Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Jogendur Deb Roy Kut v. *Funinder Deb Roy Kut from the High Court of Judicature at Fort William in Bengal; delivered 9th December* 1871.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS appeal is brought by Jogendur Deb Roy Kut, the Defendant in the suit out of which the appeal arises, against a decree of the High Court which overruled a decree of the Zillah Court, whereby a judgment in a former suit which had been pleaded was declared to be a bar to the further prosecution of this suit, and directed that the cause should be remanded to the Zillah Court for trial upon the other issues raised therein. This was the only point before the High Court, and the only point which is now legitimately before their Lordships. Mr. Doyne indeed suggested that their Lordships might give certain directions concerning the further trial of the suit if it went back to be tried in the Zillah Court, but that course would be entirely contrary to the practice of this tribunal. The ground of appeal to the High Court was that the learned Judge was wrong in holding that the decision of the late Sudder Court, dated 8th February 1853, was a judgment *in rem*, and that as such a bar to the present suit. The High Court's judgment is to this effect:—"The Judge holds that that judgment of the Sudder Court was a judgment "*in rem*, declaring the title of the Defendant "Mokurund Deb to the disputed Raj, and consequently that that judgment was a binding

" judgment not only against the party in that case,
" but against all the world, and it follows, accord-
" ing to the opinion of the Judge, that that
" judgment was decisive against the present
" Plaintiff, and that the present Plaintiff cannot
" consequently succeed." They then refer to the judgment of the full bench in the 7th Weekly Reporter, page 338, in which the law was laid down that judgments of this description were not judgments *in rem*, but judgments *inter partes*. They also say, "It is evident that the issues
" which were raised in the former suit are by no
" means identical with the issues which arise in
" this case. The Plaintiff or his representative
" was in no way a party to the former judgment
" and was not represented in that suit, and the
" decree then passed can in no way be binding
" upon him. The decision of the Judge must be
" reversed and the case remanded to him, in order
" that he may try the remaining issues which
" arise in it." Therefore it is perfectly clear that the question which I have stated is the only question which now presents itself for their Lordships' decision.

Their Lordships do not think it necessary to embarrass themselves with much discussion considering the nature of a judgment *in rem*, technically so called. It appears to them to be extremely doubtful whether there exists in India, (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of Probate and the like, and which in the case of war might be exercised in matters of prize,) any ordinary Court capable of giving what can be called technically a judgment *in rem*, but they will look to the substance of the thing, and consider whether there is any reasonable ground for the contention that the effect of a judgment *in rem* ought to be given to such a judgment as that which was pleaded in this case.

Now the circumstances of the former suit were these. Hill Rajah Surbodeb Roy Kut, the father of the Respondent and grandfather of the Appellant, died in 1850, and there arose a contest among the members of his family, children by various wives or concubines, as to who should succeed to the Raj, and, with the Raj, to the

possession of the property. It is admitted that the succession is impartible, and on the death of a Rajah passes to the eldest of the sons of equal rank; and it is further alleged, though not perhaps admitted, that according to the custom of the family the issue of one kind of marriage is to be preferred to the issue of another kind of marriage. On Surbodeb's death Mokurund Deb (the father of the Appellant) the eldest of his sons was put into possession by a summary award of a Court of Justice under the Act 19 of 1841. Upon that, Ranee Bissessuree, one of the three surviving wives of the late Rajah, in conjunction with another person, brought a suit on behalf of her infant son Rujinder Deb, in order to have that order of the Court set aside and to recover from Mokurund Deb the possession of the Raj and the possession of the property that went with the Raj. The suit necessarily involved two issues; one of them was the legitimacy of the Plaintiff, who insisted that his mother had been married to the deceased Rajah under the Gundharbo form of marriage. If he succeeded in proving that, he had to go a step further, and to prove that Mokurund Deb, his elder brother, was, as he alleged, illegitimate, that he was the son of a woman who had not been married to the Rajah at all, but the son of a slave girl.

The Court of First Instance found in favour of the Plaintiff in that suit. It went by appeal to the Sudder Court. The Judges of that Court were divided, but the majority found that the Plaintiff in that suit had made out his title to be legitimate by the Gundharbo marriage; and as regards Mokurund Deb they found that he also was legitimate, though they do not appear to have found in terms that he was the issue of a marriage in the Brahmo form, which was what he had pleaded. They seem to have thought that by reason of the declarations and acknowledgments of his father he must be taken to be legitimate; and that being at least in equal rank with the Plaintiff in that suit, and being the elder, he was as between those two parties entitled to succeed to the Raj.

In the present case the Plaintiff comes forward and raises, no doubt, the same question that was

raised in the former suit, as to the illegitimacy of Mokurund Deb, but he also raises the question of a priority of right by reason of the superior nature of the marriage between the original Rajah and his mother. The issues in the two suits therefore are not precisely the same. But if they had been precisely the same their Lordships would still have been of opinion that the decree in the former suit is not a bar to the further prosecution of this suit. They think that this case cannot in any degree be likened to those which sometimes occur in India, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. It is clear that in this case all the members of the family had conflicting interests. If such a suit as the first suit were brought here and tried according to the law of this country there could be a pretence for saying that the judgment in it was anything like a judgment *in rem* or that it could bind any but the parties to the suit. It would have been a mere suit for possession by a party claiming to have a preferable right to the party in possession, and having failed to establish that case by proving the illegitimacy of the other party.

It therefore seems to their Lordships unnecessary to consider whether an ordinary Zillah Court in India could in any case pass a decision which would have the effect contended for at the bar in this case, viz., that of determining the legitimacy of a party against all the world. It is sufficient for their Lordships to say that the judgment pleaded in this case in bar cannot be treated as one of that nature upon any principles, whether derived from the English law or from the law and practice of India, which can be applied to it, and that they must humbly advise Her Majesty to dismiss this appeal. It is an *ex parte* appeal, and it is therefore unnecessary to say anything about costs.