

directing certain parties not to proceed with a suit in the District Court of Hooghly. The Court of Appeal thought this went too far, but ordered that the decree of that Court when obtained should not be executed. But that case proceeds upon the assumption that the District Court of Hooghly is subordinate to this Court, and that this Court has power to remove the suit from that Court and to try it here. A suit relating to the same matter had been brought here before the suit had been brought in the Hooghly Court, and unless the injunction had been granted there might have been a conflict of jurisdiction between the two Courts. That case appears to me, therefore, to be quite distinguishable.

The conclusion I have come to is, that the injunction prayed for is not one which the Subordinate Judge was empowered to grant, and that the suit was, therefore, rightly dismissed.

Appeal allowed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

GOUR MONEE DEBEA (DEFENDANT) v. KRISHNA CHUNDER
SANNYAL (PLAINTIFF).*

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June 14.

Estoppel—Variance between Pleading and Proof.

A claimed certain property from *B*, the daughter of *C*, on the ground that, on the death of *C*, it had descended to *D* as the heir of *C*, and produced a kobala containing a recital that, on the death of *C*, who had died childless, it had descended to *D*. *Held*, that *A* was not estopped from proving that *C* had left a son *E*, who survived him, and that *D* was entitled to the property as *E*'s heir, and that *D*'s heir could give the title to such property.

THIS was a suit to recover possession of certain lands, which, on the admission of both the plaintiff and the defendant Gour

* Special Appeal, No. 635 of 1877, against the decree of Baboo Nobin Chunder Ghose, Roy Bahadur, Second Subordinate Judge of Zilla Mymensing, dated the 23rd December 1876, reversing the decree of Baboo Mummothonath Chuttopadhyaya, Offg. Munsif of Ishurgunj, dated the 4th April 1876.

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Monee Debea, had once been the property of one Haradhun Bhuttacharjee. It was also admitted that Haradhun Bhuttacharjee had had two children, *viz.*, a son Kisto Sunder, *alias* Gour Bhuttacharjee, and a daughter, the defendant Gour Monee Debea. The plaintiff alleged that Kisto Sunder, *alias* Gour Bhuttacharjee, survived his father Haradhun, and afterwards died childless and unmarried, and that the property in dispute then descended to one Bissumbhur Gossami, who was Gour Bhuttacharjee's father's sister's son, on whose death without issue it descended to his (Bissumbhur Gossami's) widow Bama Sundari Debea, who sold it to the plaintiff under a kobala, dated the 26th Assin 1280, corresponding with the 11th October 1873. The plaintiff further alleged that the defendant Gour Monee Debea was a childless widow, and was therefore not entitled to inherit under Hindu law.

The defendant Gour Monee Debea, who alone defended the suit, the other defendants being mere tenants, alleged on the contrary that Kisto Sunder, *alias* Gour Bhuttacharjee, had predeceased his father; and that, on the death of Haradhun, she, who, though now a childless widow, was then unmarried, became his sole heiress under Hindu law, and had ever since resided upon and enjoyed the property. She also denied that Bissumbhur Gossami was the son of Haradhun's sister, and asserted that the kobala relied upon by the plaintiff was collusive and executed without consideration.

The kobala when produced was found to contain a recital that Haradhun had died childless, and that Bissumbhur Gossami had succeeded him as his heir.

The Court of first instance found that Bissumbhur Gossami was the sister's son of Haradhun; that the kobala was executed by Bama Sundari *bonâ fide* and not without consideration; and that, at the time of Haradhun's death, the defendant Gour Monee Debea was his only daughter, and not a childless widow, but capable of inheriting from him if he died without male issue.

The only question, therefore, that remained to be decided was, whether Kisto Sunder, *alias* Gour Bhuttacharjee, survived or predeceased his father Haradhun. The plaintiff called four witnesses to prove that Kisto Sundur, *alias* Gour Bhuttacharjee, had survived his father, but the Court of first instance refused

to act upon their evidence, because, among other reasons, it was at variance with, and directly contradicted, the recital in the kobala that Haradhun had died childless, and that Kisto Sunder, *alias* Gour Bhattacharjee, had succeeded to the property as his heir, and that Court accordingly dismissed the suit.

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The lower Appellate Court accepted the evidence of the four witnesses who had been disbelieved by the Court below, and found that Kisto Sunder, *alias* Gour Bhattacharjee, had survived his father; and that, on his death, the property devolved upon his heir Bissumbhur Gossami, and it therefore reversed the decree of the lower Court.

From this decision the defendant appealed to the High Court.

Baboo *Hem Chunder Banerjee* for the appellant.

Baboo *Mokiney Mohun Roy* and *Nil Madhub Sen* for the respondents.

For the appellant it was contended that the plaintiff was estopped from proving a case inconsistent and at variance with the only document upon which his title rested. The kobala on which he relied recited that Haradhun had died childless, and even if the expression 'childless' could be taken as equivalent to 'without male issue,' it implied that Bissumbhur inherited or became entitled to the property in dispute as the heir of Haradhun, and not as the heir of his son Kisto Sunder, *alias* Gour Bhattacharjee. This was confirmed by the fact that the plaint contained an allegation that the defendant Gour Monee Debea was a childless widow, but no denial that she was the daughter of Haradhun, and no allegation that she was a childless widow at the time of Haradhun's death. From this it may be surmised that the plaintiff from the first apprehended that his evidence as to Haradhun having been survived by his son was weak and might not be believed, and therefore reserved to himself the chance of contending that even if Haradhun had died childless, and had been succeeded by his daughter, the defendant Gour Monee, as his heiress, still she would have been divested of her rights on becoming a childless widow, and Bissumbhur would have succeed-

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ed as heir of Haradhun. Such a contention would, no doubt, have been untenable, but the absence of any allegation that the defendant Gour Monee Debea was a childless widow at the time of Haradhun's death, shows that the plaintiff may have intended to rely on it as a last resource, and still further weakens the evidence offered by him to prove that Kisto Chunder, *alias* Gour Bhuttacharjee, survived his father. In short the plaintiff's plaint, as well as his kobala, shows that he claims on the ground that Bissumbhur was the heir of Haradhun and not as the heir of Haradhun's son, and even if he is not estopped by the recital in the kobala, he ought not now to succeed on the ground that Bissumbhur was the heir of Haradhun's son.

For the respondents it was contended that the recital in the kobala although evidence, was not conclusive; that the lower Appellate Court was at liberty, notwithstanding such recital, to accept evidence showing that Haradhun had been survived by his son; and further that there was evidence on the record that Bissumbhur, and afterwards his widow Bama Sundari, had, as well as the defendant, been in occupation of the disputed property; and that there was nothing to show that the defendant had exercised any rights of exclusive ownership within the last twelve years.

The judgment of the Court was delivered by

JACKSON, J.—In this case Baboo Hem Chunder Banerjee has pressed upon us very much what he considers to be something in the light of an estoppel against the plaintiff,—that is to say, an admission or statement made in the kobala by which this property was conveyed, that Haradhun, the former owner of the property, had died निः सन्तान, which means either childless or without male issue; and it is contended that if this had been the case, as it must be taken as against the plaintiff, then the title of Gour Monee, the first defendant, who was the daughter of Haradhun, would arise immediately upon his death; and that neither the plaintiff's vendor Bama Sundari, nor her deceased husband, who was Haradhun's sister's son, could have taken this property; and therefore it is insisted that, according to that

admission; Gour Monee, who it is admitted has been living in the house, must be taken to be the owner, and the plaintiff's suit ought to be dismissed.

Now, it appears to us that this is not such an admission as conclusively binds the plaintiff. It was not essential to state in this kobala by what means the property which was being sold had come to the husband of the vendor. It was enough for her to recite that her husband being dead she was his heir and representative, and that, for the reasons stated, she thought fit to sell the property. The death of Haradhun took place many years ago, when Bama Sundari, the plaintiff's vendor, was quite a young girl. It may be that she forgot or was imperfectly informed of the facts, or that those who advised her misunderstood the Hindu law, and assumed that Bissumbhur, the husband, had succeeded Haradhun by reason of his having died childless or without a son. In a recent case (1) before the Privy Council, the word निः सञ्जान has been interpreted to mean without issue,—that is to say, the term निः सञ्जान includes offspring of both sexes,—and if the word निः सञ्जान were so interpreted, the plaintiff's vendor ignores the existence of Gour Monee. It is a circumstance which the Court below would be quite right in taking into consideration, but which it would be wrong in holding binding as against the plaintiff. But whether that would be so or not, it seems to be really immaterial, because there is another finding of the Court below which equally protects the plaintiff, and that is, as we understand, an admission that Bama Sundari and her husband Bissumbhur have been in continuous possession of this property since the date of the kobala, and that Gour Monee, whether entitled or not, and although she has lived on the premises, was not the real possessor or the owner. That being so, the title of Gour Monee would be extinguished by lapse of time. Under these circumstances we are not in a position to disturb the judgment of the lower Appellate Court.

The appeal is dismissed with costs.

Appeal dismissed.

(1) See *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry*, I. L. B., 4 Calc., 23.

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