Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Balkishen Das (since deceased) and Others v. *Ram Narain Sahu and Others, from the High Court of Judicature at Fort William in Bengal; delivered the 29th April* 1903.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

At the beginning of the year 1883 four persons named Mahabir Pershad, Ramjiban, Ram Narain, and Jugdis Pershad, otherwise Thakoor Pershad, were members of a Hindu family joint in estate. Their pedigree is given on page 3 of the Record. It there appears that they were all great grandchildren of a common ancestor, Niru Sahu. Mahabir was the grandson of Jhonti, the elder son of Niru. Ramjiban and Ram Narain were sons of Juggernath, otherwise Gyan Chand, who was a son of Lalji, the younger son of Niru, and Thakoor was son of Sheo Sahai, otherwise Udho, another son of Lalji. Mahabir and Ramjiban had attained their majority, the other two were minors. Some dispute appears to have arisen between the cousins, with the result that on the 24th April 1883, Mussammat Bhago, mother and guardian of Ram Narain, and Mussammat Mauli, mother and guardian of Thakoor Pershad,

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presented a petition to the District Judge, by which they alleged that Ramjiban was ready to waste the share of the minors in certain joint assets, and prayed for a grant to themselves of a certificate under Act XXVII. of 1860, to enable them to collect the debts due to the deceased Lalji mentioned in the Schedule annexed to the Petition. It will be observed that in this Schedule the Petitioners, for the purpose of ascertaining the amount due to the minors, deducted from each debt one-fourth part as the share of Ramjiban. Mahabir Pershad appears to have objected to the grant of the certificate to the Petitioners on the ground that the family of the Petitioners was joint with him, and to have claimed an 8 annas share in the property of the joint family. A compromise was thereupon come to, and embodied in an ikrarnama, dated the 21st June 1883, to which Mahabir Pershad, Ram Narain by his mother and guardian, Ramjiban, and Thakoor Pershad by his mother and guardian, were all parties. By this instrument it was declared that an arrangement in respect of all the properties and estates, movable and immovable as per list annexed, and those not included therein, had been come to in the following manner, viz., out of 16 annas a share of 4 annas had been allotted to Mahabir Pershad, grandson and heir of Jhonti, and out of the remaining 12 annas a share of 3 annas had been allotted to Ramjiban, a share of 3 annas to Ram Narain, and a share of 6 annas to Thakoor Pershad, the heirs of Lalji. The ikrarnama then continued as follows :—

" Now all the parties are at liberty to have " their respective names registered in the " Collectorate jointly or separately, and to hold " possession of the properties according to their " respective proportionate shares. Each party " shall have in future no claim of any kind

" whatsoever on the ground of the shares being
" more or less, or in respect of the debts due to
" mahajuns, or in respect of the debts due to
" themselves against the other party, and each
" party shall pay off his proportionate share of
" the debts due to the mahajun in any way he
" thinks proper. Whatever sums are due to us
" from other persons under bahi khatas, mort-
" gage or simple bond, zurpeshgi and sudbharna
" (deeds), as per private list separately drawn
" up and signed by us, the declarants, shall also
" be realised by us collectively either privately
" or through the Court, and divided among us
" in proportion to our respective shares, or the
" sums due to us respectively shall be collected
" separately. Every one of us has, by virtue of
" this deed, the power either to continue to live
" together as a member of the joint family as
" before, or to separate his own business, none
" of us having any objection thereto."

Another petition was thereupon presented by Ram Narain and Thakoor Pershad by their respective mothers and guardians in which, after stating the effect of the ikrarnama, they asked for a certificate to be granted in respect of the properties left by Lalji to the extent of 9 annas. And a petition appears to have been presented by Mahabir also. On the 28th July 1883 the District Judge passed an order that Mahabir, Thakoor, Ramjiban, and Ram Narain should get a joint certificate to collect debts due to the estates of Lalji and Gyan Pershad.

Mahabir Pershad appears to have taken his share and nothing more is heard of him. Ramjiban, Ram Narain, and Thakoor Pershad, and after the latter's death Ramjiban and Ram Narain, appear to have continued to live together and to have collected their revenue and enjoyed their propertyin all external respects in the

same manner as before the execution of the ikrarnama.

Thakoor Pershad died in the year 1886 without having attained his majority, and leaving a widow, Mussammat Amta, who was also a minor. Ramjiban died in the year 1887, apparently childless, but leaving a widow, Mussammat Janki (now deceased). Ram Narain attained his majority in 1890. He is the first and principal Respondent in this Appeal, and is subsequently referred to as the Respondent.

The Appellants are the present representatives of a firm of money-lenders at Benares. On the 23rd May 1887 the then representatives of the firm commenced an action against (1) Mussammat Janki as widow and heir of Ramjiban, (2) Ram Narain, then a minor, and (3) Mussammat Amta (described as a minor) widow and heir of Thakoor Pershad, under the guardianship of Mussammat Mauli, her mother-in-law and next friend, to recover money alleged to be due upon a mortgage executed by Lalji in May 1869. A Decree was made against all the Defendants and Ram Narain alone appealed. On his appeal the Decree was reversed as against him on the ground that the evidence was insufficient to establish the claim, and by the Decree of the High Court dated the 12th June 1891 the suit was dismissed as against him. But it remained standing as against the other Defendants and execution was taken out against the property formerly of Ramjiban and Thakoor Pershad.

Thereupon the Respondent Ram Narain Sahu commenced the present action against the Appellants and the Repondents Mussammat Janki and Mussammat Amta. In his plaint he alleged that the husbands of the two widows and himself had been a joint family, and no separation had taken

place between them and he was therefore solely entitled to the property by survivorship. He made no mention of the ikrarnama of 21st June 1883, and he relied on two documents called a solehnama of 24th January 1889 and an ikrarnama of 26th July 1890 as admissions by the two widows respectively of his title. The substantial relief prayed was a declaration that the properties mentioned in the Schedule belonged to the Respondent.

By their written statement the Appellants denied the Respondent's title, and pleaded the ikrarnama of 21st June 1883.

The issues framed for adjudication were, first, Is Plaintiff's allegation of title by survivorship and possession true? Second, Whether the husbands of the judgment debtor Defendants were separate from Plaintiff at the time of their respective deaths?

The action was tried by the Subordinate Judge of Mozufferpore. The learned Judge held that the ikrarnama of 21st June 1883 merely defined and fixed the shares of the members which each would get in case of actual partition and separation, and that there was no separation between Ramjiban, the Respondent, and Thakoor Pershad, and accordingly he made a Decree dated the 18th January 1896 in favour of the Respondent.

This Decree was confirmed on appeal by the High Court of Bengal. The learned Judges in that Court thus expressed themselves with reference to the ikrarnama of the 21st June 1883:—

"We may say that if it stood alone without "any other evidence—evidence of the conduct of "the parties concerned about the time of this "transaction and subsequent thereto—we should "have to declare, in accordance with the decision "of the Privy Council in the case of *Appovier* "v. *Rama Subba Aiyan* (XI. Moore's Indian

" Appeals, p. 75), that there was a separation in " estate beween all the parties concerned, though " at the time there was no partition by metes and " bounds. But, as laid down by the Judicial " Committee in the case of *Babu Doorga Pershad* " v. *Mussummat Kundun Koowar* (Law Reports 1, " Indian Appeals, 55), the question in every case " like this is one of intention, namely, whether " the intention of the parties, to be inferred from " the instruments which they had executed and " the acts they had done, was to effect a division " such as to alter the status of the family."

Looking at that document as a whole and reading it by the light of the evidence of the conduct of the parties, the learned Judges came to the conclusion that, although separate shares were allotted to all the different members of the family, the intention was that Mahabir Pershad should have a separate share, and that the rest of the family, consisting of Ramjiban, Ram Narain, and Thakoor Pershad, should hold the remainder of the property jointly amongst themselves. They expressed a doubt whether a transaction like this, entered into by the then managing member of the family, would be binding on the minors, though no doubt ostensibly the names of their natural guardians were used as representing their interests. But however that might be, it seemed to them to be clear enough from the evidence that what followed from the ikrarnama was that Mahabir was the only person who separated from the family, Ramjiban, Ram Narain, and Thakoor Pershad continuing to be joint both in mess and property. It might well be said, they added, having regard to the facts of this case, that though the ikrarnama of 1883 operated as a separation in estate between all the four members of the family, yet immediately or shortly afterwards Ramjiban, Ram Narain and Thakoor Pershad re-united themselves

as members of a joint family, and continued to be so until Ramjiban's death. At the conclusion of the Judgment is the following passage :—

" We may, however, state that the Subordinate " Judge is not right when he says, that ' the " ' ikrarnama merely defined and fixed the shares " ' of the members which each would get in case " ' of actual partition and separation, for it recites " ' that under this deed each individual has the " ' power to live as a member of the joint family " as before, or separate his own business.' This " view, as expressed upon the terms of the " ikrarnama itself, is not correct; for whether " it was optional with the parties to continue " to live together as members of a joint " family, or separate themselves in business, " their shares in the family estate having " been defined, that is to say, separate shares " having been allotted to each of them, it " was in their power to effect a partition by metes " and bounds, if they so pleased. The question " is not whether there was a separation by metes " and bounds, but a separation in estate and " interest; for that would have the same legal " effect, so far as altering the status of the family " was concerned, as a partition by metes and " bounds."

The present appeal is from the Decree of the High Court, dated the 6th December 1897.

Their Lordships entirely agree in the last quoted passage from the Judgment of the High Court, and they think it expresses accurately the effect of the decision in *Appovier* v. *Rama Subba Aiyan*. It disposes of the reasons stated by the Subordinate Judge for his Judgment, and in the opinion of their Lordships it is equally fatal to the first conclusion arrived at in the High Court, viz., that there was not in fact any separation in estate and interest between all the co-parceners in 1883. There is no difficulty

in the construction of the ikrarnama, in which it is stated in unambiguous terms that defined shares in the whole estate had been allotted to the several co-parceners. Learned Counsel for the Respondent relied on the passage which gave liberty to any of the parties either to live together as a member of the joint family as before or to separate his own business as being inconsistent with a separation in estate. But there is no inconsistency, and the clause conferred on the parties no larger liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bounds, or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it. Consistently with the broad principle laid down in the *Apponier* case, this was determined by the allotment to them of defined shares which, to use Lord Westbury's illustration, converted them from joint holders into tenants in common.

If the learned Judges meant that the legal construction or legal effect of an unambiguous document like the ikrarnama could be controlled or altered by evidence of the subsequent conduct of the parties, their Lordships cannot agree with them, and they do not think that the case of *Baboo Doorga Pershad* v. *Mussummat Kundun Koowar* (1 Ind. App. 55), cited by the learned Judges is any authority for such a proposition. But as will be seen from what has already been said, their Lordships do not regard the subsequent actings of the parties as inconsistent with an intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition.

The question upon which their Lordships have felt most difficulty is whether the document can be considered as binding the co-parceners, who were minors at the date of it. But they think that in these proceedings they must treat it as binding upon them. There is no doubt that a valid agreement for partition may be made during the minority of one or more of the co-parceners. That seems to follow from the admitted right of one co-parcener to claim a partition, and (as has been said) if an agreement for partition could not be made binding on minors a partition could hardly ever take place. No doubt if the partition was unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings set it aside so far as regards himself. Some evidence was given to show that the mothers of the two minors were acting under the control and influence of Ramjiban. But as against this it may be pointed out that in the proceedings for a certificate which led to the execution of the ikrarnama they seem to have been acting independently of, and even adversely to, Ramjiban. For he can hardly be thought to have prompted a petition which contained an allegation that he was ready to waste the property of the minors. It should also be said that the partition on the face of it was not unfair, and in fact the shares allotted to the minors were at least as large as, and perhaps larger than, they were strictly entitled to. Again, it was a partition in interest only, and the partition by metes and bounds was postponed to a period when they might be in a position to protect their own interests. Lastly, no suit has been brought or can now be brought by any of the parties to impeach the ikrarnama. Indeed, Counsel for the Respondent did not question the binding effect of the instrument, but relied on it as being,

according to its proper construction, in his favour.

It only remains to consider the second ground for the judgment of the High Court, viz., that the co-parceners re-united immediately or shortly after the date of the ikrarnama. Mr. Mayne met this point by saying that the parties were incompetent in law to re-unite in the accurate sense of that word, or so as to restore the status of a family joint in estate. His argument was that in Bengal a member of a joint family once separated can re-unite only with a father, brother, or paternal uncle, following the text of Vrihaspati quoted in Mitakshara ii. 9. sect. 3. And he supported his argument by reference to other authorities.

Their Lordships do not find it necessary to express an opinion on this point, because, in the case before them there is no proof of an intention of the parties to re-unite in estate and interest. Indeed, there is not wanting evidence independently of the ikrarnama, and both before and after its execution, of an intention to separate their interests. Their Lordships again refer to the petition in the names of the minors, which preceded the execution of the ikrarnama. Separate shares in the family property were thereby claimed and the grant of a separate certificate under Act XXVII. of 1860 as regards the shares of the minors only was prayed, and by a petition presented by the advisers of the minors in their names after the date of the ikrarnama they prayed for a separate certificate of their 9 anna shares only. By a kobala dated the 8th November 1883, and therefore subsequent to the ikrarnama in favour of Hari Das and others, the parties again treat themselves as having separate shares. The entries in the registers, so far as they go, point in the same direction, but their Lordships agree with

the Courts below in not attaching much weight to these as evidence.

The solehnama dated the 24th January 1889 and the ikrarnama of the 26th July 1890, which are mentioned in the plaint, were not relied on by Counsel for the Respondent, and properly so, because the signature of neither of those documents appears to be properly or sufficiently proved.

Their Lordships are therefore of opinion that the Appeal to the High Court should have been allowed, and they will humbly advise His Majesty that the Decree of the Subordinate Judge dated the 18th January 1896 and that of the High Court dated the 6th December 1897 be discharged, and instead thereof an Order be made dismissing the suit of Ram Narain, the first Respondent, with costs, and that the first Respondent pay the costs of the Appeal to the High Court. He will also personally pay the costs of this Appeal.