Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Parsotam Gir v. *Narbada Gir, from the High Court of Judicature, Allahabad; delivered 24th March* 1899.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

This is an Appeal from a decree of the High Court at Allahabad. The Plaintiff Mahant Nepal Gir who is now represented by the Appellant sued for recovery of possession of four villages. The suit was brought in the Court of the Judge of Small Causes at Allahabad exercising the powers of a Subordinate Judge. He gave the Plaintiff a decree which has been reversed by the learned Judges of the High Court who dismissed the suit with costs.

The facts of the case are few and simple and not now in dispute. The whole argument before this Board turned upon the meaning and effect of a judgment of the High Court in a previous litigation between Mahant Nepal Gir and Parshad Gir the person whom the Defendant Narbada Gir claims to represent.

The parties to the present suit are Sannyasis or Ascetics of a sect known as Baghambari from the name of their founder who lived more than a hundred years ago. The gaddi or shrine of Baghambari which appears to have been endowed with considerable property was originally established in

a house below the fort of Allahabad. This house was destroyed in the Mutiny and the gaddi was removed in consequence to an adjoining mauza called Baski. The manager of the gaddi at this time was Baba Bhola Gir. Bhola Gir died on the 8th of March 1868, leaving four chelas or disciples Nepal Gir Bijai Gir Moti Gir and Parshad Gir. There seems to have been at first some dispute about the succession but the differences whatever they were were soon arranged. On the 25th of March 1868 the four chelas executed an Ikranama or deed of arrangement providing for the administration of the gaddi and division of offices between them. Nepal Gir became gaddi-nashin or head Mahant Moti Gir Bhandari or treasurer and manager at Allahabad Bijai Gir manager of certain villages and Parshad Gir manager of the villages in dispute.

This Ikranama was duly registered on the 30th of March 1868. It recites that Bhola Gir before his death gave the following direction to his four chelas in the presence of respectable people. " After me you four persons should by common " consent become proprietors of all the properties " belonging to the gaddi of Baba Baghambasi " and should maintain the property and manage- " ment thereof as usual like myself." It then goes on to declare that in compliance with that direction and in order to avoid future disputes and to keep up the name and prestige of the gaddi and properties the four persons parties to the deed unanimously covenanted in the terms expressed in the following clauses. Clause 1 provided that Nepal Gir having been appointed Mahaut should be installed as gaddi-nashin. Clause 2 so far as material was in the following words :—

" 2ndly, that as formerly the name of Baba Bhola Gir was " entered in respect of the ilakas (villages) and the Mahant's " name was not entered so the names of Bijai Gir and Parshad " Gir be entered in respect of the ilakas and they should be

" peshwakars (heads) and managers of the property (ilakas)
" and other affairs and should maintain the management of
" receipts and disbursements in the same way as it had been
" before. But they on account of their names being entered
" or any other person for any reason neither have nor shall
" have any right whatever nor even the Mahant himself shall
" have any power of partition or temporary or permanent
" transfer in respect of the whole or any part of the moveable
" or immoveable property because all the properties belong to
" the gaddi of Baba Baghambari and they are not meant for
" person or for any particular individual."

Clause 1 had provided for the expulsion of the gaddi-nashin in certain events. Clause 2 provided for the expulsion of any of the other three " discovered doing any vicious act or any " act disgracing the gaddi or contrary to the " customs of the Math." Clause 3 provided that,—

" As at present the disciples stay at ilakas (villages) and
" look after the management of cultivation and making
" collections of the ilakas like managers so Bijai Gir and
" Parshad Gir should in the like manner live there as
" munsarims and managers and carry on the current affairs as
" usual. In case of their proving unfaithful and of misconduct
" the Mahant Moti Gir and the third person who might be
" left of good behaviour have and shall have power to turn
" them out with their mutual consent and consultation as an
" owner has in respect of the manager."

Clause 4 provided for the duties to be undertaken by Moti Gir. Clause 5 so far as material was as follows:—

" 5thly, that none of us either gaddi-nashin peshwakar or
" another disciple or any one who may be the successive
" representative or disciple of any person shall have any
" power to act contrary to any of the terms of this document
" . . . and those who are our disciples should also live as
" usual in those ilakas of which we are the managers in our
" stead but in case of misbehaviour the Mahant and Pesh-
" wakar have and shall have in every case authority to turn
" them out."

On the terms of this Ikranama Parshad Gir entered into possession of the villages in dispute. One of his first acts after he obtained possession was to join with the other three persons parties to the deed in a petition for a certificate to enable the four to collect the debts due to the

estate of Bhola Gir. The petition was verified by a declaration signed by Parshad Gir himself. It set out Bhola Gir's will as contained in the Ikranama and proceeded to state that the petitioners in union among themselves for giving additional strength to the will having executed an Ikranama on the 25th March 1868 "with the conditions entered therein" got it registered and according to same mutation of names in their favour was effected and that under the same they had been in possession and enjoyment as proprietors of all goods properties (imlak) appertaining to the Gaddi of Baghambari left by the deceased Goshain.

Whether in the interval between the execution of the Ikranama and the end of the year 1881 Parshad Gir remitted any contribution in money or in kind from the estates under his management to the Gaddi of Baghambari at Baski is a question about which a good deal of evidence was adduced which left the matter still in doubt. For the purpose of the present suit that question seems to be wholly immaterial. It is clear that from the commencement of the year 1882, Parshad Gir made no remittance to the Gaddi of Baghambari. In June 1884 there was a meeting of the persons interested to which Parshad Gir Moti Gir and the representatives of Bijai Gir who was then dead were summoned. Moti Gir and the representatives of Bijai Gir attended and formally acknowledged the obligation incumbent upon them to act in conformity with the terms of the Ikranama. Parshad Gir absented himself without making any excuse or sending any explanation of his conduct. The parties present resolved that Parshad Gir should be requested to state his intentions and furnish an account of the property under his management within a limited time and that then a further meeting should be convened to consider future

proceedings. A notice to that effect with a copy of the proceedings of the meeting of June 1884 was accordingly sent to Parshad Gir. Parshad Gir however paid no attention to the summons and treated the matter with absolute indifference. Thereupon the Mahant Nepal Gir Moti Gir and the representatives of Bijai Gir brought a suit to recover possession of the villages in dispute and for an account.

Parshad Gir filed a written statement. He alleged that the villages in dispute did not belong to the Gaddi of Baba Baghambari at Baski but to the Gaddi of Baba Baghambari at Niria one of the villages in dispute where Parshad Gir lived. He denied that he had executed the Ikranama of March 1868. He pleaded that he had been in adverse possession for 12 years and that the Plaintiffs' claim was barred by limitation.

While the suit was pending and after it had been partly heard Parshad Gir died. On his death Narbada Gir who had taken possession of the villages in dispute claiming under Parshad Gir was brought upon the record but no amendment was made nor was any fresh issue directed.

The Subordinate Judge found that the villages in dispute belonged to the Gaddi of Baba Baghambari at Baski that the Ikranama of March 1868 was executed by Parshad Gir and that he never challenged its genuineness or validity until he filed his written statement. He negatived the plea of adverse possession. He held that if Parshad Gir had been alive the Plaintiffs would have been entitled under the terms of the Ikranama to oust him from the villages in dispute on account of his misconduct in not rendering accounts and sending profits to the Gaddi and in claiming them as his own property. He further held that Narbada assuming that he was Parshad Gir's heir could not retain possession of the villages in dispute against

the will of the Plaintiffs who were entitled to resume possession of the villages and to make a fresh arrangement for their management. He dismissed the claim for an account. Narbada he said had not misappropriated the profits which the Plaintiffs claimed, and as it was not proved that any personal estate of Parshad Gir had come to his hands he could not be made accountable for the profits received by Parshad Gir. In the result therefore the claim for an account was dismissed but the claim for possession was granted.

Against this decree Narbada appealed. On the 8th of March 1886 the learned Judges who heard the Appeal pronounced a judgment which unfortunately neither the High Court on the Appeal in the present suit nor the learned Counsel at the Bar nor their Lordships are able to understand. They seem to have misapprehended the grounds of the Subordinate Judge's decision. They held Parshad Gir absolved apparently because it was not proved to their satisfaction that he "had acted as a person "accountable to the Gaddi." "The impression "left upon our minds" they said "is that . . . "there is good reason for believing that from "1868 down to his death Parshad Gir occupied "and asserted an independent position in respect "of the Niria Shrine." So they held that the suit would have failed against Parshad Gir if he had been alive and accordingly they reversed the decree and dismissed the suit against Narbada Gir as the legal representative of Parshad Gir with costs. But they concluded their judgment with the following announcement. "We think "that the Subordinate Judge should as we pro-"pose to do have left it open to the Plaintiffs "or rather Nepal Gir to institute a suit against "Narbada Gir personally in which a number of "questions which as yet have never been raised "or considered can be properly dealt with and

" determined and in holding that the present " suit failed as against Parshad Gir we leave " untouched and undecided all matters affecting " the rights of the Plaintiff Nepal Gir on the one " side and of Narbada Gir on the other."

On the 30th of July 1892 Nepal Gir sent a notice to Narbada Gir requesting him under threat of legal proceedings to come in and submit his accounts treating him as " manager and agent in " charge " of property belonging to the Gaddi of Baghambari. As Narbada Gir paid no attention to this notice the present suit was brought for the purpose of recovering possession of the villages in dispute. Narbada pleaded the defence of *res judicata* adverse possession by Parshad Gir and title under Parshad Gir's will and refused to admit the validity and existence of the Ikranama of March 1868.

The Subordinate Judge held that the suit was not barred by the decree of the High Court of the 8th of March 1886. He found in favour of the Plaintiff on all the issues and gave a decree for possession with mesne profits for three years.

Narbada Gir appealed to the High Court. On the 14th November 1895 the learned Judges of the High Court pronounced a judgment which is almost if not quite as difficult to understand as the judgment of their predecessors in 1886. They observe that the difficulty which they had felt in the case had been " in trying to ascertain " from the judgment of the Court in the previous " suit what were the findings upon which this " Court in that suit made its decree dismissing the " suit." They then address themselves to the solution of that problem. They begin by rejecting the only part of the former judgment which is absolutely clear and they express their opinion that " the only possible construc- " tion " of that judgment which would make it

" consistent throughout and would not suggest " absolutely inconsistent findings" is a construction which (if their Lordships have rightly apprehended its effect) leaves it undetermined whether the Ikranama of 1868 was or was not proved or was or was not binding on the parties and attributes to learned Judges of one of the highest Courts of Appeal in India the view that a person who executes a solemn instrument in the terms of such an Ikranama and accepts the management of property on the conditions therein contained is at liberty to repudiate the trust and to set up an adverse title in some other religious foundation if not in himself without being liable to removal either by the parties interested or by the Court. Having placed this construction on the earlier judgment and finding that the only charge against Narbada Gir was that he obtained possession under the Ikranama of 1868 and then wholly repudiated the obligations of that instrument the learned Judges of the High Court treated the matter as *res judicata* and dismissed the suit with costs in all Courts.

The High Court placed some reliance on the notice of the 30th of July 1892. Narbada Gir did not accept it or act upon it. It seems to their Lordships to have no bearing on the question between the parties.

Their Lordships think that it would be an idle and a hopeless task to speculate upon the grounds of the judgment of the High Court in 1886. Whatever the grounds may have been they are certainly not apparent on the face of the judgment. One thing, however, is plain; the learned Judges in 1886 did not intend to decide anything as between Nepal Gir and Narbada Gir. They left it open to Nepal Gir " to institute a " suit against Narbada Gir personally." They said in so many words " We leave untouched and " undecided all matters affecting the rights of

" the Plaintiff Nepal Gir on the one side and " Narbada Gir on the other." The only reason why the High Court in 1895 refused to give effect to those words was because they considered that if they construed them according to their plain meaning they " should be holding that the decree " of this Court in the previous suit was simply " what is known in England as a decree of nonsuit." Such a decree, they say, no Court in India has power to make. Now the objection to a judgment of nonsuit under the old practice in this country—there was no such thing as " a decree of nonsuit " for the term " nonsuit " was not known in Chancery—was this:—It enabled a Plaintiff after he had dragged the Defendant into Court if he found the case going against him or that he had not the requisite materials to support his claim to elect to be nonsuited with the result that he could bring a fresh action and so harass the Defendant with further litigation. The Judge at the trial was powerless: the Plaintiff was *dominus litis*. There can be no room for such an objection when the Judge has the matter in his own hands. But however that may be the real answer to the difficulty propounded by the High Court is this:—The question is not whether the judgment of the High Court in 1886 was right but whether it did or did not finally decide the present question as between Nepal Gir and Narbada Gir. It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left " untouched and " undecided."

Mr. Mayne for the Respondent did not go so far as to contend that the judgment of 1886 as it stands and of itself would support a plea of *res judicata*. Following the arguments or suggestions contained in the judgment under appeal he endeavoured to persuade their Lordships that there must have been some grounds for the

decision of the High Court in 1886 or some findings underlying that decision which would support a case of what may be called constructive estoppel. It is enough to say that there is no such thing known to the law as constructive estoppel and if there were it would not satisfy the requirements of Section 13 of the Code of Civil Procedure (XIV. of 1882). "The conditions for the exclusion "of jurisdiction on the ground of *res judicata* are" as Willes J. says "that the same identical matter "shall have come in question already in a Court "of competent jurisdiction, that the matter shall "have been controverted and that it shall have "been finally decided." That is just what Section 13 requires; there must be a final decision.

Langmead *v.* Mabb 18 C.B. N. S. 270.

Their Lordships are of opinion that the view taken by the Subordinate Judge was correct. Their Lordships will therefore humbly advise Her Majesty that the Appeal ought to be allowed, the decree of the High Court reversed, and the Appeal to it dismissed with costs, and the judgment of the Subordinate Judge restored.

The Respondent must pay the costs of the Appeal.