

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kali Kishore Dutt Gupta Mozoomdar v. Bhusan Chunder, from the High Court of Judicature at Fort William in Bengal; delivered 26th July 1890.

Present:

LORD WATSON.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Sir Barnes Peacock.*]

This is an Appeal from a decree of the High Court at Calcutta reversing a decree of the Subordinate Judge of Goalpara, who was also Deputy Commissioner of that District, and from two interlocutory orders of the High Court in the Appeal to that Court from the Subordinate Judge.

The Plaintiff is the Appellant, and the Defendant the Respondent. Each of the parties claims to be heir at law of Juggut Chunder Dutt Gupta Mozoomdar, deceased, who was an inhabitant of Khagrabari, in the station of Dhubri, in the said district.

Juggut Chunder died on a pilgrimage in the year 1867 without issue, leaving a widow, Bama Soondari Gupta, as his sole heiress. The precise date of his death is disputed, the Plaintiff's contention being that he died on a day in Falgoon 1273, corresponding with the 7th of March 1867, whilst that of the Defendant is that he died on the 24th of Cheyt 1273, corresponding with the 5th of April in the same year, 1867.

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The parties were not agreed as to the age of Bama Soondari at the time of her husband's death. The Plaintiff makes her out to have been about 9 years of age, whilst the Defendant puts her age at that time at 12 or 13. The point is not very material, and it may therefore be taken at 9, in accordance with the Plaintiff's view.

Bama Soondari died on the 14th of Assar 1284, corresponding with the 7th of July 1877, and that would make her about 19 at the time of the alleged adoption. The Plaintiff's claim is that upon her death he succeeded to the property of Juggut Chunder as his second cousin and heir by collateral descent. The Defendant claimed as an adopted son of Juggut Chunder, and in that capacity obtained, by means of his guardian and manager, possession of the property in suit which belonged to Juggut Chunder at the time of his death. On the 27th of June 1883 the Plaintiff, then a minor, by his guardian and next friend, filed his plaint, and, after alleging that he was in possession of certain portions of Juggut Chunder's property, claimed that the remainder, being that specified in the plaint, might be awarded to him after the establishment of his right thereto by inheritance. The 5th paragraph of his plaint contains the following allegation:—

“Gunga Narain Gupta was the manager of the properties left by Juggut Chunder, the deceased husband of the minor Bama Soondari, on her behalf, till the time of her death, and did many fraudulent acts, even during her lifetime, with the vain hope of becoming the malik of the properties in dispute. Having failed in this he at last, after the demise of Bama Soondari, entered into a conspiracy and fraudulent combination with Ramanund Mozoomdar, the brother of his father-in-law, and falsely set up his minor son, the Defendant, as the legally adopted son of Bama Soondari, with a view to keep in his own hands the properties left by the deceased Juggut Chunder and Bama Soondari, depriving the real heir,

the minor Plaintiff. In fact, the minor Defendant is not the adopted son of Juggut Chunder, and Bama Soondari never took him as her adopted son ; nor indeed had she any authority or right to adopt, nor had Juggut Chunder given her any permission to adopt."

The Defendant, by his guardian, put in a written statement, in which, amongst other things, he denied the Plaintiff's right of inheritance, and set up his own title as an adopted son.

The important issues recorded for trial were,—

1st. Is the minor Plaintiff Kali Kishore Dutt Gupta the heir of the late Juggut Chunder ?

2nd. Is the minor Defendant Bhusan Chunder, *alias* Bepin Chunder, the legally adopted son of Bama Soondari, the deceased widow of the late Juggut Chunder ?

At the trial the Defendant was called upon to prove his title as a son by adoption, notwithstanding the fact that the Plaintiff was out of possession, and could not have succeeded in the event of the Defendant's failure without proving his own title as collateral heir by descent. As remarked by the High Court,—

"From the judgment of the Lower Court it appears that the Subordinate Judge almost assumed the first issue in the Plaintiff's favour, for, after setting out the facts of the case, he says:—'The whole question, therefore, turns upon the inquiry, was Bepin Chunder, Defendant, really adopted by Bama Soondari under a legally valid power to adopt, conferred upon her *bonâ fide* by her husband Juggut Chunder, or not? If there was such a *bonâ fide* adoption based upon a power to adopt duly and formally conferred by Juggut Chunder on his wife, then clearly the Plaintiff is at once out of Court. But if no adoption of the kind alleged ever took place, or if the form or outward ceremony of an adoption took place without the indispensable basis of a formally conferred power to adopt emanating from Juggut Chunder Mozoomdar, then the Defendant is at once put out of Court, and the direct consequence is the establishment of the Plaintiff's right and title.' In other words, he proposed to make the establishment of the Plaintiff's title depend upon the failure or otherwise of the Defendant in proving the validity of his adoption."

Five witnesses deposed to the fact of Juggut Chunder's having given his wife an anumati patra. Biseswari Gupta stated that Juggut Chunder read it out and placed it in a box, and handed it to his wife. The witnesses stated that the anumati patra was executed in the month of Cheyt 1273, before Juggut left home on his pilgrimage.

It was clearly proved, and in fact it was not disputed, that Juggut Chunder in the year 1867 left home on a pilgrimage to Gya and Benares, and that he died in the district of Monghyr prior to arriving at his destination.

Soon after the death Chunder Nath Gupta, who had a small interest as a co-sharer with Juggut Chunder in the zemindari pergunna Taria, gave notice of the death to the Government authorities, as he was legally bound to do; whereupon, in the month of May 1867, the property of Juggut Chunder was attached, and on that occasion a closed tin box containing documents, which was then in the residence of the deceased at Khagrabari, was taken possession of by the Sub-Inspector of Police of Gowripore and placed in an iron safe in his custody. The box and its contents remained in the custody of the police until the 6th of September 1867, when, acting under an order of the Civil Court made upon the petition of Bama Soondari, a document purporting to be an anumati patra signed by Juggut Chunder and attested by amongst others Chunder Mohun Das found in the box was sent by the Sub-Inspector of Police to the Deputy Commissioner, with a return under the seal of the Sub-Inspector to the following effect :—

“Incarnation of justice !

“In obedience to the order received, Chunder Mohun Sen, the uncle of Bama Soondari Gupta, was brought (to the station), and in his presence the closed tin box, which was attached, was opened, and on an inspection of the papers which it contained a closed cover to the address of the Registrar Saheb Bahadoor

was found. The Sen aforesaid stated that the cover contained the anumati patra authorizing the adoption ; but as I could not believe his statement, I opened the cover in the presence of Babu Biseswar Roy, the Court Inspector entrusted with the charge of the sub-district, and found the anumati patra signed by the deceased zemindar Juggut Chunder Mozoomdar, engrossed on a stamp paper, authorizing the Gupta aforesaid (Bama Soondari) to adopt. I send it to the Court along with this report after re-sealing the cover containing it with sealing-wax."

On the 11th of September 1867 the said document was sent by the Deputy Commissioner to the Civil Court, where it remained until the 6th of February 1870, when it was returned to Pudma Lochun Goswami, the then manager of Bama Soondari, a copy proved to have been examined with the original by the Mohurrer in the Collector's office and the Mohafez in the ordinary discharge of their duties having been filed in the Court.

Thus it appears that the document found in the box which was seized at the residence of the deceased remained in the custody of officers of Government from May 1867 to February 1870, when it was returned to the manager of Bama Soondari.

The witnesses above referred to who spoke to the anumati patra were examined in the time of the predecessor of the Subordinate Judge, and were believed by the Judges of the High Court, who had as good an opportunity as the Subordinate Judge himself of forming an opinion as to their credibility.

The Defendant proposed to prove the anumati patra by a copy of the document which was filed in the Civil Court, and by proving the loss of the original by a certified copy of a deposition of Gunga Narain Gupta made in a former proceeding between the same parties.

The copy had been filed by the Defendant in the Court of the Subordinate Judge on the 24th of April 1885, and on the same day two witnesses

had been examined on the part of the Defendant to prove that the copy was a true copy of the original. This was in the time of a predecessor of the Subordinate Judge who decided the case.

The copy of the deposition of Gunga Narain was tendered by the Plaintiff on the 17th of April 1886, as evidence intended to be used on his behalf. On the 1st of June the Plaintiff's witness Chunder Mohun Das deposed to the signature of Gunga Narain to the original, and the document was then marked as an exhibit, and was admitted to the record as part of the Plaintiff's evidence.

On the 21st of June 1886 the Defendant put in a petition to the Lower Court, stating that the original anumati patra executed by the deceased had been stolen, and praying that an authenticated copy might be used as evidence. In support of the petition the Defendant relied upon the above-mentioned deposition of Gunga Narain, which stated that, on the death of Pudma Lochun, the said Gunga Narain was appointed manager of the said estate, that on taking charge of the said estate after the death of the said Pudma Lochun he received the original anumati patra, and that, on search amongst the papers of the said estate, the said anumati patra could not be found, and that since that time he had searched in different ways for the said document, but that from credible sources he came to know that the said document had been stolen.

The Subordinate Judge refused to allow the deposition of Gunga Narain to be used as evidence of the loss of the original anumati patra, as Gunga Narain was living and ought to be called, and he afterwards allowed the copy of the deposition to be withdrawn from the record by the Plaintiff. He also rejected the copy of the anumati patra, upon the ground that there

was no evidence of the loss of the original, and it was removed from the record.

It would have been much better if, when the Judge rejected the copy of the deposition, Gunga Narain had been produced as a witness on behalf of the Defendant, but that was not done. It is true that Gunga Narain was afterwards tendered for cross-examination, but it was held to be then too late, as the Defendant's case had been closed.

Before the rejection of the anumati patra, Chunder Mohun Das, who was in the employ of Juggut Chunder up to the time of his death, had been examined before the Subordinate Judge as a witness on behalf of the Plaintiff, and deposed that one month after the property was attached he was told by Chunder Gupta to sign his name to the anumati patra, and refused to do so, and that Chunder Mohun Sen, Mritunjoy Bose, and Pudma Goswami, who were then present, told him that they would cause his name to be written. This is a most improbable story, and is not at all in accordance with the Plaintiff's case as stated in the 5th paragraph of the plaint. If this statement were true, Chunder Gupta, Chunder Mohun Sen, and Pudma Goswami must have been conspiring together, when, in fact, it appears from other parts of the evidence that they were hostile to each other.

The witness was disbelieved by the High Court, and their Lordships consider that his evidence was wholly unworthy of credit.

Amongst other things the witness swore that "when Juggut Chunder went on pilgrimage he did not, either at that time or before it, execute any will or anumati patra, nor did he grant any," and further, "that he had heard that as there was no anumati patra Chunder Nath Mritunjoy Bose and Pudma Lochun consorted together to fabricate one." Their

Lordships cannot but remark upon the fact of the Subordinate Judge's having recorded as evidence such worthless statements. It is also worthy of notice that the document which the Defendant attempted to prove by the copy which was rejected was that which was seized by the police in the closed box and forwarded to the Civil Court, and which was in the custody of Government officers from the time of the attachment of the property in May 1867 to February 1870, and that the time at which Chunder Mohun Das states that he was requested to attest an anumati patra was about one month after the property was attached, or in other words, whilst the document relied upon by the Defendant was in the custody of the police.

Another document, namely, a will of Juggut Chunder, was tendered in evidence by the Defendant and rejected by the Judge without referring to the evidence on the record in support of it. His reason for rejecting it, to use his own words, whatever may be the meaning attached to them, was, "Juggut Chunder's will was also put in, but refused admittance to the record on the ground of its inadmissibility under any definite section of the Evidence Act. It contains an allusion to an intention on the testator's part to proceed on pilgrimage after having executed, or after executing, a deed of power to adopt; but worded as it is, there is nothing to show definitely that such a deed of power ever was actually executed as a matter of fact."

The will was as follows :—

"To—

"The abode of all bliss, Srijut Chunder Nath Gupta, a co-sharer zemindar of pergunnah Taria, hissa half anna, inhabitant of Khagrabari.

"I, Juggut Chunder Dutt Mozoomdar, son of Ramkant Mozoomdar, deceased, a co-sharer zemindar of pergunnah

Taria, inhabitant of Khagrabari, station Gowripore, in the district of Goalpara, do execute this will to the following effect :—

“ I am starting for Gya and Benares for the purpose of performing the necessary sradhs of my ancestors, of offering pindas to them and of doing religious acts on my own behoof, after giving you the power to realize the rents of my zemindari in the said pergunnah, of my invalid lakheraj property in kismut Uchita and others, and of my purchased brahmottur and mowrussi jotes and other immoveable and moveable properties, to perform the sheba of the ancestral deities, to preserve the houses, to pay the debts and to collect the dues, to institute suits against any persons and to register my name in the sudder and mofussil and to sign the same. No son or daughter has yet been born unto me. The human body is transitory; no one can tell what may happen at any time. God forbid, but as I may die after going to the place of pilgrimage, I leave behind me an anumati patra to my wife, to adopt a son in order to the preservation of the pindas of my ancestors and myself. You are also the husband of my uterine sister and have always been living with your family in the same mess with me, and for a long time have been doing me good service by way of caring for my zemindari, &c. And there is also an unmarried niece (sister's daughter). As it is necessary for me to maintain them and you, I execute this will of my own accord and in a sound mind, to the effect that should I die after reaching the place of pilgrimage, you will take possession of a 1-anna share out of the 5-annas share which I have in the zemindari, and of a 1-anna share out of the 9-annas share which I have in the invalid lakheraj kismut Uchita and others, by registering your name in place of mine, and you shall enjoy the same down to son, grandson, daughter's son, &c., your heirs. With respect to my remaining 4-annas share in the zemindari and the 8-annas share in the invalid lakheraj, and with respect to the 3-annas share of the zemindari and the 3-annas share of the invalid lakheraj which I have obtained as a gift from my maternal grand-aunt Srijuta Bhairabi Chowdhvani, altogether with respect to the 7-annas share in the zemindari and the 11-annas share in the invalid lakheraj, and with respect to my purchased brahmottur, mowrussi jotes and others, which are in my possession and enjoyment, you shall, on my demise, cause a fit boy to be adopted from a good family or from out of my gyantis, by my wife Bama Soondari Gupta, and getting him recognized as heir, you shall manage the zemindari and all other properties till the minor attains his majority. If you or your son, grandson, or daughter's son &c., be not living, the 1-anna share of the zemindari and the 1-anna share of the invalid lakheraj and others, which I have given you, shall be obtained by me, or by my son, grandson, whoever may be in existence. If I or my wife, son, grandson be not living, then the zemindari, &c., left by me shall be obtained by you, or by your

son, grandson, and daughter's son, &c., whoever may be in existence. To the above effect I execute this will.

“The 7th Cheyt 1273 B. S.”

The will, if genuine, was a very important document, for it not only supported the evidence as to the anumati patra, but amounted to an assertion by Juggut Chunder, through whom the Plaintiff claims, that he had given power to his wife to adopt, which, in the absence of evidence to prove the revocation of the power, would, in their Lordships' opinion, have been sufficient to support the adoption. Further, the direction to Chunder Nath to cause a fit boy to be adopted by his wife would in itself, in the absence of an anumati patra, amount by implication to a power to his wife to adopt a fit boy from a good family.

It is very improbable that, if the will had been forged by Chunder Nath after the death of Juggut, he would have made the devise to himself of a one-anna share in the zemindari and a one-anna share of the invalid lakeraj dependent upon a condition which he must have known had never been performed, namely, the reaching by Juggut Chunder of the place of pilgrimage, Juggut Chunder having died on the journey to that place in the district of Monghyr. That condition is also an answer to the objection made on behalf of the Plaintiff that the will was never acted upon.

The Subordinate Judge then, having no evidence before him either of the original or of the copy of the alleged anumati patra, or of the alleged will, proceeded to deal with the whole case, and in the result expressed himself in the following terms. He said:—

“Upon a review of the whole of the evidence, I must confess that my faith has been utterly shaken in the evidence of the witnesses adduced on the Defendant's side, whereas I see no grounds whatever for discrediting those much maligned Mymensingh witnesses, on the Plaintiff's side, who were

examined by commission upon the subject of the Plaintiff's genealogical claims to inheritance. They are apparently permanent residents of the Mymensingh district, and to all appearances, unbiassed by any *personal* interest in the results of the present suit.

"Of course, *either* of the genealogical tables might be a forgery and false concoction, without difficulty. But I see no good or reasonable grounds for condemning the Mymensingh table as such, whereas I *do* believe that the Defendant's table is a fabrication in its suspicious brevity.

"In fine, I find no difficulty in arriving at the conclusion that the Defendant's claims are absolutely *nil*, and that they are based, from first to last, upon fraud and forgery. That *some* sort of a mock ceremony, to act as a *quasi* adoption, actually *did* take place, I am quite willing to believe. But that what took place was really an adoption of the Defendant (then about *nine* years of age) by Bama Soondari, or that any real *bonâ fide* adoption by her would have been attended by no more respectable a concourse of the surrounding zemindars and other native gentry than the few who had any pretensions whatever to the claim of respectability, who are said to have been present on the occasion, is a most significant circumstance.

"My belief is that the unfortunate Bama Soondari was for long past utterly crushed, and made to live a living, lingering death by the iron rod of restraint wielded by Gunga Narain so pitilessly; and that, as far as the sham adoption is concerned, that the unfortunate creature was wholly unconscious of what was going on around her, being in her last collapse, and about to breathe her last.

"There being no reason, therefore, for doubting the genuineness of the Plaintiff's claim in this suit, I decree the suit in Plaintiff's favour, with all costs."

The Subordinate Judge was silent as to the persons whom he considered to have been implicated in the fraud and forgery, or the witnesses upon whose evidence he relied in support of that finding.

The judgment of the Subordinate Judge is very unsatisfactory. There was no evidence to justify the belief which the Judge avowed "that the unfortunate Bama Soondari was for "long past utterly crushed, and made to live "a living, lingering death by the iron rod "of restraint wielded by Gunga Narain so pitilessly; and that as far as the sham adoption "is concerned the unfortunate creature was

“ wholly unconscious of what was going on
 “ around her, being in her last collapse, and about
 “ to breathe her last.” The Subordinate Judge
 did not even confine himself to the case before him,
 but went out of his way to declare his suspicions
 and throw out insinuations without the slightest
 evidence to warrant them. He said. “ It is diffi-
 “ cult to prevent one’s suspicions of foul play from
 “ carrying one back as far as the time of Juggut
 “ Chunder’s death, and suggesting to one’s mind
 “ that very possibly he did not die a natural
 “ death. The ever convenient cholera was at
 “ once put forward as the cause of his end, and
 “ this might or might not have been so.” The
 Judge does not condescend upon particulars;
 Gunga Narain Gupta, described by him as an
 utterly unscrupulous character, was not with
 Juggut Chunder on his pilgrimage or at the
 time of his death, nor was he the person who
 reported that the death was the result of cholera.
 Upon whom could his suspicions be supposed to
 rest, except upon those or some of those who were
 with the deceased at the time of his death, and
 who reported that he died from cholera? Again,
 speaking of Bama Soondari, he says, “ I do not feel
 “ much in the way of scruples myself in suggesting
 “ another and more probable cause of her illness
 “ and death, and that is slow poison, resulting
 “ from her obduracy in refusing to adopt the
 “ Defendant.” Again, “ It is curious what a
 “ high rate of mortality appears to have been
 “ amongst vitally essential personages, such as
 “ the late manager, Pudma Lochun, in whose
 “ time the alleged unfortunate theft of the box
 “ said to contain the all important deed of power
 “ to adopt is stated to have occurred; the attesting
 “ witnesses also to the important deed are all
 “ dead, and so on.”

Hasty, uncalled for, and indiscreet expressions
 like these, casting suspicions of grave crimes

against unnamed absent persons, without one tittle of evidence to support them, are wholly unwarrantable, and cannot but destroy respect for the judgment and discretion of the Judge, and lower the confidence which might otherwise attach to his decision upon the questions really before him.

The case was appealed to the High Court, and by two interlocutory orders of that Court made in the Appeal the copy of the anumati patra and of the deposition of Gunga Narain which was put in as part of the evidence for the Plaintiff were restored to the record. Those orders are also included in this Appeal. Their Lordships consider that the High Court was right in making them, and also in their finding that the anumati patra was executed by Juggut Chunder, and that the copy produced was a copy of the original which found its way into the Civil Court in the manner already stated.

The will of Juggut Chunder, which was rejected by the Subordinate Judge, and as to the genuineness of which he expressed no opinion, was produced, and proved to the satisfaction of the High Court. They gave credit to one of the attesting witnesses, Krishna Nath Surma Roy, and other evidence in support of it, and their Lordships see no reason to disturb their finding.

The High Court appear to their Lordships to have dealt very properly with the arguments urged on behalf of the Plaintiff, and the documents produced in support of the contention that both the will and the anumati patra were fabricated after the death of Juggut Chunder. With regard to the contention that the anumati patra and will were dated on days subsequent to the death of Juggut Chunder, it is impossible to believe, in the face of all the evidence in the case, that Juggut Chunder died in the month of Falgoon 1273, and not on the 24th of Cheyt in

that year, as alleged on the part of the Plaintiff in the plaint. It was inconsistent on the part of the Subordinate Judge to admit evidence to prove that Juggut Chunder died in Falgoon 1273 after leave to amend the plaint had been refused.

On the argument before their Lordships much reliance was placed on the account at page 93 of the record, dated 15th Bhadro 1274, or 30th of August 1867, in which a sum of Rs. 48. 14 was charged for the expenditure for the half-yearly sradh of Juggut Chunder. It was contended that, if Juggut died on the 5th of April 1867, the time for the performance of the half-yearly sradh had not arrived on the 15th Bhadro 1274, whereas, if he died on the 24th Falgoon 1273, or 7th of March 1867, as alleged by the Plaintiff, the period for performing the half-yearly sradh was on the very day of the date of the account. Their Lordships do not attach any importance to that document. It seems that the half-yearly sradh may be performed at any time during the sixth month after the death, and calculating by lunar months five months and four days had elapsed since the 5th April 1867. The account is signed by Chunder Mohun Sen, but he was not the manager of Bama Soondari's estate, nor had he been appointed her guardian. The reason for his rendering an account is not explained. The account is also signed by the Extra Assistant Commissioner, but it does not appear what he intended to vouch by his signature.

It is impossible to believe that, if the will and anumati patra were forged, any of the persons interested in the forgery could have been ignorant of the date of the death, or would have forged documents dated a month later. Such an account as that now under consideration could never induce their Lordships to believe

that Juggut Chunder died in Falgoon, in the face of the statement in the plaint that he died on the 24th of April, and of all the other evidence in the cause to which the Judges of the High Court have adverted.

The High Court referred to a genealogical table produced in support of the Plaintiff's title. They considered, for the reasons given, that it was not entitled to any credit. The original document is not on the record transmitted to this Board, and their Lordships are unable, therefore, to form any opinion respecting it, or to say that the High Court came to an erroneous conclusion respecting the Plaintiff's heirship. They concur generally with the High Court in their findings upon the facts, and they will humbly advise Her Majesty to affirm the judgment of the High Court, and the interlocutory orders before referred to. The Appellant must pay the costs of the appeal.

