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 THE  
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 TRUSTEE OF  
 BENGAL  
 v.  
 KRISHNA  
 CHANDRA  
 MOZUMDAR.

they had brought a suit to have a declaration of their title as putnidars, in which case an issue as to that title would have been framed and tried by the lower Court. The proceedings in this suit were regulated by Act X of 1877, and their Lordships do not find any provision there which would authorize the Appellate Court to do what has been done in this case. Section 565, which enables the Appellate Court in some cases to determine a question of fact upon the evidence then on the record, cannot apply where the case has not been set up in the lower Court. Their Lordships are, therefore, of opinion that the decree of the High Court should be varied by striking out the declaration that the defendants are putnidars of the mouzahs and the order as to costs, and ordering that the defendants do bear the costs of the suit in the High Court and the lower Court. They will humbly advise Her Majesty accordingly, and the respondents will pay the costs of this appeal.

C. B.

*Decree varied.*

Solicitors for the appellant: Messrs. *Lawford, Waterhouse & Lawford.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

## APPELLATE CIVIL.

*Before Mr. Justice Field and Mr. Justice Grant.*

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 May 13.

DROBOMOYEE CHOWDERAIN (DEFENDANT) v. SHAMA CHURN  
 CHOWDERY (PLAINTIFF) AND OTHERS (DEFENDANTS).\*

*Hindu Law—Adoption—Vested estate divested by adoption—Power to adopt.*

*A*, a Hindu, having succeeded to his father's estate died unmarried, leaving him surviving his father's mother *S.* and his step-mother *N.* After *A's* death, *N.*, under a power from her husband, adopted *B* as a son to *A's* father.

*Semble*, that the adoption did not divest the estate of *S.* in whom *A's* estate had vested on his death.

\* Appeal from Appellate Decree No. 2719 of 1883, against the decree of Baboo Jiban Kristo Chatterji, Rai Bahadur, Subordinate Judge of Purna and Bogra, dated the 15th of August 1883, affirming the decree of Baboo Aghore Chundra Hazra, Extra Munsiff of Nawabgunge, dated the 10th of April 1882.

THIS was a suit for the recovery of land. The plaintiff described the plaintiff as "Shama Churn Chowdhry, minor son of Uma Churn Chowdhry, deceased, by his next friend and mother Surjomoni Chowdhraïn, caste Shaw, occupation zemindar, &c., inhabitant of Jamalpore, pargana Apel, station Panch Bibi, plaintiff." It then stated that the land in dispute formed portion of two mouzahs which belonged to the minor as his ancestral property, and which had been owned, and held in possession for a long time, before 12 years next preceding the institution of the suit, "by the predecessors of the minor plaintiff, and after them by Surjomoni Chowdhraïn on behalf of the plaintiff." The plaintiff went on to state that, while Surjomoni was in possession of the disputed land on behalf of the minor Shama Churn, the defendants wrongfully dispossessed her therefrom, in Cheyt 1284; that the defendant had no right to the land, but that "the minor has right to it, and the plaintiff is entitled to obtain possession of the same on behalf of the minor." The fifth paragraph of the plaintiff was as follows:—

"5. The plaintiff, therefore, prays (a) that a decree may be passed awarding to her, on behalf of the minor Shama Churn Chowdhry, possession of 18 bighas 12 cottas of land, as per boundaries given below, on determination that the same is comprised within *chuck* No. 28, appertaining to mouzahs Mirzapore and Ajampore, the zemindari of the minor Shama Churn Chowdhry, and on declaration of the right of the minor Shama Churn thereto; (b) that costs of Court may be allowed to her; (c) that a decree may be passed awarding to her any other relief in any shape whatever which she might be deemed entitled to receive."

The seventh paragraph of the plaintiff was as follows:—

"7. That the plaintiff has, according to the purport of the will left by the late Uma Churn Chowdhry, the father of the minor Shama Churn Chowdhry, duly obtained from the Judge's Court, Dinapore, probate and certificate relating to the said will, for the purpose of administration of the estate left by the said deceased."

The plaintiff was signed and verified by Surjomoni Chowdhraïn, "guardian on behalf of Shama Churn Chowdhry, minor."

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The first paragraph of the defendant's written statement was as follows :—

"1. That the plaintiff's alleged minor Shama Churn is not either the legitimate or adopted son of the deceased Uma Churn Chowdhry, and neither is the said minor his legal heir; consequently the plaintiff has no right to bring a suit on behalf of the said minor who is a party without right."

The third issue fixed by the Court of first instance was "whether the minor plaintiff Shama Churn Chowdhry has any right to proceed with the suit?" On this point the judgment of the Court of first instance was as follows :—

"This is, indeed, a very general issue, and the defendants' pleader has very wisely restricted it to the simple point for consideration, *viz.*, whether the minor plaintiff is entitled to *chuck* No. 28, Mirzapore. Now it is admitted on all sides that Uma Churn Chowdhry was the real owner of the said *chuck* Mirzapore. The plaintiff has proved the will and *anumatipetro* under which he was adopted by the widow of the said Uma Churn Chowdhry. I am not going to enquire into the validity or otherwise of Uma Churn's will, or to consider whether the plaintiff's adoption was legally good or not, for to try these incidental facts would be to exceed the proper limits of this suit, and I am glad to remark that the learned pleader, who has ably argued this case on behalf of the defendants, did not press those points. But it is argued that inasmuch as the said Uma Churn had a son living at the time of his death, and as that son died some four or five months before the plaintiff's adoption, the properties belonging to the said son of Uma Churn were vested by right of inheritance in Uma Churn's mother Surjomoni, who is the constituted guardian of the minor plaintiff; and that as there is no proof of actual gift by Surjomoni in favour of the plaintiff, the plaintiff could not be entitled to *chuck* No. 28, Mirzapore, and as such has no right to sue for the disputed land. Let us consider how far these contentions are sound. Now the will of Uma Churn leaves no doubt that the testator intended that succession to his estate should be conferred on his son living at the time of his death, and on the demise of his said son, on the sons to be adopted by his widows. If, therefore, Surjomoni became possessed of Uma Churn's properties on the death of his son Hur Cumar, she became so entitled, not as of absolute right, but as a trustee or manager on behalf of the minor plaintiff. That matters were thus understood by the parties appears from the several acts of the said Surjomoni. The name of the minor plaintiff was registered by the provisions of Bengal Act VII of 1876, and Surjomoni was appointed as a guardian of the plaintiff under Act XL of 1858. Besides, Surjomoni distinctly states in her deposition that the plaintiff is the owner of all the properties left by Uma Churn

or Hur Cumar, and that she has no claim whatever to any of those properties. Under all these circumstances, it does not lie in the mouth of the defendants to question the plaintiff's right to *chuck* No. 28, Mirzapore. If, according to the defendants, Uma Churn had a right to sue for the said *chuck* No. 28, then the minor plaintiff, as adopted son of the said Uma Churn, has undoubtedly that right.

"Then I see no force in the argument that the plaintiff's suit as framed could not lie. The evidence adduced on behalf of the plaintiff discloses the same title as alleged in the plaint. This issue is, therefore, decided in favour of the plaintiff."

On appeal this decision was upheld. The Subordinate Judge's judgment, so far as is material, is as follows:—

"It is admitted on all hands that the deceased Uma Churn Chowdhry was the owner and possessor of *chuck* No. 28, which appertains to his zemindari Mirzapore and Ajampore. It is proved by the evidence of the witnesses, examined by the plaintiff that Uma Churn Chowdhry gave permission or *anumatipetro* to his widow to adopt, and that the said widow adopted the minor plaintiff as her and her deceased husband's son with the permission of her husband by performing the necessary *lag*, &c., according to the Hindu law, and it is also proved that the minor plaintiff has been in possession of all the property left by his deceased father and brother according to the terms of the will executed by the said Uma Churn Chowdhry, and he has been treated by agnates and cognates as adopted son of the deceased Uma Churn Chowdhry, and he has obtained registration of his name under Act VII of 1876 (see will and *anumatipetro* filed by the plaintiff): These documents have been proved and attested by the plaintiff's witnesses, and they were acted upon. I, therefore, hold that these documents are genuine. On the contrary, the defendants have failed to prove that the minor plaintiff is not an adopted son of the deceased Uma Churn Chowdhry, or that he has no right to the disputed property, or that his adoption was invalid. According to the Hindu law I, therefore, hold that the minor plaintiff is the legal adopted son of the deceased Uma Churn Chowdhry, and his adoption is valid according to the Hindu law, and that he is competent to bring this suit through his legal guardian against the defendants, because his possession and rights in the disputed lands have been satisfactorily proved."

The defendant appealed to the High Court.

Baboo *Srinath Das*, and Baboo *Gurudas Bannerji*, for the appellant.

Baboo *Rash Behary Ghose*, for the respondents

The judgment of the Court (FIELD and GRANT, JJ.) was delivered by

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FIELD, J.—The plaintiff in this case is an adopted son and is still a minor. He sues to recover possession of certain lands which he alleges to be a portion of an estate which belonged to Uma Churn, his adopted father. The only point with which we have to deal upon this appeal is, whether the minor has a good title as adopted son. All the questions of fact have been found in his favor by the Courts below; and there is now no question as to these facts before us.

Uma Churn had three wives; with one of these ladies we have no concern. The two wives with whom we are concerned are Nobo Sundari and Gaya Sundari. Gaya Sundari was the mother of Hur Cumar, and Hur Cumar upon Uma Churn's death, succeeded to his property. Hur Cumar died unmarried and during minority; and his mother Gaya Sundari died before him. Upon Hur Cumar's death, Gaya Sundari's co-wife, Nobo Sundari, in the exercise of an *anumatipotro*, or power of adoption granted to her by Uma Churn, adopted the present plaintiff.

It has been contended before us on the part of the appellant that, inasmuch as upon Hur Cumar's death, his grand-mother Surjomoni, mother of Uma Churn, was his heiress, the property vested in her as such; that the subsequent adoption of Shama Churn by Nobo Sundari could not have the effect of divesting the inheritance which had once vested; and that therefore Shama Churn has no title to the property by virtue of which he can maintain this suit. This argument is based upon the decision of the Privy Council in the case of *Bhoobun Moyi Debi v. Ram Kishore Acharji* (1) and the subsequent case decided by this Court—*Kally Prosonno Ghose v. Gocool Chandra Mitter* (2). See also the case of *Nil Komul Lahuri v. Jotendro Mohan Lahuri* (3). In none of these cases did the exact point which has been raised before us occur. But this very point did occur in another case which was not quoted in the course of the argument, the case of *Annammah v. Mabbu Bali Reddy* (4). We entertain no doubt that upon the authorities the decision of the bare question of Hindu law would be fatal to the success of the plaintiff's case if it had to be decided upon this bare question alone. The

(1) 10 Moore's, I. A., 279.

(3) I. L. R., 7 Cal., 178.

(2) I. L. R., 2 Cal., 295.

(4) 8 Mad. H. C. 108.

adoption by Nobo Sundari having taken place after the estate had vested in Surjomoni upon the death of Hur Cumar, the subsequent adoption could not have the effect of divesting the estate once so vested. But it is said that there is something more than the *anumatipotro*, that the case is to be decided not upon the *anumatipotro* alone, but upon the *anumatipotro* taken with a will made by Uma Churn, probate of which will has since been granted. In the case of *Bhoobun Moyi Debi v. Ram Kishore Acharji* (1) their Lordships of the Privy Council observed that they were dealing with an *anumatipotro* only and without reference to any testamentary disposition, or the possible effect of such a disposition. They said: "Whether under his testamentary power of disposition, Gour Kishore could have restricted the interest of Bhowanee Kishore in his estate to a life interest, or could have limited it over (if his son left no issue male, or such issue male, failed) to an adopted son of his own, it is not necessary to consider; it is sufficient to say that he has neither done nor attempted to do this;" and then further on: "No case has been produced, no decision has been cited from the Text Books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested." But it is contended that upon the true construction of this will, the testator did not intend to make any provision for the event which had actually taken place. The clause of the will runs to this effect: "If my existing son, *i.e.*, Hur Cumar, should die, and if no son of my loins should be born, then my wives, in the exercise of the power of adoption given to each of them for adopting three sons each, shall adopt sons, and such sons shall take the estate." It is argued that the testator was speaking with reference only to the state of things at the time of his death; and that what was in his mind was the event of the बह्वर्तन पुत्र existing son, dying during his lifetime, not being in existence at the time of his death: and that he did not contemplate the event which has actually happened, *i.e.*, the case of this son dying after his death. We have to observe that it is sought to raise this question, not between rival claimants to the inheritance, but

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between a stranger and a person who is in possession of that inheritance, having succeeded thereto with the consent and acquiescence of Surjomoni, the only person who would be entitled to maintain a construction of the will adverse to the present plaintiff's title. We think that a stranger has no right in this way to seek out a flaw in the plaintiff's title and impugn the validity of that title.

There is evidence in the case to show that Surjomoni has acquiesced in the plaintiff's title; she acted as his guardian in bringing the present suit; and at her instance the minor's name was registered under the Land Registration Act. According to a possible and probable construction, the will has given the inheritance to the plaintiff, and we think that a stranger is not entitled to come in and say, that under another construction, not set up by the person who would benefit thereby, that person and not the plaintiff is the rightful owner.

We are, therefore, of opinion that this appeal must be dismissed with costs.

P. O'K.

*Appeal dismissed.*

*Before Mr. Justice Mitter and Mr. Justice Ghose.*

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 July 11.

JOGENDRO NATH SIRCAR (JUDGMENT-DEBTOR) v. GOBIND CHUNDER  
 ADDI AND ANOTHER (DECREE-HOLDERS).<sup>o</sup>

*Civil Procedure Code, 1882, ss. 284, 295, 315—Execution of decree—Payment out of proceeds before confirmation of sale—Interest on decree from date of sale to date of confirmation.*

Although there is no express provision in the Code laying down that a decree-holder may take out of Court the proceeds of an execution sale before the date on which the sale is confirmed, yet s. 315 of the Code implies that this may be done.

The Court, however, under special circumstances, may refuse to pay over to the decree-holder the purchase money until the sale is confirmed, but in such case it should provide for due payment of interest on the money detained.

*Held*, that under the special circumstances of this case, the decree-holder was not entitled to receive interest from his judgment-debtor from the date of the sale to the date on which the sale was confirmed.

<sup>o</sup> Appeal from Order No. 133 of 1885, against the order of C. B. Garrett, Esq., Additional Judge of 24-Pergunnahs, dated the 26th of January 1885.