Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sreenath Gungo Padhya, and others v. *Mohesh Chunder Roy and others, from the High Court of Judicature at Fort William in Bengal; delivered 20th June* 1873.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is an appeal from a judgment of a division bench of the High Court at Calcutta, which dismissed a suit instituted by the Appellants. The suit was brought by them as the grandsons and heirs of Sudasib Roy, for possession of property which had formerly belonged to him; and they sought, in order to establish their right to that property, to set aside an adoption which had been made by the widow of Sudasib of a person called Issur Chunder. Bemola appears to have been the only widow left by Sudasib. The question in the suit is, whether the adoption which was alleged on the part of the Respondent Mohesh Chunder, who is the son of Issur Chunder the adopted son, was valid or not. On the part of the Appellants it is said that no power was given by Sudasib to his widow to make an adoption and that although the adoption was in fact made by her some years after her husband's death, and although Issur Chunder was treated by the family as a properly adopted son, still there was no foundation for his title. The High Court came

to the conclusion upon the evidence that the validity of the adoption is established; and their Lordships, after hearing very fully the discussion upon the evidence by the counsel for the Appellants, are of opinion that it is impossible to disturb that judgment.

It appears that Sudasib had a brother of the name of Bhobanee, and the case in favour of the adoption is that the two brothers came to an agreement that they would give power to their wives for each to adopt a son. It is said that there was a wusseutnamah executed by the two jointly, and that in addition there were deeds made by each separately giving the power to their respective wives. Considerable evidence was given as to the execution and existence of these deeds. A lady of the name of Krishnamonee, who was a member of the family and a niece of the two brothers Sudasib and Bhobanee, said that she was present when the deeds were executed, the joint deed and the two separate deeds, and there are other witnesses who say that they have seen the deeds. With regard to the wusseutnamah there is also evidence, which is not unsatisfactory, of its existence, and of its having been brought forward as a deed shortly after the death of Bhobanee. It was proved before the Collector and placed in the records of the collectorate. After Bhobanee's death, Bemola. as the widow of Sudasib, and the two widows of Bhobanee presented petitions to the Collector praying that their names might be placed on the register instead of those of their deceased husbands, and on that occasion they produced this wusseutnamah and called witnesses to prove its validity. After having done so, it was put amongst the records, and there is a proceeding of the Collector, dated on the 8th December 1821, which not only refers to the document but states its contents. It appears

that there had been an investigation, and the proceeding in the collectorate states that on investigation of the records certain things appeared; and then there is this important statement in it: "Afterwards on perusal of the wusseutnamah "bearing the signatures of Sudasib Roy and "Bhobanee Perschaud Roy aforesaid, dated the "16th Magh 1219, B. S., it appeared that they "appointed Joyhurruree Chatterjee, their sister's "husband, as protector and guardian of their "wives, and executed to him a wusseutnamah to "the following effect: that should they (we the "the writers of the O. N.) die without issue, "then the names of their widows should be "entered in the joint serishta in lieu of their "own in respect of the zemindaries, and that "each one of them should adopt a son, and until "majority of such adopted son should continue "to carry on the affairs of the zemindary, make "payments of Government revenues, &c., and "that their widows shall have no power to act "independently in respect of any of his, Joy-"hurruree's, duties by virtue of their distinct "proprietary rights." There is, thus, as long ago as the year 1821, an incorporation of the contents of that document in the order of the Collector. The non-production of it seems also to be satisfactorily accounted for, because it seems that some of the records in the collectorate office have perished from damp and decay, and a fair presumption arises that it was thus destroyed. The evidence of the execution and existence of the separate powers given by the two husbands to their wives is not so clear and satisfactory as that of the wusseutnamah; but it was admitted at the bar that the wusseutnamah itself, if a genuine document, was sufficient to confer a power upon each of the widows to make the adoption. It is not necessary to say more on the evidence of the *factum* of the deeds. It

may be that there are circumstances in the case which, if this evidence had stood alone, might have caused considerable difficulty to those who had to decide this case. But the evidence which has been given of the recognition of the adopted son by the family, appears to their Lordships to remove that difficulty and to make this case very clear. It was admitted at the bar by both the learned counsel for the Appellants, with a full knowledge of the evidence, that there had been an acknowledgment and recognition of Issur Chunder by the whole family from the time of his adoption down certainly to the death of Doorgamoye, who was a daughter of Sudasib, and subsequently down to the time of the death of Bemola, which occurred in 1861; and no evidence has been shown to their Lordships that from the death of Bemola in 1861 to the commencement of this suit, which was on the last day of 1866, there was any protest made, or proceedings taken by those who now assert that upon her death their full title to the possession of their grandfather, Sudasib's property, accrued.

It is not necessary after the admission which has been made for their Lordships to go into the evidence of acknowledgment. It is singular that throughout the case there is no sign whatever that any member of the family had ever thrown doubt upon the adoption. The evidence is really all one way. From the time when Issur Chunder was introduced into the family by Bemola as an adopted son, he was recognised and treated as one of the family. There were the widows of the other brother; there were descendants of a daughter of Sudasib, besides Doorgamoye, the mother of the Appellants; and none of those persons appear in any way to have questioned the title of Issur Chunder as the adopted son.

But the case does not rest on mere recognition, because the property of the family was dealt with upon the footing that he was validly adopted. One transaction furnishes the most cogent evidence against the claim now put forward by the Appellants to set aside this adoption. Sudasib's daughter, Doorgamoye, appears to have been born about the year 1814, and the present Appellants, her three sons, claim, through her, to be heirs of their grandfather, Sudasib. She, after she was of full age, took from Issur Chunder property under a conveyance, in which he is described as the adopted son of Sudasib. That conveyance gave her the right to considerable property, which, upon her death (which happened some time before the year 1844) descended upon the three present Appellants, and they petitioned to have the property placed in their names, presenting in the ordinary way a petition for mutation. It is well to advert to the terms of the conveyance, in order to see how explicitly the *status* of Issur Chunder as adopted son is stated in it. It is addressed "To my *sister* Doorgamoye Dabea." "I Issur Chunder Roy "Chowdhry, son of Sudasib Roy Chowdhry "deceased, zemindar of pergunnah Koondee, in "the Borochondopye of the seven annas share, do "execute this ikrar in the year 1248. My father "executed a deed of permission in favour of his "wife, *i. e.*, my mother, Bemola Dabea Chow-"dhranee, in these terms, that if he should die "without issue she should adopt a son who "would be entitled to the estate, and to offer the "pind (funeral cake); and would give you "property yielding a profit of Rs. 2,400, which "you would hold from generation to generation, "with the power of sale and gift. Afterwards, "on the death of my father, my mother adopted "me as her son, according to the said deed of "permission and to the shasters, and out of the "said amount due to you, gave you an eight

" annas share of the mouzah Chundunput, &c., " from the zemindary left by my father, and an " eight annas share of mouzah Halencha Ship- " pore, &c., having purchased the same. With " regard to the remainder which is due, a dispute " having now arisen with my mother, and " amicably settled with the consent of both, a " five annas share of 5 annas, the Government " revenue of which is Rs. 1,444 : 9 : 6 : 2, out of " 5 annas, 4 gundas, and 2 cowries, which is her " share of the 13 annas, 14 gundas, and 3 cowries " (13 annas and a quarter less than 15 gundahs), " which is the co-sharer's share of talook Gore- " gran, is given to you as the proportion still " due to you, to hold from generation to genera- " tion." Now the present Appellants from the time of their mother's death claimed to have the benefit of this conveyance, and have actually enjoyed it. Their Lordships do not say that this amounts to an estoppel, but it certainly affords evidence as strong against the claim they now set up as it is possible to conceive. On the death of their mother, they do not repudiate this deed, but still keeping the benefit which she obtained under it, they bring this suit claiming the property of their grandfather upon the assertion (which is derogatory to that contained in the deed) that Issur Chunder was not the adopted son. It appears to their Lordships—although the evidence of the execution of the documents conferring the powers to adopt might be considered weak in the absence of the deeds themselves, still that the recognition of the adopted son by the family, not doubtful, but strong and uniform, for a period of upwards of 40 years, is so strongly confirmatory of and so entirely consistent with them—that the High Court came to a right conclusion in holding that this adoption was established.

The chief circumstance which seems to have occasioned doubt in the minds of the judges of

the High Court is that Bhobanee, shortly after his brother Sudasib's death, presented in the Civil Court at Rungpore a petition stating that his brother had agreed with him that he would not give any power of adoption to his widow, and obtained from Bemola a petition assenting to that view. Upon proceedings afterwards taken, the judge held that the supposed petition of Bemola had not been really presented by her; and it was set aside. Now the High Court seem to have felt a good deal of doubt, because upon that occasion Bemola did not put forward the power of adoption which she possessed, and which, if genuine, was dated on the same day as the agreement which Bhobanee in these petitions alleged to be the day upon which the agreement by Sudasib not to give a power to his wife to adopt was made. But their Lordships think that the immense strength of the case on the part of the Respondents cannot be shaken by any speculation which may arise from the non-production of the power to adopt at that time. First of all, as the High Court say, they had not the proceedings before them; they had only the judgment of the judge of the Court. He certainly does not advert to it, but notwithstanding that he did not advert to it, it may have been referred to in the course of the proceedings. But if it was not, the widow Bemola was probably in a position where she herself was not able very much to interfere in the case, or she might have thought that she had a sufficient case to overthrow the agreement set up by Bhobanee without bringing into issue a document which he would certainly have disputed if it had been introduced. It does not appear that Bhobanee made any strong case in favour of this agreement, which was after very short proceedings found to be fabricated.

Their Lordships regret that the High Court, acting upon this doubt, refused to give the

Respondents their costs, because their doing so has probably encouraged this appeal.

Their Lordships desire to say that they are not to be understood to accede to the contention of Mr. Cowie, that the Appellants could not, during the lifetime of the widow, have in any way questioned this adoption by proceedings against her and her alleged adopted son, because, as he says, she having a life interest upon the assumption that the adoption was invalid, they had no *locus standi* during its continuance to take such proceedings. It is quite unnecessary to consider that proposition, and all their Lordships desire to say is that they must not be understood to assent to it. In this case there is not merely the absence of proceedings to question the adoption, but evidence of positive acts of recognition on the part of the family, and of these Appellants themselves, so strong that it is unnecessary to discuss any question of law. It is sufficient to say that upon the facts the decision of the Court below is right.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this Appeal, with costs.