojosoondari, by whom, it was enjoyed during her life; that on her death, on the 3rd of April, 1868, it devolved on Gopal Lall Mullick as the nearest collateral heir of Gocool; and that Gopal Lall Mullich, who died on the 7th of October, 1868, devised (for it is under a testamentary gift that she claims) all his interest in it to her. She treated Behari Lal as the principal Defendant, and alleged that he was fraudulently holding the property under the false pretence that Brojosoondari had adopted his brother Haran Krishna, and that he is the guardian of her adopted son. The Defendants insisted upon the adoption as valid, and the question was thus reduced to one of title between the Plaintiff and Haran Krishna. In this state of things the principal questions which arise on the record are whether the will upon which the title of the Plaintiff depends was executed by her husband; and if so, whether her title was defeated by a valid adoption? This question of adoption of course involves the two issues, whether Brojosoondari had authority to adopt, and whether she had in fact exercised that authority by adopting Haran Krishna. To these issues of fact has been

superadded one of law, namely, whether, supposing the adoption to have been made in fact but without certain ceremonies, those ceremonies were so essential to such an adoption that the omission to perform them invalidated that which would otherwise have been a good adoption. The lower Court found in favour of the Plaintiff that the will had been executed; it found also that the authority to adopt, which it was said Brojosoondari had exercised, had been given to her by her husband; but it also found that no adoption in fact by her in exercise of that power had been established, and that if it had been established it would have been invalid for want of the necessary ceremonies. The High Court abstained from dealing with the issue as to the will, obviously because if the adoption were a good adoption it would prevent any interest in the property from passing to Gopal Lall Mullich, and lie therefore could have had none to dispose of in favour of the Plaintiff. And taking up in the first instance the issues as to the adoption, it found that the widow had authority to adopt; that she had duly exercised that authority; and having first referred to a Full Bench the question whether ceremonies were necessary and essential to an adoption in the case of Sudras, and having received from that body a certificate that they were not essential, it adopted that finding, and so disposed of the question of law. The result was a decree dismissing the Plaintiff's suit; and the present appeal is against that decree.

2. Before considering the question of adoption, it may be well to refer a little more particularly to some of the antecedent facts of the case, Gocool Chunder, as has already been said, died in November, 1841. He left him surviving, not only his widow, but Gobind Lall Mullick, his father. The estate in question had descended to him and a deceased brother Brojendro Chunder Mullick from their maternal grandfather, either directly or through their mother Rashmoui Dossee, it does not appear very clearly which. Brojendro Chunder Mullick died without children, and unmarried, and his eight annas share passed by law to his father. For several years the father-in-law and the widow appear to have gone on harmoniously. She was probably very young, her husband having died young, and the father-in-law naturally administered the whole estate. Then quarrels began between them, and Gobind hall seems to have conceived the notion of defeating the widow's estate altogether by setting up a case that his son Gocool Chunder had in his lifetime adopted a cousin Doyodronath by name, who was one of the grandsons of Gopal Lall Mullick. Litigation ensued, and in the course of that litigation the widow appears to have pleaded a written authority to adopt. The case was tried before a Principal Sudder Ameen, who decided against her authority to adopt, but also decided against the case of adoption by her husband which was set up by Gobind Lall Mullick. The result of this decision, if it had stood, would have been to confirm Brojosoondari in her widow's estate, but with a negation of the genuineness of the written anumati patro which she had set up. On appeal the Sudder Court took the somewhat singular course of saying that inasmuch as the property was situated in different zillahs, and their previous leave to bring the suit in the zillah in which it was

brought had not been obtained, the whole proceedings were coram non judice and must begin again. In that state of things Gobind Lall Mullick, the father-in-law, died in the month of March, 1858. Shortly after his death the solehnamah, or instrument of compromise, on which so much turns in this case, was executed between Gopal Lall Mullick and the widow. It contains clear admissions on the part of Gopal Lall that the case set up by his brother Gobind Lall as to the adoption of Doyodronath was a false case, and that the widow had an authority from her husband to adopt five sons in succession. It further contains the following provision: "And you shall take as your adopted son, in the manner prescribed by the Shastras, the son born of the womb of the wife of Anund Mohun Mullick, your sister's husband; that is to say, the son born of the womb of your uterine sister; but if for any cause you cannot adopt that son, you shall, by adopting successively the sons of any other person or persons of the same caste with yourself, maintain in accordance with your husband's permission the line of persons by whom offerings of water and the funeral cake are to be made to yourself and your husband, and to the pitriloka (ancestors) of both of you." This solehnamah also contained a confirmation of the gifts which Gobind Lall was said to have made out of the eight annas share which he inherited from his son Brojendro Mullick, viz., two gifts of four annas, and of one anna to Gopal hall Mullick, and a gift of the remaining three annas to Brojosoondari herself; and farther, an agreement between the parties thenceforth to hold the estate in the proportions of eleven annas and five annas.

3. It appears to their Lordships impossible for the representative of Gopal Lall, claiming through him, to contend in the face of this document that there was no power to adopt. Two Courts, moreover, have found that there was authority to adopt, and their Lordships feel bound in this, if in any case, to adhere to their rule of not disturbing the concurrent finding of two Courts upon an issue of fact. It has however been strongly argued before them that inasmuch as the widow once set up a written authority to adopt, whereas the witnesses who now speak to the adoption seek to prove only a verbal authority to adopt, so much discredit attaches to the ease for the adoption that the witnesses who depose to it are not to be believed when in conflict with those for the Plaintiff. Their Lordships do not conceive that that argument is well founded. The solehnamah, it may be observed, does not itself state whether the authority to adopt was written or verbal. It may well be that according to the course, unhappily too common, of Hindu litigation, when the widow found that her father-in-law, who was the principal witness, if the story now told is true, to the giving the verbal authority to adopt, had turned round upon her and was seeking to dispossess her by setting up a false case of an adoption by her husband, she may have been advised, and may have been foolish and wicked enough to adopt the advice, to set up a written authority to adopt which really never existed. And she may at the time when the solehnamah was executed have abandoned that case, and fallen back upon a verbal permission to adopt which was then admitted. But if this were so, her inconsistent conduct would not affect the credit of those

witnesses who now speak to the verbal authority to adopt, and to the alleged exercise of it by her. Therefore their Lordships think that this argument ought not to have much weight with them in determining the credit of the witnesses who have sworn to the adoption.

4. The story of the adoption, as told by the Defendant's witnesses, is as follows: Brojosoondari, who had previously adopted one Romesh Chowdry, and after his death had taken some steps to procure in adoption a son of one Mozoomdar, an adoption which it is clear on the evidence was never perfected, determined to adopt Haran Krishna, the second son of Anund Mohun Mullick, being a person answering to the description in the solehnamah of the child - to be taken in adoption. The child was formally given and received in adoption at Brojosoondari's house at Neemteeta in zillah Moorshedabad on the 20th of December, 1867, corresponding with the 6th of Pous., B. 1274; but no religious ceremonies were performed on that occasion. A few days afterwards she went to a place called Ashtamoonissa in zillah Pubna, which was the home of her father, and took up her abode with Gourang Chunder Roy, her nephew or cousin, taking with her Harem Krishna, the adopted son. Three months afterwards, in the month of Cheyt, she caused the putreshti jag ceremonies, including the datta homam or burnt sacrifice, to be celebrated under her auspices in the house of this Gourang Chunder Roy; and on that occasion executed a wasiutnamah in favour of Behari Loll, authorizing him to act as guardian of, and manager of the estate for, the adopted son during his minority. On the following day, the 31st of March, 1868, she further recognised the adoption by executing a pervannah to the ryots, declaring that she had adopted this child and that they were to pay their rent to Behari hall on his account. She died at Ashtamoonissa a few days afterwards, on the 3rd of April, 1868, and at her obsequies, which took place there, Haran Krishna took the part which it is usual and proper for a son of the deceased to take. After the return of the Defendants to Neemteeta there was a dispute as to the fact of the adoption, and Gopal Lall Mullick and his faction appear to have got possession, temporarily at least, of the house of Brojosoondari at Neemteeta. It is pretty clearly established that Gopal Lall Mullick performed or affected to perform the sradh, which is customarily performed thirty days after the death of the deceased, at her house, whilst Haran Krishna, as her adopted son, was performing a rival sradh in the house of his natural father. But although Gopal Lall Mullick may have got temporary possession of the house, there is nothing to shew that he ever got possession of the property. There is in the Record some evidence of a threatened or apprehended disturbance, and of some persons having been bound over to keep the peace, but there is nothing to shew how Haran Krishna got into possession, as he unquestionably did get into possession, or that Gopal Lall Mullick ever took any legal proceedings to disturb or question that possession. That is the general effect of the evidence in favour of the adoption.

5. On the other side there are a great many witnesses who deny altogether the fact of the adoption. Some of them, relying on the absence of the usual publicity, say

that if there had been an adoption they must have known of it; that they would have been invited guests, and would have been present at the ceremony; others again attempt to prove two distinct alibis, one being directed to shew that Brojosoondari was not at Neemteeta, where the adoption is said to have taken place in the month of Pous, but had quitted it for Ashtamoonissa in the preceding month of Aughran or at some prior time; the other to shew that Haran Krishna did not accompany her, but remained in the interval between Pous and Cheyt in the house of his natural father. It may be remarked that the most respectable witness who speaks to the presence of Haran Krishna in the house of his natural father at one time during this period is the pleader who was examined first for the Plaintiff, and that his testimony is not absolutely inconsistent with the Defendant's case, because it is part of that case that Haran Krishna was not at Ashtamoonissa during the whole of Brojosoondari's residence there, but in consequence of the illness of his natural mother was sent back to his natural father's house at Neemteeta for a time, returning in or before Cheyt to Ashtamoonissa. The evidence, however, of other witnesses who speak to the fact of his continued residence at Neemteeta is utterly irreconcilable with the notion of his having gone with Brojosoondari to Ashtamoonissa, or indeed with his ever having been there. Therefore there is a direct conflict of evidence, and it is perfectly impossible to reconcile the two stories. The learned Judges of the High Court seem to have gone very carefully through the evidence on both sides, and their Lordships are not disposed to dissent from the conclusion to which they came, that the testimony of the witnesses on the part of the Defendant, and especially that of Gourang Chunder Roy, is more worthy of credit than that of the witnesses for the Plaintiff. It is not necessary for their Lordships to go in detail through the evidence on both sides. It is sufficient to say that the conclusion to which the High Court came is that to which their Lordships, after hearing the whole of the evidence read, would themselves have been disposed to come, and that they also think it is confirmed by the probabilities of the case. One of the arguments on the other side as to the improbability of the alleged adoption was founded upon the state of ill feeling which is said to have existed, and which does seem at one time to have existed, between Brojosoondari and Anund Mohun, and her sister. It is not, however, shewn that that state of feeling, if it existed at one time, continued to exist up to the time of the alleged adoption. That it once existed is a circumstance which may perhaps explain why, instead of taking Haran Krishna in the first instance, Brojosoondari adopted Romesh Chowdry, and afterwards shewed some disposition to adopt a second person out of the family ; but it seems very difficult to reconcile the hypothesis that her hostility toward Anund Mohund and his wife continued up to the time of her death, with the unquestionable fact that Anund Mohund's son Behari was with her at Ashtamoonissa, a place distant from his and her ordinary abode, for some time before, and up to, the time of her death. The reasonable inference to be drawn from that fact is that whatever may have been the state of feeling at a previous time between Brojosoondari and Anund Mohun, his branch of the family had been restored to her favour. Another point

which was much argued as throwing discredit upon the evidence for the adoption was founded on a document which the High Court has held was not properly proved in the cause, and which certainly might have been better proved if the person to whom it is said to have been addressed had been produced as a witness. This is the letter which Anund Mohun is said to have written on receiving the news of Brojosoondari's death to one Gour Soonder Chowdry, and in which he is supposed to speak of her having executed a gift on her death bed in favour of his son Behari, a gift inconsistent with the alleged adoption. Their Lordships are not prepared to say that if this letter had been better proved it might not have been explained as referring to the wasiutnamah under which Behari has certainly acted as guardian of the adopted son, though the document itself is lost. On the other hand the facts already stated as to the possession of the estate by Behari as guardian for Haran Krishna, and the omission of Gopal Lull to take legal proceedings to obtain possession, and the (sic)perwannah to the tenants, which the High Court has found to have been executed by Brojosoondari in her lifetime, go far to corroborate the general truth of the oral evidence in favour of the Defendant.

6. Upon the whole, therefore, their Lordships are of opinion, after weighing the evidence on both sides, that they must affirm the decision of the High Court as to the fact of adoption.

7. The next question to be considered is the correctness of the finding of the High Court to the effect that amongst Sudras in Bengal no ceremonies are necessary in addition to the giving and taking the child in adoption. The strongest argument against this proposition is, of course, founded on the 56th sloka of the 5th section of the Dattaka Mimansa, which says, "It is therefore established that the filial relation of adopted sons is occasioned only by the proper ceremonies, of gift, acceptance, and burnt sacrifice, and so forth; should either be wanting, the filial relation even fails." It is admitted that whatever may be the force of the words "so forth" in the case of Brahmins, or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Sudra is the datta homam, or burnt sacrifice, which it is said he, though as incompetent to perform that for himself as he is; to repeat the prescribed texts of the Vedas, may perform by the intervention of a Brahmin priest. The authorities, however, which have been with great candour fully cited by Mr. Come, shew that it has long been questioned whether even the performance of the datta homam was essential to a valid adoption, at all events in the case of Sudras. Jaganatha lays down (3 Digest, 244) this broad proposition: "The oblation to fire with holy words from the Veda is an unessential part of the ceremony ; even though it be defective, the adoption is nevertheless valid," and in arguing in support of this proposition he seems to make no distinction between Sudras and the superior castes. In the case before the Privy Council 2 Knapp, 287. (which it appears was a case between Brahmins), Lord Wynford says in his judgment, "But although neither written acknowledgments nor the performance of any religious ceremonial are essential to the validity of adoptions, auch

acknowledgments are usually given, and such ceremonies observed, and notice given of the times when adoptions are to take place in all families of distinction as those of zemindars or opulent Brahmins, that wherever these have been omitted, it bonoves the Court to regard with extreme suspicion the proof offered in support of an adoption." This statement of the law is perhaps of more value than it would otherwise have been, when it is considered that the case was argued on one side by Mr. Serjeant Spankie, who had great experience in India and probably was better acquainted than English counsel at that period generally were with questions of Hindu usage and law. It cannot, however, (sic)In considered as more than a dictum, since the decision was (sic)agamid the adoption as a fact. It was, nevertheless, in accordance with the law as then laid down by Sir Thomas Strange at pp. 83 and 84 of the 1st vol. of his Treatise, 1st edit., and the authozities cited by him. Then it has been more recently decided in the Madras High Court that even in the case of an adoption by a Brahmini woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this ease in not considering to what extent the Madras decision is correct, and how far the ceremonies may be omitted in the case of (sic)adeption by a Brahmini woman. They may, however, observe that the reasoning of the Madras Court applies even a fortiori to Sudrns. The other Indian decisions which have been cited, and partieularly those of the late Suddur Dewanny Adawlut, clearly shew that the present question has long been treated as an open and vexed one by Pundits as well as Judges. It was so treated in a case before their Lordships in 1872, Sreenarain Mitter v. Sreemutty Kishen Soondory Dassee Law Rep. Ind. Ap. (Sup. Vol.) 149., but was not then decided, the unit being dismissed upon another ground. Lastly, the Full (sic)Beaen in this case appears to have satisfied itself that the passage in the Dattaka Nirnaya, upon which Pundit Shamachurn Sircar, in (sic)has Vyavastha Darpana relies as an answer to those who deny that the performance of the datta homam is essential to an adoption by a Sudra, is in fact an authority the other way.

8. Upon the whole, then, their Lordships have come to the conclusion that the weight of authority is in favour of the finding of the Full Bench of the High Court.

9. They would have been sorry to come to a different conclusion, because, although it may be true that the use of the ceremony in question on the occasion of an adoption is so general amongst Sudras that tins absence of it may fairly, as Lord Wynford observed, cast suspicion upon a doubtful case of adoption, yet to hold that where the giving and taking of a child in adoption are established, the omission of the ceremony invalidates that adoption, would mischievously, as they conceive, strengthen the meshes of the purely ceremonial law, and tend to encourage suits to impeach bona fide adoptions. Their Lordships, agreeing with and adopting the finding of the Full Bench of the High Court, do not think it necessary to consider what would be the effect of the subsequent ceremonies performed at Ashtamoonissa as a remedy of any defect which up to that time may have existed in the adoption. They only observe that they have not been referred to any distinct

authority that the defect may not be so supplied, particularly in cases where, as here, according to the evidence, it was from the first announced that the ceremonies usually incident to an adoption would take place at a subsequent time.

10. The title of the Defendant being established, their Lordships need not consider whether the will, which is an essential link in that of the Plaintiff, has been proved, and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. There will of course be no order for costs, the case having been heard *ex parte*.