1880

RANI ANAND KUNWAR v. THE COURT OF WARDS.

logical table that Sitaram had three daughters who have sons living. They would be as near in succession to Shunkersahai as the minor plaintiff would have been, even if he had been a naturally born son.

It must also be borne in mind that even if Adjudhia Pershad, Luchman Pershad, Sheo Rutton, and Ram Rutton have precluded themselves from suing to set aside the adoption, the minor plaintiff could not, even if he were a naturally born son, and the adoption of the second defendant should be set aside, succeed to the property of Shunkersahai, if either of the sons or grandsons of Sitaram should survive the first defendant. The minor, admitting him to be a bandhu, has merely a very remote possibility of ever succeeding to the property of Shunkersahai. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decisions of both the lower Courts, and to dismiss the suit, with costs, in both the lower Courts. The appellants' costs of this appeal must be paid out of the estate of the minor Chandra Shekhar.

Solicitor for the appellants: Mr. *T. L. Wilson.*

Solicitor for the respondent: Mr. *H. Treasure.*

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

1881
March 10.

IN THE MATTER OF THE PETITION OF ASGUR HOSSEIN AND OTHERS.

THE EMPRESS *v.* ASGUR HOSSEIN AND OTHERS.*

"*Incapable of giving Evidence*"—*Evidence Act* (*I of* 1872), *s.* 33—*Duty of Committing Magistrate—Witnesses—Examination on Oath—Statements of Witnesses.*

The incapacity to give evidence mentioned in s. 33 of the Evidence Act need not be a permanent incapacity.

In re Pyari Lall (1) dissented from.

* Criminal Appeal, No. 67 of 1881, against the order of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 15th December 1880.

(1) 4 C. L. R., 504.

1881

IN THE MATTER OF THE PETITION OF ASGUR HOSSEIN.

The Magistrate to whom a complaint was made, examined certain persons on oath in the absence of the accused, merely for the purpose of ascertaining whether there was any, and what case, against the prisoners; and he did not take down in writing the statements of the persons so examined. *Held*, that the Magistrate was wrong in examining the witnesses on oath in the absence of the accused, or for the purpose of finding out whether there was a case; but that, having done so, he was not bound to take down their statements in writing.

IN this case one Asgur Hossein, a Police head constable, and four chowkidars, were charged with voluntarily causing hurt to two men, named respectively Dooli and Darshan. The committing Magistrate made an enquiry, not in the presence of the accused, in the course of which he examined certain persons, some of whom were afterwards called as witnesses. No note of these examinations was made by the committing Magistrate, though the persons examined were examined on oath. At the trial it was proved, that one of the complainants, Darshan, was ill, and confined to his house; and the Judge, under s. 33 of the Evidence Act, allowed in evidence the deposition which Darshan had made before the committing Magistrate. The prisoners, having been found guilty by the Sessions Judge sitting with assessors, appealed to the High Court.

Mr. *M. M. Ghose* for the appellants.—The prisoners have been prejudiced in their defence by the conduct of the Deputy Magistrate, who refused to give them copies of the depositions on which the committal was based. Again, the deposition of the complainant Darshan should not have been admitted in evidence, as there was no proof that he was "incapable of giving evidence" within the meaning of s. 33 of the Evidence Act. See *In the matter of Pyari Lall* (1).

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

PONTIFEX, J.—(The learned Judge, having gone through the evidence, confirmed the finding of the Sessions Judge. His Lordship then continued.)

(1) 4 C. L. R., 504.

1881

IN THE MATTER OF THE PETITION OF ASGUR HOSSEIN.

The deposition before the Deputy Magistrate of one of the complainants (Darshan) was admitted by the Sessions Judge under s. 33 of the Evidence Act, it being stated by certain of the witnesses that he was ill and confined to his house. We are of opinion, that the evidence as to his illness was not sufficient to bring the case within s. 33 of the Evidence Act. The Sessions Judge ought to have required more precise evidence as to the nature of the illness and the incapacity of the witness to attend. A case has been cited to us, that of *Pyari Lall* petitioner (1), in which it was held, that the incapacity to give evidence mentioned in s. 33 must be a permanent incapacity. In our opinion, that is not a necessary construction. We are inclined to think, on the construction of the entire section, and from reference also to s. 32 which precedes it, that something short of permanent incapacity might satisfy the words of the section "incapable of giving evidence." It is not, however, necessary to decide that question in this case, or we might have to send the case before a Full Bench. It is sufficient in this case, without reading the deposition of Darshan, to support the conviction.

There was a preliminary objection which was taken, *viz.*, that the committing Magistrate had made a kind of preliminary enquiry, in which he examined certain persons, some of whom were afterwards called as witnesses; that the appellant before us applied for the depositions given by these persons; and that though they were so examined, in answer to his application no depositions were forthcoming. This Court called for an explanation on this point. The Deputy Magistrate explains that this preliminary enquiry was not an enquiry conducted in the presence of the accused; that the enquiry he made of these particular persons was for the purpose of finding out whether there was any and what case; and that he did not take down their statements in writing, though he did examine them after swearing them. We think it was inofficious and improper to swear these witnesses on an occasion and for the purpose as stated, but having sworn them, we are of opinion that, under the cir-

(1) 4 C. L. R., 504.

cumstances, he was not bound to take down their statements in writing. As the Deputy Magistrate was only the committing officer, and as he did not try the case, we think that the accused has no cause of complaint in this respect.

The conviction will be confirmed.

1881

IN THE MATTER OF THE PETITION OF ASGUR HOSSEIN.

Conviction confirmed.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

KANAI LALL KHAN AND ANOTHER (DEFENDANTS) *v.* SASHI BHUSON BISWAS AND OTHERS (PLAINTIFFS).*

1881
Feby. 9.

Representative—Revivor of Suit—Substitution—Issue—Mortgage Decree—Hindu Widow—Party to Suit—Res Judicata—Code of Civil Procedure (Act X of 1877), ss. 13, 244.

Where the plaintiff in a suit prays that a person may be substituted on the record as the heir of a defendant who has died, the Judge should raise an issue as to whether the person sought to be substituted is the heir of the deceased defendant.

In 1872, *A* brought a suit on a mortgage against the mortgagor, a Hindu widow, who died pending the suit. *A* then applied that the suit should be revived against *B* as the representative of the defendant. *B* denied that he was such representative, but the Judge refused to go into the question, made *B* a party, and gave *A* a decree for the sale of the mortgaged property. *B* subsequently brought a suit to have it declared, *inter alia*, that the mortgage and decree only covered the widow's life interest.

Held, that the suit was not barred either as *res judicata*, or under the provisions of s. 244 of the Code of Civil Procedure.

PREVIOUSLY to the year 1863, Digambar Mondol, who was possessed of several immoveable properties in the 24-Pargannas, among which was a two-anna share of taluq Huda Rashkhali, died, leaving his widow Romoni his sole heiress under the Hindu law. On the 6th of October 1863, Romoni borrowed

* Appeal from Original Decree, No. 302 1879, against the decree of Baboo Brojendro Coomar Seal, First Subordinate Judge of the 24-Pargannas, dated the 21st July 1879.