Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Bireswar Mookerji and others v. *Ardha Chunder Roy and others, and Shib Chunder Roy and others* v. *Srimati Gobind Mohini and others, from the High Court of Judicature at Fort William in Bengal; delivered 5th March* 1892.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD HANNEN.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The first three Appellants in the first of these appeals,—Bireswar Mookerji, Sureswar Mookerji, and Shib Pershab Banerji—are the grandsons of Juggut Chunder Roy Chowdhry, who died on the 19th October 1869. He left two daughters, one, Hemangini, the mother of the first two grandsons, and the other, Ushamoyi, the mother of the third. The other two Appellants are the daughters' husbands and guardians of their sons. The Respondents, Ardha Chunder and Shib Chunder are the sons of Radha Krishna, an uncle of Juggut Chunder, who died in August 1865. The third Respondent, Bama Soondari, is the widow of Tejas Chunder, the son of Gopi Krishna, another uncle of Juggut Chunder, and

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the Respondent Gobind Mohini is the widow of Sri Krishna, another uncle. Pran Krishna, the father of Juggut Chunder, Gopi Krishna, Radha Krishna, and Sri Krishna were four of the sons of Joygopal Roy, who died in 1826–27. He left three other sons who all died before Juggut Chunder, and their shares in his property became vested in the four sons above named.

One of the suits, which are the subjects of the first of these appeals, was brought by Ardha Chunder against Shib Chunder and the other persons who are parties to the appeal, and also against Kadumbini, the widow of Juggut Chunder, and Horendra his granddaughter, the sister of Bireswar and Sureswar.

The plaint stated that Juggut Chunder adopted the Plaintiff Ardha Chunder as his son in the year 1273—April 1866 to April 1867—and made a will on the 13th Bhadro 1275—27th August 1868, by which, after giving legacies and monthly stipends to some persons, he bequeathed all his remaining properties moveable and immoveable to the Plaintiff. The plaint also stated that, as one of the sons of Radha Krishna, Ardha Chunder was entitled to $\frac{8}{60}$th parts, and as devisee under Juggut Chunder's will to $\frac{19}{60}$th parts, in all to $\frac{27}{60}$th parts of the joint estate, and it prayed that the will of Juggut Chunder might be construed, and a declaration made as to what provisions in it are valid, and of the rights of the Plaintiff and Defendants in the estate left by Juggut Chunder. It also prayed that the questions whether the Plaintiff being the son of Radha Krishna was entitled to a moiety of the share of the estate left by him, and whether the Plaintiff was the legally adopted son of Juggut Chunder, might be determined. Other consequent declarations and directions were asked for, but they need not be stated. At the settle-

ment of issues ten were recorded, but of these only the fourth and fifth have to be considered in this appeal. The fourth is, "Is it a fact that "Plaintiff is the legally *dattak* (adopted) son "of Juggut Chunder?" The fifth is, "Has "Plaintiff any interest under the will of Juggut "Chunder? If so, what is the nature of that "interest?"

At the hearing before their Lordships the learned Counsel for Ardha Chunder did not rely upon the adoption. It was contrary to Ardha Chunder's interest to do so, as Shib Chunder, his natural brother, in his written statement, alleged that Ardha Chunder being the legally adopted son of Juggut Chunder had no right and share in the estate left by his natural father Radha Krishna. It was contended by Mr. Arathoon, who appeared for Shib Chunder, that the adoption was valid and this question had better be first determined.

The Subordinate Judge, after observing in his judgment upon the evidence of what took place before the death of Radha Krishna, and afterwards when Juggut Chunder performed a grand ceremony of adoption, held that the adoption was invalid, on the ground that there was no giving and taking. The High Court on appeal, after also observing fully upon the evidence, came to the conclusion that there was no gift and acceptance in Radha Krishna's lifetime, and no giver, in a legal sense at any rate (his widow being mentally incapable), when the ceremony was performed. Their Lordships see no reason to depart from the ordinary rule where there are concurrent findings of fact, and therefore decide that there was no adoption.

Mr. Arathoon also contended that in this case Ardha Chunder should be put to his election, relying on the following passage in Juggut

Chunder's will :—"And the share of annas "4–5–1–1 which the late Radha Krishna Roy "Chowdhry had in the same way, has been "obtained by his son, Shib Chunder Roy "Chowdhry." This occurs in a paragraph of the will, in which the testator states the devolution of the property of his paternal grandfather. No case of election arises here. The testator had no power to dispose of Radha Krishna's share and did not intend to do so.

There remains the question of the effect of the will. Clause 4, which contains the bequest to Ardha Chunder, begins : "Having no son, I "loved and supported Ardha Chunder Roy "Chowdhry, the youngest son of the late "Radha Krishna Roy Chowdhry, as my son. "And as the said boy was very attached "to me and my wife, and was an object of "affection to us, I had a mind, granting to my "daughters and daughters' sons a proper portion "of my share of the ancestral property and "self-acquired property, to give the remainder "of the moveable and immoveable property to "the said boy. Since then I have taken the said "boy in adoption in virtue of the consent and "gift of his father and mother, after getting the "vyavasthas (opinions) of pundits, and on per-"forming the ceremony of jag according to the "Shastras." Here is a clear indication of his intention, before making an adoption, to give the greater portion of his property to Ardha Chunder. He did not select him as being an adopted son, but for reasons independent of adoption, though they were likely to lead to it. The clause then continues, "Therefore the said "dear boy Ardha Chunder will be the heir to "the whole of my moveable and immoveable pro-"perty." It states the legal effect of the adoption, viz., that Ardha Chunder would take

the whole of his property, subject only to such duties of the maintenance of other persons as the law imposed. But this would not have been consistent with the testator's intention, and he proceeds to say: "But I direct that, ex- "cepting the property granted by me as stated in "paragraph 11 of this will, the said Sriman Ardha "Chunder Roy Chowdhry, and after him his son, "and after him his grandson, and on the death of "the latter, his great grandson shall obtain the "proper share, ancestral, of my father, the late "Pran Krishna, and the 4-annas share out of the "proper share of my uncle, the late Sri Krishna "Roy Chowdhry, obtained by me by gift under "his will, and the self-acquired moveable and "immoveable property of me and my father "which will be left. If, through my mis- "fortune, *the said boy* die without leaving a son, "which God forbid, then I give permission to "my wife Kadumbini that she may, for the "purpose of providing for the presentation of "funeral cakes and libations, take in adoption "two sons in succession, one on the death of the "other, from one of my paternal cousins who "may have sons." And there is a direction that if no son be had of his paternal cousins all his daughters' sons shall be in equal shares entitled to his paternal and self-acquired property.

It will be observed that he says, "the said boy "die without leaving a son," not "said adopted son," or "my adopted son." The bequest is to Ardha Chunder by name, and is not dependent upon the adoption. Both the Lower Courts have so decided, and their Lordships are of opinion that their decision should be affirmed.

As to the second appeal, in which Shib Chunder is the Appellant, it was admitted by his learned Counsel that, so far as it relates to the share of Sri Krishna Roy Chowdhry, it could not

be supported, and should be dismissed. The other questions in it are raised in the first appeal and decided by the above judgment. Their Lordships will therefore humbly advise Her Majesty to dismiss both appeals, and to affirm the decree of the High Court made in the appeals to it. The Appellants will pay the costs of these appeals.