APPELLATE CIVIL.

1874
April 18.

Before Mr. Justice Phear and Mr. Justice Morris.

BEHARY LALL MOHURWAR (ONE OF THE DEFENDANTS) *v.* MADHO LALL SHIR GYAWAL (PLAINTIFF) AND LUCKHO DAYEE (DEFENDANT).*

Declaratory Decree—Suit to set aside Deed—Act VIII of 1859, *s.* 15—*Cause of Action—Reversioner.*

See also 15 B L R 79.

A Hindu died, leaving a widow, two daughters *R* and *P*, and a grandson *B* by his daughter *R*. The widow took possession of the estate and executed an *ikrarnama*, wherein, after reciting that she was in possession "without the co-parcenary of any one," she declared that "*B*, the grandson of me the declarant, is the heir of my late husband and of me the declarant," and that all the property was "the right of *B* as aforesaid," and continued:—"During the life of me the declarant I am in possession without the co-shareship of any one, and will continue to be so; after my death *B* will get possession of the whole of the moveable and immoveable properties appertaining to the estate of my late husband. No one else has the right or demand to the same; therefore these words have been written and given as an *ikrarnama* that it may be of use when occasion arises." Under the *ikrarnama* proceedings were completed for mutation of names in favor of *B*. Subsequently to the execution of the *ikrarnama* *P* gave birth to the plaintiff, and shortly afterwards died. The plaintiff, on attaining his majority, and during the life of the widow and *R*, brought a suit against *B* to have the *ikrarnama* set aside, and declared void as, against him, and for a declaration of his right to a moiety of the estate of his grandfather on the death of the widow, *Held* that he had no cause of action.

ONE Damoodur Mahton Gyawal died possessed of considerable property, and leaving a widow, Luckho Dayee, two daughters Raneee Dayee and Phoola Dayee, and a grandson by his daughter Ranee Dayee, the defendant Beharee Lall. Subsequently, the other daughter, Phoola Dayee gave birth to a son, the present plaintiff, and three days after his birth, she, Phoola Dayee, died.

*Regular Apppeal, No. 52 of 1873, against the decision of the Subordinate Judge of Zilla Gya, dated the 21st December 1872.

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Between the date of the death of Damoodur Mahton and the birth of the plaintiff, Luckho Dayee, who was in possession of the estate as widow of Damoodur, executed an *ikrarnama* in favor of the defendant Beharee Lall, wherein, after reciting that she had two daughters by her late husband Damoodur, *viz.*, Ranee Dayee and Phoola Dayee, and that her husband was dead leaving her his heiress, and that she was in possession of his estate, moveable and immoveable, "without the co-parcenary of any one," she continued :—

"Whereas Mussamut Phoola Dayee, the daughter of me, the declarant, has no son, and Mussamut Ranee Dayee has her son, Beharee Lall Mohurwar, living, so that I, the declarant, have no son of my own, therefore by the shastras, the said Beharee Lall Mohurwar, the grandson of me, the declarant, is the heir of my late husband and of me, the declarant. For instance, Beharee Lall aforesaid does all the work of the Gyawals for the *jatris* (pilgrims) who come from Tirhoot and other parts of the country appertaining to my husband: and I, the declarant, still in order to comply with the *ikrar*, I write and give that all the mauzas of this Zilla and Zilla Tirhoot, and the houses and household goods cash and things, jewellery, precious stones and utensils, instruments, silks, woollens, slave girls and the slaves and *jatris*, specially *jatris* of Maharaja Roodra Narayan Bahadoor, the Rajah of Durbanga, and of the Baboo's relatives, and of the caste of the said Raja and others, property of my late husband and of me, the declarant, and in my possession and the other dues to and demands of my husband and me are all the right of Beharee Lall Mohurwar as aforesaid. During the life of me, the declarant, I am in possession without the co-shareship of any one, and will continue to be so, that I may be able to give charities. After my death Beharee Lall Mohurwar will get possession of the whole mauzas of this Zilla and Zilla Tirhoot, and of all the moveable and immoveable properties, and dues and demands appertaining to the estate of my late husband. No one else has the right or demand to the same. Therefore these few words have been written and given as an *ikrarnama*, that it may be of use when occasion arises."

It was alleged on behalf of the plaintiff, and appeared to be proved that, under this *ikrarnama*, certain proceedings for mutation of names had taken place in favor of the defendant Beharee Lall.

The present suit was brought by Madhoo Lall Shir, after

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attaining his majority, to have the *ikrarnama* declared void as against him and to have it cancelled. He also prayed for a decree to declare his right by inheritance to possession of a moiety of the estate of the late Damoodur Mahton on the death of Luckho Day ee, and to protect his title from harm caused by the existence of the *ikrarnama*.

The defendant Beharee Lall pleaded *inter alia* that the plaintiff had no such interest as would entitle him to bring the suit; and that, even if he had, neither the plaint nor the evidence disclosed any cause of action.

The first Court, relying on the case of *Jamiyutram* v. *Bai Jamna* (1), held, that upon his mother's death the plaintiff succeeded her as heir-at-law to his grandfather Damoodur Mahton, and accordingly gave a decision in his favor under s. 15 of Act VIII of 1859.

The defe ndant Beharee Lall appealed to the High Court.

Baboo *Kali Mohun Doss* and *Boodh Sen Sing and* Moonshee *Mohamed Yusuff* for the appellant.

The *Advocate-General*, offg. (Mr. *Paul*) *(Mr. C. Gregory*, and Baboos *Unnoda Persad Banerjee*, *Chunder Madhub Ghose*, and *Aubinash Chunder Banerjee* with him) for the respondents.

Baboo *Kali Mohun Doss*, for the appellant, contended that the plaintiff had no cause of action. A contingent right is no ground for an action under s. 15 of Act VIII of 1859—*Pranputty Kooer* v. *Lalla Futteh Bahadoor Singh* (2). In order to entitle a plaintiff to a declaratory decree, he must show that he has an exisiting right, and that his right has been invaded by the defendant—*Kenaram Chuckerbutty* v. *Dinonath Panda* (3). The paintiff is not entitled to consequential relief, unless he can show that he is the next reversioner, and he is not so—*Bhaskar Trimbak Acharya* v. *Mahadev Ramji* (4). The Jvdge's construction of the case of *Jamiyutram* v. *Bai Jamna* (1) is entirely wrong. Though some portions of the *shastras* pronounce the daughter's sons to be equal in some respects to the son's son's it does not follow that they are equal in all respects,

(1) 2 Bom. H. C. Rep., 11.
(2) 2 Hay's Rep., 608.
(3) 9 W. R., 325.
(4) 6 Bom. H. C. Rep., O. C., 15.

especially in legal qualifications—*Kattama Nachiar* v. *Dorasinga Tevar* (1). It was there held that daughtars' sons took *per capita*; whilst the plaintiff in this case seeks relief *per stirpes*. [PHEAR, J.—The effect of that decision is that a daughter's son can have no interest during the lifetime of the other daughter, The Bombay case seems to take a wrong view of the matter,] The plaintiff cannot have any right until the other daughter is dead, nor has he any cause of action, inasmuch as he has only a contingent interest, and it does not appear what interest he may have after the two intervening life estates, *viz.* of the widow and the other daughter, have ceased. This view appears to have found favor with their Lordships in the Privy Council—*Thakoorain Sahiba* v. *Mohun Lall* (2). In the case of *Rani Brohmomoyee* v. *Raja Anund Lall Roy* (3),

(1) 6 Mad. H. C. Rep. 310.

(2) 11 Moore's I. A., 386.

(3) *Before Mr. Justice Markby and Mr. Justice Birch.*

The 17th April 1873.

RANI BROHMOMOYEE (DEFENDANT) *v.* RAJA ANUND LALL ROY (PLAINTIFF).*

Declaratory Decree—Suit to set aside Adoption—Reversioner.

Mr. *Woodroffe* (with him Baboos *Bhowany Churn Dutt*, *Mohiny Mahun Roy*, and *Kader Nath Sircar*) for the appellant.

The *Advocate-General*, offg. (Mr. *Paul*) (with him Baboos *Hem Chunder Banerjee* and *Bama Churn Banerjee*) for the respondent.

THE following judgments were delivered:—

MARKBY, J.—In this case it appears that one Raja Nund Lall, having no sons of his own, at one time intended to adopt, and took some steps towards adopting his brother's grandson Operdeo Lall, but afterwards quarrelling with his brother, adopted another child, the son of his dewan, Gujendro Lall. Raja Nund Lall died, leaving him surviving his wife, the defendant, Brohmomoyee, and his adopted son, Gujendro. Gujendro has since also died, and the defendant Brohmomoyee has thereupon adopted another son Opendro Chunder, who is a defendant in this suit, by the name of Opendro Lall Roy. Opendro Chunder is still a minor, and his mother has assumed to act as his guardian in this suit, but whether she has obtained the certificate necessary for that purpose under Act XL of 1858 does not appear.

The present suit was brought by Anund Lall, the brother of Nund Lall, originally against Brohmomoyee alone, but afterwards the minor was added. Anund Lall alleges himself to be the reversionary heir of his

* Regular Appeal, No. 154 of 1872, against a decree of the Judge of Zilla Midnapore, dated the 4th April 1872.