

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chowdry Pudum Singh v. Kooer Oodey Singh, from the late Sudder Dewanny Adawlut at Agra, North-Western Provinces of Bengal; delivered on the 12th March, 1869,*

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Present:

LORD CHELMSFORD.

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

THIS is an Appeal from a Decree of the late Sudder Dewanny Adawlut at Agra, reversing a Decree of the Principal Sudder Ameen of Zillah Meerut, made in favour of the Appellant.

The suit was instituted by Chowdry Mohur Singh, the father of the Respondent (who died while the suit was pending), to recover possession from the Appellant of the whole of the moveable and immoveable property formerly belonging to Chowdry Hem Singh, deceased, a cousin of the Plaintiff, consisting of ancestral property and of property acquired and amassed by Chowdry Hem Singh and by his widow Khoosal Kooer out of the proceeds of his ancestral estate.

The suit was instituted after the death of the widow Khoosal Kooer, the Plaintiff's claim being founded on his right of heirship to Hem Singh. It appears by the Plaint and a Genealogical Table annexed to it, that there were other persons descended from the same common ancestor as the Plaintiff, who would have an equal right with him to a share in the succession of Hem Singh. The Plaintiff, in his plaint, assigns as a reason for not

including them among the Defendants, that " they had not possession of the property in suit, and that if they thought they had any right or interest in the matter they could proceed against the Plaintiff at their option."

The plaint states that after the death of Khoosal Kooer the managers of the estate presented a spurious will to the Collector, setting forth the Defendant as her adopted son, and by that means he contrived to get possession of the estate. And it alleges that the Defendant is not the adopted son of the deceased widow Khoosal Kooer, and that she had no power to adopt a son as long as the Plaintiff was alive. That the Defendant does not belong to the family of which Khoosal Kooer and Plaintiff are members, and that he is merely the foster son of Suhej Kooer. That it is not true that Khoosal Kooer ever executed a will, and, had she done so, a will made on the point of death would not be legal.

The Defendant, by his answer to the plaint, states that the villages and properties claimed belonged to Hem Singh, the sole and absolute proprietor, though some of the properties were purchased after his death by his widow Khoosal Kooer. That Hem Singh had no issue, and therefore he selected the Defendant, who was of the same family and sect as himself, and was then but twelve months old and the youngest child of his parents, with their consent, to be his adopted son. That he received Defendant into his arms and brought him up as his own son, and authorized his wife, in case the rites of adoption were not performed during his own lifetime, to perform them after his death, declaring that he had constituted Defendant proprietor of his entire estate, as though Defendant were his own son. That accordingly, when Hem Singh died, Khoosal Kooer carried out his injunctions, and performed the ceremony of adoption of the Defendant.

The Defendant further states in his answer that the property left by Suhej Kooer, aunt of Hem Singh, also came into his possession in consequence of his being Hem Singh's adopted son. And that, although being the rightful heir and successor to the estate, he did not need the support of a will, yet that, as a matter of precaution, Khoosal Kooer executed a

will in his favour. That he does not rest his title upon that will, but bases his claim as lawful and absolute proprietor of the estate on his hereditary rights.

Issues were framed by the Zillah Court which were calculated to raise various questions, but the Sudder Court, in their Judgment upon Appeal from the Zillah Court, after observing that the issues were very badly drawn, said, "The pleadings show that the only point for determination was whether the widow, Khoosal Kooer, adopted the Defendant, Pudum Singh, by desire of her husband, Hem Singh."

This single question appears to have been the one to which the greater part of the evidence in the suit was directed, and upon which alone the Judgment in the Zillah Court, and also in the Sudder Court, proceeded.

The Principal Sudder Ameen dismissed the Plaintiff's claim with costs, being of opinion that it was clearly proved by the testimony of the Defendant's witnesses,—most of whom, he said, were respectable and trustworthy persons,—that Hem Singh adopted the Defendant, Pudum Singh, when he was twelve months old, and gave authority to his wife, Khoosal Kooer, to complete the formal ceremony of adoption, and that it was further proved by the testimony of the same witnesses that after Hem Singh's death, Khoosal Kooer went through the ceremonies of adoption in respect to the Defendant.

Upon Appeal from this Decree to the Sudder Court, that Court, upon the documentary evidence in the cause, arrived at a conclusion directly opposed to that of the Lower Court, considering that it entirely excluded the presumption of the truth of the Defendant's story, that the widow adopted him at the end of 1836 by desire of her husband.

They therefore held that the Plaintiff was entitled to succeed to a share in the property in suit as one of the next of kin of Hem Singh, and decreed in favour of the Appeal and of the Plaintiff's claim, and reversed the decision of the Lower Court with costs.

The Decree, which was drawn up in conformity with this Judgment, embraced the whole of the property included in the plaint, although the Court

held that the Plaintiff was entitled only to a share in the succession as one of the next of kin of Hem Singh. The Decree, therefore, cannot be maintained, and the evidence furnishes no materials to enable their Lordships to vary it so as to limit it to the share of the property to which the Plaintiff has established a right. It is possible, also, that some portion of the property claimed may have belonged to Khoosal Kooer in her own right, and may have passed to the Defendant by her will, the validity of which, as to such property, the Plaintiff can have no right to question.

But although the Decree in favour of the Respondent for the whole of the property claimed by him cannot stand, yet as he would not be entitled even to a share in the succession to Hem Singh if there were a valid adoption of the Appellant, their Lordships have felt it their duty to determine that question (the most important if not the sole question dealt with by the Courts below) in order to prevent further litigation respecting it.

The question as to the adoption of the Appellant is one entirely of fact. There is no doubt, and indeed it was fully admitted, that adoption might be made by a widow under an authority conferred upon her for that purpose by her husband. Of course, such authority must be strictly pursued, and as the adoption is for the husband's benefit, so the child must be adopted to him and not to the widow alone. Nor would an adoption by the widow alone, for any purpose required by the Hindoo law give to the adopted child, even after her death, any right to the property inherited by her from her husband. In order, therefore, to establish the validity of the adoption in this case it was necessary for the Appellant to prove:—

1st. The authority given by Hem Singh to his wife to make the adoption; and

2nd. The actual adoption by Khoosal Kooer of the Appellant as the son of Hem Singh.

The Appellant proved, by several witnesses to whom the Principal Sudder Ameen gave credit, but upon whom the Sudder Court placed no reliance, that the Appellant was the younger son of Zalim Singh; that Hem Singh asked, and obtained permission of Zalim Singh and his wife, to adopt the Appellant. That Hem Singh took away the Appel-

lant, then a child of twelve months old, and carried him to his house, and placing him on the lap of Khoosal Kooer, said, "I have brought you this child to adopt as our son." That a year after, Hem Singh said to Khoosal Kooer. "If I live long enough, I shall go through the ceremony of adopting the child myself; if not, I authorize you to perform the ceremonies of adoption as soon as he is five years old;" and that Hem Singh died a year after giving this authority. The witnesses also proved, that when the Appellant had attained the age of five years, Khoosal Kooer went through all the ceremonies of adoption which they minutely described. It does not appear by the evidence of any of the witnesses that Khoosal Kooer declared at the time that the ceremonies were performed for the purpose of the adoption of the Appellant as the son of Hem Singh, in pursuance of the authority which he had given her. One of them, on the contrary, says that "Khoosal Kooer adopted Pudum Singh as her own son, at the request of Hem Singh."

If the adoption of the Appellant as the son of Hem Singh had really been completed by Khoosal Kooer, his name ought to have been substituted for hers in the books of the Revenue Collector, as the property of Hem Singh would, by the act of adoption, have been divested from Khoosal Kooer, and would have vested in the Appellant as his son and heir. Some of the witnesses say, that after performing the ceremonies, Khoosal Kooer ordered her dewan to give notice of the adoption to the Collector. Either this order was never given, or it was not obeyed, for it does not appear that any change was made in the entry in the Collector's books; and Hem Singh's property continued to be registered in Khoosal Kooer's name down to the time of her death, which took place at least ten years after the Appellant had attained his majority. But Khoosal Kooer caused herself to be entered in the books of the Qanoongoe or Record Keeper of the village of Koorja, as the guardian and protector of Pudum Singh (the Appellant).

Now if this were intended as the record of the fact of an adoption which had divested the property of Hem Singh from his widow, and made her merely guardian of the minor adopted son, it seems extra-

ordinary, after such a complete lawful adoption as the witnesses represent, that Khoosal Kooer did not take the most effectual mode of recording it, by pursuing the regular course of substituting the Appellant's name for her own in the Revenue Collector's books. In the absence of any such record, the instances of the occasional description of the Appellant as the son of Hem Singh are of no value. The Principal Sudder Ameen laid great stress upon a supposed entry of the Defendant's name as under the guardianship of Khoosal Kooer in the Khewut for Proprietary Register of 1256 Fusly, which he said would not have been made if the Appellant were not the adopted son of Hem Singh. Upon turning, however, to the only Khewut printed in the proceedings of the date named, it will be seen that there is no entry at all as to guardianship, but under a column headed "Name of Puttidar" the Appellant is entered as "Pudum Sing, son of Hem Singh." In a statement of mutation of names of Lumberdars and Puttidars however, in which Pudum Singh's name is entered in the column of Puttidars, but not as the son of Hem Singh, there is the signature of Khoosal Kooer, with the addition of the words "guardian of Pudum Sing;" and it is probable that the Principal Sudder Ameen mixed up the Khewut and this document together in his mind. It is the only one of similar documents in evidence which is signed by Khoosal Kooer, and there is nothing upon the face of it to show that it relates to Hem Singh's property.

The description of Pudum Singh, as the son of Hem Singh, in the first power of attorney executed by him and Khoosal Kooer, is of little importance, as the parties were at liberty to describe themselves as they pleased in this private instrument; and the same observation applies to the entry of Hem Singh's name as the father of the Appellant in the income-tax receipts, as most of the particulars inserted in the different columns could only be known to and filled in by the party by whom the tax was to be paid. The Appellant, in support of the evidence of an adoption, relied upon a proceeding by Khoosal Kooer on the 25th March, 1836, when she presented a petition at the office of the Deputy-Collector of Revenue, describing herself

as the widow of Hem Sing, and praying that the name of Pudum Sing might be added to her own in the Zemindaree registers of certain villages. The Sudder Court observed upon this proceeding "that the joint entry of the widow's and Pudum Singh's names was in some respects inconsistent with the averment of his adoption, which would have placed the two in the position of parent and child, or guardian and heir." And, they added, "We find that the application referred to property acquired by the widow after her husband's (Hem Singh's) death, and which is not in suit in the present case."

There is some doubt as to the accuracy of the statement that the village named in the petition of Khoosal Kooer are not in suit in this case, as it was pointed out in the course of the argument that most of them are included in the Plaint. But there still remains an objection to the use of this proceeding in proof of the adoption of the Appellant, which was slightly adverted to by the Court. It must have preceded the alleged ceremony of adoption. The Appellant was twelve months old at the time of the commencement of the intended adoption. Hem Singh lived a year afterwards, and died on the 22nd October, 1834. The ceremonies of adoption are stated to have been performed by Khoosal Kooer when the Appellant was of the age of five years, which, according to the dates, he could not have been on the 25th March, 1836, when the petition of Khoosal Kooer was presented.

All the acts of Khoosal Kooer with respect to Hem Singh's property appear to have been dictated by a desire to continue to be Zemindar during her life, and to secure the succession to it after her death to the Appellant. She may have attempted, at the same time to reconcile her continued possession with the alleged wishes of her husband in favour of the Appellant.

The documentary evidence produced on the part of the Respondent tends much more strongly to throw suspicion upon the veracity or the accuracy of the witnesses who speak to the fact of the adoption by Khoosal Kooer, as it is wholly inconsistent with the idea of any such adoption having taken place.

It must always be borne in mind that Khoosal

Kooer remained the registered owner of Hem Singh's property for the whole of her life. In addition to this circumstance, there are acts and declarations of Khoosal Kooer which cannot be reconciled with the fact of an adoption of the Appellant. Stress was laid by the Counsel for the Respondent on a statement made by Khoosal Kooer in a suit instituted by her against Tara Singh, claiming the succession as heir to the whole of her husband's property, that "Hem Singh died without leaving any issue male or female." It was observed that this action, which was brought on the 23rd of March, 1836, was contemporaneous with the above-mentioned Petition of Khoosal Kooer to have the Appellant's name added to her own as the proprietor of certain villages, which was presented on the 25th of March, 1836. According to what has been already remarked, this must have been prior to the time at which the alleged adoption took place, and therefore it was then strictly true that Hem Singh had died without leaving issue. But yet it is extraordinary, if Khoosal Kooer had any intention of carrying out her husband's wishes with regard to the Appellant, that no mention whatever should have been made of the authority to adopt, and of her purpose to adopt the Appellant when the proper period arrived, in a suit which seemed peculiarly to require a true and full account of the destination of Hem Singh's property. Again, in 1841, long after the alleged adoption, Hem Singh, and Tara Singh his brother, having been joint proprietors of a village, and upon the death of Hem Singh, Khoosal Kooer's name having been entered in the Register instead of his, and upon the death of Tara Singh the name of his widow Meha Kooer having been substituted, upon the death of Meha Kooer, Khoosal Kooer caused her name to be recorded as proprietor of the village, which, if there had been an adoption of the Appellant as heir of Hem Singh, he would have been.

Although the Appellant does not rest his title to Hem Singh's property upon the will of Khoosal Kooer, yet it is impossible to pass over the fact of her having made this will or to omit all notice of the contents of it. Although, according to the case of the Appellant, Khoosal Kooer had failed in her duty by not divesting herself of Hem Singh's



property upon the completion of her adoption, yet as that act made him heir to his adopting father, no strength could be added to his title by the will of the widow. In consequence, however, of her remaining in possession of Hem Singh's property, doubt would probably be cast upon the fact of the Appellant's adoption, and therefore her declaration of her having performed the ceremonies in pursuance of her husband's authority would have been useful as evidence; but instead of describing the Appellant as the adopted son of Hem Singh, the will of Khoosal Kooer is in these terms:—"As Kooer Pudum Singh, the adopted son of your Petitioner, has been in possession of your Petitioner's estates for a long period, and as Petitioner has no other heir or successor but him, and as Petitioner has retained him in possession during her lifetime, and he carries on all the business of managing the villages and Zemindaries, &c., therefore Petitioner prays that the name of Pudum Singh be substituted for her own name as proprietor of all the Zemindaree and Malgoozary villages and maafee lands of her estate, and Pudum Singh may be recognized as the owner of all her real and personal property."

Upon the death of Khoosal Kooer reports were made of the facts connected with her death by the Qanoongoes of the different Mouzahs in which Khoosal Kooer was styled either Zemindar, or Zemindar and Lumberdar, and all of them stated the conditions of settlement of Mouzahs in these terms:—"Whomsoever Khoosal Kooer may constitute her heir in her lifetime, the same shall be entitled to the office of Malgoozar after her death."

The Putwary's memorandum on the death of Khoosal Kooer is as follows: "The said Mussumat departed this life by the will of God on the 17th December, 1861, &c., and left Kooer Pudum Singh, her adopted son, aged 31 years, as the heir and successor to all her property."

Pudum Singh, being of the age above-mentioned at the time of Khoosal Kooer's death, it is not likely that he had never heard of his having been adopted as the son of Hem Singh, if such a ceremony had taken place. And if he had been informed of the fact, it was to be expected that, although he had patiently submitted to Khoosal Kooer's usurpation of his property during her life,

he would have seized the earliest opportunity of asserting his rights as the heir of Hem Singh. But it appears that this was not the course which he pursued, nor the title by which he claimed the succession. The Report of the Tehseeldar of Koorja on the succession to Khoosal Kooer, states "that the Putwary and Qanoongoe, in their respective reports of the death in question, have mentioned Kooer Pudum Singh, her adopted son, as the heir to the property of the deceased Mussumat. And that Pudum Singh had put in a petition praying that his name might be recorded as Lumberdar and Puttidar in place of that of Khoosal Kooer, deceased, as there was no other heir but himself."

The Counsel for the Appellant endeavoured to explain away the effect of this claim as heir of Khoosal Kooer, by the suggestion that, in thus claiming, the Appellant had been misled by the reports of the Qanoongoes as to the right of succession to the property held by Khoosal Kooer. But (as already observed) if the Appellant really had a title to the property as the heir of Hem Singh, it is impossible to believe that he could have been ignorant of it; and his claim to the succession in a different character is almost conclusive against the attempted proof of a lawful adoption of the Appellant as the son of Hem Singh by Khoosal Kooer, and consequently against the truth of the story told by the witnesses upon the subject,

Their Lordships, therefore, agree with the Sudder Court, that the Appellant has failed to prove that he was lawfully adopted as the son of Hem Singh by Khoosal Kooer, in pursuance of authority conferred upon her for that purpose by her husband; and that he has, therefore, no answer to the claim of the Respondent to a share of the succession to Hem Singh's property. But as the Court has made a Decree which gives the Respondent the whole of Hem Singh's property, when he is entitled only to a part, that Decree must be set aside.

Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare that it has been established between the parties to the suit, that the Appellant is not the duly adopted son of Hem Singh, and that on the death of Khoosal Kooer, Mohur Singh, the father of the Respondent, and the

other heirs in equal degree then living became entitled to inherit the estate of Hem Singh, of which his widow died possessed. And they will recommend to Her Majesty that with this Declaration the cause be remitted to the High Court of Agra to make such inquiries as shall be necessary to ascertain what share of the estate of Hem Singh the said Mohur Singh was entitled to, and what part of the property claimed by the Plaintiff was the estate of Hem Singh. And as the Appellant has succeeded in proving the invalidity of the Decree, although he has failed in his opposition to the Plaintiff's title, their Lordships will further recommend that each party bear his own costs of the Appeal.

