

PRIVY COUNCIL.

SRISH CHANDRA ROY

v.

BANOMALI ROY.

P. C.*
1904

February 24.
March 23.

[On appeal from the High Court at Fort William in Bengal.]

Specific Performance—Suit—Ekrar—Attempt by party to rescind agreement of which his heirs afterwards seek specific performance—Consideration, failure of—

Where parties had made a compromise comprising an agreement, the chief consideration for which was the execution of an *ekrar* by one party acknowledging the title (as adopted son) of the other party to the agreement, and the former had subsequently by his conduct (in bringing a suit to set aside the adoption and alleging that the *ekrar* had been obtained from him by fraud) attempted and in a great measure succeeded in depriving the latter of the benefit of the agreement.

Held, in a suit by the heirs of the party, who had so tried to rescind the agreement that there had been a failure of consideration and the conduct referred to was at variance with and amounted to a subversion of the relation intended to be established by the compromise; and that specific performance of the agreement could not be enforced.

APPEAL from a judgment and decree (9th July 1901) of the High Court at Calcutta, by which a judgment and decree (31st January 1899) of the Additional Subordinate Judge of Pubna and Bogra were affirmed.

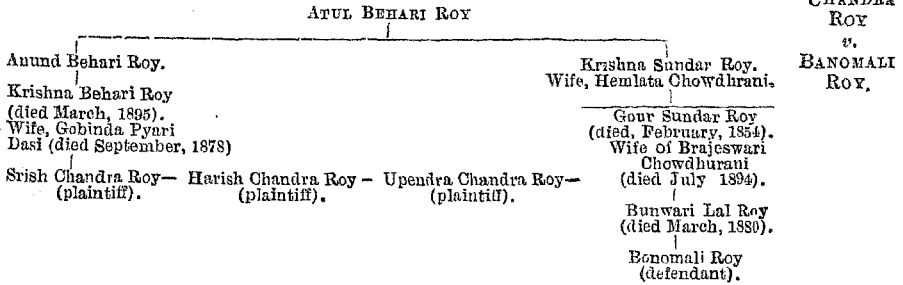
The plaintiffs appealed to His Majesty in Council.

The suit, out of which the appeal arose, was one for specific performance of an agreement dated 20th May 1861, and the only question involved in the appeal was whether under the circumstances of the case the Courts below had rightly exercised their discretion by refusing to grant such specific performance.

The following pedigree, which was set out in the judgment of the High Court, explains the position and relationship of the

* *Present*;—Lord Davey, Lord Robertson, and Sir Arthur Wilson.

parties, between whom the dispute leading to the suit has arisen :—



The facts, which were practically undisputed, are fully stated in the judgment of the High Court (HILL and BRETT JJ.) appealed from, which is as follows:—

HILL J. In the year 1861, Banwari Lal Roy, the adopted son of Gour Sundar Roy, brought a suit (No. 96 of 1861) against Krishna Behari Roy, who, but for the adoption, would have been the heir-at-law of Gour Sundar Roy, for the purpose of setting aside a *patni* lease of *mousah* Narsingpura and Sayandaban, granted to the latter by Hemlata Chowdhrani, the mother of Gour Sundar Roy. The suit, in which Krishna Behari, in his defence impeached the adoption of Banwari Lal, terminated in compromise, in accordance with which the Court made its decree on the 23rd May 1861, in part decreeing and in part dismissing Banwari Lal's claim.

The compromise was embodied in a petition to the Court, bearing date the 15th Jeyt 1268 (23rd May 1861), in which it is stated by Krishna Behari (the petitioner), after various recitals which are not now material, "now considering that when I Brajeswari Chowdhrani, the widow of the said Gour Sundar Roy, has, under the aforesaid deed of authority by her husband, in fact, accepted the gift of the plaintiff as a son, and has duly adopted him, and that when I personally have witnessed the gift and have affixed my name and seal as witness to the deed, I come to the conclusion that there is no chance of the *patnis* granted by Hemlata Chowdhrani standing good in the suit of the plaintiff,

1904
 ~~~~~  
 SRISH  
 CHANDRA  
 ROY  
 v.  
 BANOMALI  
 ROY.

who is the duly adopted son of Gour Sundar Roy, unless he, the plaintiff, willingly ratifies all the said *patnis*." It is then stated that the plaintiff had consented, on the receipt of a *nazarana* of Rs. 1,500, to ratify the *patnis* at an annual rent of Rs. 946, and that he (Krishna Behari) withdraws from *mousah* Sayandaha. The petition then proceeds:—"I file also with this petition the *ekrar*, which I have executed to-day on proper stamp in favour of the plaintiff, containing my admission of the authority to adopt, which the late Gour Sundar Roy executed in favour of his wife, Brajeswari Chowdhrani, and of the fact of due adoption by her of the plaintiff in pursuance thereof;" and it is then prayed that the plaintiff's claim for possession of *mousah* Sayandaha may be decreed, and his claim for possession of *mousah* Narsingpura may be dismissed, and that the *ekrar* in original may be returned to the plaintiff.

This *ekrar* is of the same date as the petition, and contains an unequivocal acknowledgment of the validity of the adoption of Banwari Lal, as well as of his right, as the adopted son of Gour Sundar Roy, to hold for ever all the property left by his adoptive father. The *ekrar* concludes with a relinquishment by Krishna Behari, for himself and his heirs, of all claim to that property. On the filing of the petition and *ekrar*, the suit was, as has been stated, disposed of by the Court in accordance with the prayer of the petition.

It is the case for the plaintiff that, as part of the same transaction and as part consideration for the compromise of the suit, the agreement, upon which the present suit is based, was executed by Banwari Lal. The document, which is addressed to Govinda Pyari Dasi, the wife of Krishna Behari, after reciting that certain *mehals* (the *mehals* now in suit), being close to the lady's residence, she was solicitous of obtaining them in permanent settlement, but that the said *mehals* were at the time in the possession of Brajeswari Chowdhrani, proceeds:—"Therefore I promise that, when the said *mehals* will come back to my *tehas* possession, I will settle the said *mehals* on you or your heirs in permanent *ijara*, at an annual gross rental of Rs. 1,001, without any premium or *nazarana*. Neither I nor my heirs can have any objection thereto."

The settlement of suit No. 96 of 1861 was arrived at, as mentioned above, on 10th Jeyt 1268, corresponding with the 22nd May 1861. In the meantime, on 4th May 1861, Banwari Lal Roy had instituted two suits numbered respectively 118 and 119 of 1861, for the avoidance of certain other *patni* leases granted by Hemlata Chowdhurani. In these suits Krishna Behari Roy intervened shortly after the compromise of the suit No. 96 of 1861 and was added as a defendant under s. 73 of Act VIII of 1859. He, thereupon, filed written statements in both suits impeaching the adoption of Banwari Lal Roy, and alleging that the *ekrar* of 10th Jeyt 1268 had been obtained from him by fraud. The Court, however, found against him on both points, and the suits were decreed in favour of Banwari Lal Roy on 20th March 1863. From these decrees Krishna Behari Roy appealed to the District Court, raising again the same questions. On 17th September 1863 both appeals were dismissed with costs, the Judge observing, in his judgment, that a more hopeless opposition than Krishna Behari's could hardly have been conceived. He, nevertheless, appealed to the High Court, but met there with a similar fate, both his appeals being dismissed, with costs on 1st August 1864. From that date down to the year 1871 Krishna Behari appears to have remained quiescent. But, on 24th February 1871, he himself instituted a suit against Banwari Lal Roy and his adoptive mother for the purpose of setting aside the alleged adoption of the former, and of obtaining a declaration of his own reversionary right as the heir of Gour Sundar Roy. In his plaint he alleged that the adoptive mother of Banwari Lal had caused him, while in her service, by fraud, allurements and threats to execute deeds of acknowledgment containing false statements, with reference, presumably, to the adoption of Banwari Lal. Then, on 29th June 1871, he put in a written statement setting out his case in an amplified form. In this document, he characterizes the deed of gift of Banwari Lal to his adoptive mother, to which he was himself an attesting witness, as a forgery, and in relation to the compromise of the suit No. 96 of 1861, he states: "Next taking counsel with his (Banwari Lal's) pleaders and mukhtars, and with the evil object of producing strong fear in my mind, he brought a suit in the Court of the

1904  
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 SRISH
 CHANDRA
 ROY
 v.
 BANOMATI
 ROY.

1904
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 SRISH  
 CHANDRA  
 ROY  
 v.  
 BANOMALI  
 ROY.

principal Sadar Amin of this district for setting aside the *patni* of my principal property, Narsingpura, and others, and for obtaining possession of them, and having influenced and overpowered me with false hopes of gain, caused written statements, *ekrars* and *solenamahs*, etc., containing false statements in admission of his own adoption to be drawn up in my name by his pleaders, mukhtars and servants, and got them signed by me; and that the particulars stated in the false and fraudulent *solenamahs* filed in the said suit to the effect that *mehal* Sayandaha, which formed my *patni*, was surrendered to the defendant No. 2, and besides I paid him Rs. 1,500 cash as *nazarana*, are all false and untrue." (This sum has admittedly been paid) "and have been entered, advisedly, only to give a colour of reasonableness to the said *solenama* on the face of it, and at the same time to accomplish his own motives, by holding out false hopes to me, he executed an enticing *roka*" (*i.e.* the agreement on which the present suit is based), "in the name of my wife promising to grant her in future a *maurasi talook* of the *mehal* called Dhulauri. Consequently, the defendants are not entitled, under law and equity, to any benefit of my aforesaid acts, which they caused me to perform illegally and untruthfully, having entrapped me by their aforesaid designs."

The suit was tried by the District Judge of Rajshahye, and on the 3rd August 1871, was dismissed as being barred under s. 3 of Act VIII of 1859; on an appeal by Krishna Behari to the High Court, this decision was affirmed on the 4th January, 1873. Then he appealed to the Privy Council, but there, also, he was defeated, his appeal being dismissed, with costs, on the 17th November 1875. This brought the litigation between him and Banwari Lal to a close.

The only other facts, which it seems necessary to mention, are, that Gobinda Pyari Dasi died in September 1878. Banwari Lal died in 1880. Brajeswari Chowdhrani died in July 1894 and Krishna Behari Roy died in March 1895.

Then on the 29th September 1896, the plaintiffs sent a letter through a pleader to the present defendant, enclosing a draft *kaimi iyara pottah* of the *mehals* in suit in favour of the plaintiffs, and requesting him to signify his approval of the draft within

thirty days. To this requisition, the defendant replied, on the 28th October 1896, denying the plaintiff's right to a *kaimi pottah* of the *mehals*, and then this suit was instituted on the 8th February, 1897. On the foregoing facts the Subordinate Judge dismissed the suit. He was of opinion, that the delay in bringing the suit amounted to an abandonment of the agreement sought to be enforced, and that the conduct of the plaintiff's father, after the compromise, in setting up his own title as the heir of Gour Sundar Roy, and calling in question the title of the defendant's father in violation of the very essence of the agreement, disentitled the plaintiffs to the relief claimed. He further held that, inasmuch as the plaintiffs' father had, by the *ekrar* of the 8th Jeyt 1268, covenanted never to deny the title of Banwari Lal, and as that promise constituted the sole consideration for the confirmation by Banwari Lal of the *patni* of Narsingpura, and the promise to execute the lease, the consideration for that promise failed in consequence of the attempts made by Krishna Behari in the litigation, to which reference has been made above, to overthrow the title of Banwari Lal.

Now, although the views of the Subordinate Judge, with respect to the effect of the delay in bringing the suit, and with regard to the failure of the consideration for the agreement, may be open to question, I agree with him as to the effect of the conduct of Krishna Behari subsequent to the compromise. His conduct would, I think, have disentitled him to ask for the specific enforcement of the agreement in a Court of equity had he himself sought to do so, and the plaintiffs must take the consequences of his acts, for their case here, as in the Court below, was, that the agreement was between their father and Banwari Lal, their mother, Gobinda Pyari Dasi, being named merely as a benamdar for the former, and it is in the character of his representatives, that they sought, and still seek, to enforce the agreement.

The case, in my opinion, falls within the principle stated at page 441 of Fry On Specific Performance (3rd edition), to which the Subordinate Judge has referred. The passage is as follows:—  
 “We shall now consider the closely allied cases, where he (the plaintiff) has disentitled himself, not by default merely, but by acts in fraud or contravention of the contract, or at variance

1904  
 SRIH  
 CHANDRA  
 ROY  
 v.  
 BANOMALI  
 ROY.

1904  
 SRISH  
 CHANDRA  
 ROY  
 v.  
 BANOMALLI  
 ROY.

it, or tending to its rescission and the subversion of the relation established by it. For when the party to a contract, who asks the intervention of the Court for its specific execution, has been guilty of such conduct, that circumstance may be put forward as a defence to the action." And the learned author goes on to point out that this defence may be availed of, although there has not been anything which amounts to an agreement to rescind. Later on, in the same connection, he refers to the case of *Blackett v. Bates*(1) upon which case also the Subordinate Judge has placed reliance in support of his decision, where Lord Cranworth, L. C. said: (though he based his decision on another principle). "It is a strong thing to say that after a party has denied the validity of an agreement and taken proceedings to set it aside, he can, when the result of those proceedings has proved adverse, turn round and insist on specific performance." This, it is true, is but a *dictum*, and may not amount to more, as the learned author of *Fry On Specific Performance*, puts it, than the expression of a doubt; yet it seems to indicate sufficiently clearly the tendency of the Lord Chancellor's opinion, and coming from such a quarter must be entitled to great weight. There might be cases in which, perhaps, it would not be proper to refuse specific performance on the sole ground that the plaintiff had taken legal proceedings <sup>v.</sup> with a view to setting aside the agreement, but, if so, I do not ~~think~~ think that the present case is one of them. But at all events the case, as I have said, appears to me to fall within the general principles stated by Lord Justice Fry. Virtually from the moment the compromise of the 8th Jeyt, of which the agreement, now in suit, ~~according to~~ according to the plaintiff's own case, formed a component part, was concluded, Krishna Behari directed all his efforts to annulling its effect, and that upon allegations of fraud and unfair dealing on the part of Banwari Lal, for which there would seem to have been not the slightest foundation; nor did he desist from these efforts until, in the year 1875, he was defeated in the Privy Council. Had he been successful, it is needless to say, the agreement, which his heirs are now seeking to enforce, would have been waste paper. The whole of this long protracted and, no doubt, costly litigation was in fraud of the compromise, and

(1) (1865) L. R., 1 Ch. App. 117.

aimed (whether directly, or otherwise, does not seem to me under all the circumstances to be material), at the rescission of the agreement and the subversion of the relation established by it.

Under such circumstances I think that the Lower Court properly exercised its discretion in refusing to specifically enforce the agreement, and I would accordingly dismiss this appeal with costs. Whether, if the plaintiffs had asked for damages failing the specific enforcement of the agreement, they would have been entitled to recover them, is a question upon which I need not enter, as it was not raised in this Court.

BRETT J. I agree.

*Upjohn K. C.* and *W. C. Bonnerjee* for the appellants contended that the Courts below were wrong in refusing to grant specific performance of the agreement of 20th May, 1861. The conduct of Krishna Behari Roy on which the respondent relied as having effected a failure of consideration for the agreement did not, it was submitted, affect the right of Govinda Pyari Dasi to enforce it. The agreement was made with her, and she had a separate and independent right to have it specifically performed and as Banwari Lal had received the full benefit of the consideration for the agreement, the respondent as his heir was bound to perform it, notwithstanding anything Krishna Behari had done. Having received the full benefit of it, moreover, Bunwari Lal became a trustee for Govinda Pyari Dasi of the interest agreed to be granted to her on the death of Brojeswari Chowdhurani, and the execution of that trust threw upon the respondent as Banwari Lal's heir, the obligation to give the appellants specific performance, which the Courts below should therefore have granted.

*Asquith K. C.* and *C. W. Arathoon*, for the respondent contended that specific performance had under the circumstances been rightly refused. The agreement sued on was made between Banwari Lal and Krishna Behari, Govinda Pyari Dasi being merely a benamdar; the latter had therefore no right under it independent of Krishna Behari. The chief consideration to Banwari Lal for the agreement was Krishna Behari's acknowledgment of Banwari Lal's status as the adopted son of Gour Sunday,

1904  
 ~~~~~  
 SRISH
 CHANDRA
 ROY
 v.
 BANOMALI
 ROY.

1904
 ~~~~~  
 SRISH  
 CHANDRA  
 ROY  
 v.  
 BANOMALI  
 ROY.

which was given by the *ekrar* of 22nd May, 1861. Krishna Behari's subsequent conduct effected a failure of that consideration, and fully justified the Courts below in refusing to grant specific performance of it at the suit of Krishna Behari's heirs. The Specific Relief Act (I of 1877) s. 28 cl. (b) was referred to.

*W. C. Bonnerjee* in reply.

1904  
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 March 23.

The judgment of their Lordships was delivered by LORD DAVEY. The suit out of which this appeal has arisen was one for specific performance of an agreement dated the 20th May 1861, whereby Banwari Lal Roy, the father of the respondent, promised that, when certain mehals (referred to in the case as Dhulauri) should come back into his *khas* possession, he would settle the same on Srijuta Govinda Pyari Dasi (the mother of the appellants) and her heirs in permanent *ijara* at a rental of Rs. 1,001. It is alleged in the plaint, and it is clearly established by the documents in evidence, that this agreement was part of a compromise made between Banwari Lal Roy and Krishna Behari Roy (the husband of Govinda and father of the appellants), and formed part of the consideration for that compromise. The respondent refuses specific performance on the ground of failure of consideration and other equitable grounds.

The facts of the case are as follows. Gour Sundar Roy died in February or March 1834 childless, but leaving his mother, Hemlata Chowdhurani, and a widow, Brajeswari Chowdhurani, surviving. After his death Brajeswari adopted Banwari Lal Roy as the son of Gour Sundar. But for this adoption Krishna Behari Roy would have been the heir of Gour Sundar, and subject to the interests of the latter's mother and widow would have succeeded to his estate. Hemlata appears to have assumed the management of the estate, and she purported to grant, but without any apparent authority to do so, four permanent leases of parts thereof, including leases of two *mehals* called Narsingpara and Sayandaha to Krishna. After Banwari Lal came of age he made an arrangement with Brajeswari by which six annas of the estate were granted to her for her life for maintenance.

In the month of May 1861 Banwari Lal instituted a suit against Krishna to set aside the *ijaras* or permanent leases granted

to him by Hemlata ; and also instituted similar suits against the holders of the other permanent leases granted by her. A compromise was thereupon come to between Banwari Lal and Krishna the terms of which are contained in four documents dated the 20th and the 22nd May 1861.

1904
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 SRISH  
 CHANDRA  
 ROY  
 2.  
 BANOMALI  
 ROY.

The documents dated the 20th May 1861 were :

(1) The agreement now sued on.

It should be mentioned that the property comprised in this agreement was included in the six annas granted to Brajeswari for her life, and would not therefore come into the *khas* possession of Banwari Lal, until her death.

(2) A *patni pottah*, or permanent lease, of other *mehuls* also in favour of Govinda, at a total rent of Rs. 689-4, upon payment of a premium of Rs. 1,301.

An *ekrar* dated the 22nd May 1861 was then executed by Krishna in favour of Banwari Lal. It recited (amongst other things) that Brajeswari duly adopted Banwari Lal under the power contained in an *anumatipatra* executed in her favour by Gour Sundar on the 28th Magh 1240 B.S. It also recited the institution of a suit in 1858 by one Ganga Prosad Roy impeaching the *anumatipatra* and Banwari Lal's adoption, which was dismissed apparently on the ground that, even if the adoption was invalid, Ganga Prosad Roy had no title in the lifetime of Krishna. The *ekrar* then continues as follows:—

“I, of course, made no mention of the *anumatipatra* granted by the late Gour Sundar Roy, and of your adoption, in my application to intervene in the said suit. Still as I consider it necessary to give you some proof that I do not in any manner or mode deny or refuse to acknowledge the truth of the said events, I execute this *ekrar* in your favour, in which I say that the said Gour Sundar Roy did, in fact, execute in favour of his wife Brajeswari Chowdhvani the said *anumatipatra*, and that in pursuance thereof, the said Chowdhvani, following the terms of the said *anumatipatra*, and with the permission and consent of her mother-in-law, the said Hemlata Chowdhvani, received you as a gift, under a deed of gift, and adopted you as a son according to the prescribed rites, and I, by way of attesting the said deed of gift as a witness, have placed my signature and affixed my seal amongst the witnesses, and I fully admit the truth of the *anumatipatra* executed by the late Gour Sundar Roy and of your adoption. And I also admit the correctness of the statement made by Brajeswari Chowdhvani to the effect that her husband, the said Gour Sundar Roy, had executed an *anumatipatra* in her favour to adopt a son, and that she had, in pursuance thereof, duly adopted you as a son, after having received you as a gift, and acknowledging you the lawful heir of the late Gour Sundar Roy, in

1904  
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 SRISH
 CHANDEA
 ROY
 v
 BANOMALI
 ROY.

her *ekrar* in your favour, dated the 29th Sraban 1264 B.S., which was filed in suit No. 36 of 1856 of the Court of the Principal Sudder Amin of this district. And you, as the adopted son of the late Gour Sundar Roy, now hold and will for ever hold to sons and grand-sons and others, in course of succession, as owner, having the rights of gift and sale, the movable and immovable properties left by him. To the said properties, I and my heirs do not have, nor will ever have, any claims or objection. If my heirs at any time in future do ever advance any claims it shall be rejected. To this effect I execute the *ekrar*. Finis, dated the 10th Jeyt."

On the same 22nd May 1861 Krishna filed a *solehnamia* in Banwari Lal's suit against him, from which it appeared that Banwari Lal had agreed to ratify the lease of Narsingpara on receipt of a *nasarana* of Rs. 1,500, and Krishna on the other hand had surrendered the lease of Sayandaha. The document concludes as follows:—

"I file also with this petition the *ekrar*, which I have executed to-day on proper stamp in favour of the plaintiff containing my admissions of the authority to adopt which the late Gour Sundar Roy executed in favour of his wife, Brajeswari Chowdhrani, and of the fact of due adoption by her of the plaintiff in pursuance thereof and I pray that, on reading my petitions, &c., and also the petition which the plaintiff is filing, the plaintiff's claim for *khas* possession in respect of the aforesaid Sayandaha *mehal* may be decreed, and his claim in respect of the remaining *mehals* may be dismissed."

It is stated in the judgment of Mr. Justice Hill, in the High Court, that Krishna in his defence to Banwari Lal's suit had impeached the adoption of Banwari Lal. And no doubt that was so, though the written statement is not in the Record. But however that may be, it is plain, from the documents which have been referred to, that it was at least known or feared that Krishna intended to do so. And their Lordships have no hesitation in inferring that the principal object of Banwari Lal in entering into the compromise was to obtain from Krishna a clear admission of his title to the zemindari and immunity in the future from attacks upon his title from that quarter.

Within a short time, however, after making this compromise Krishna applied for leave to intervene in Banwari Lal's then pending suits against the holders of the other permanent leases purporting to have been granted by Hemlata, and was made a defendant therein. He thereupon filed written statements in both suits impeaching the adoption and alleging that the *ekrar* of 22nd

May 1861 had been obtained from him by fraud. The Court found against him on both points, and decrees were made in favour of Banwari Lal. Krishna appealed to the District Judge and thence to the High Court without success. In February 1871 he instituted a suit of his own against Banwari Lal and his adoptive mother for the purpose of setting aside the adoption and obtaining a declaration of his own title as reversionary heir to Gour Sundar. His plaint and subsequent written statement contained charges of fraud and mis-representation against both the defendants, the details of which it is unnecessary to consider. The suit was dismissed by the District Judge and an appeal by Krishna to the High Court was also dismissed. He then appealed to Her late Majesty in Council, but without success.

Govinda died in 1878. Banwari Lal died in 1880, and the present respondent is his heir. Brajeswari died in 1894 and Krishna died in 1895.

The present suit was heard by the Additional Subordinate Judge of Pabna and Bogra, who, by his decree dated the 31st January 1899, dismissed it with costs. That decree was affirmed on appeal to the High Court, and the present appeal is from the decree of the latter Court dated the 9th July 1901.

The appellants sue as heirs both of Govinda and of Krishna, and the first point of the appellants' Counsel was, that Govinda was entitled in her own right to the reversionary lease, and her title was not affected by the conduct of Krishna. In the High Court, Mr. Justice Hill stated that the case of the appellants "here as in the Court below was, that the agreement was between their father and Banwari Lal, their mother, Gobinda Pyari Dasi, being named merely as a benamidar for the former, and it is in the character of his representatives that they sought, and still seek, to enforce the agreement." Without this statement their Lordships would have no difficulty in drawing the inference from the circumstances of the case that it was a *benami* transaction. In any case Govinda was not a purchaser from Krishna, and she could not have any better right or title than Krishna himself.

The second and principal point of the appellants was characterized by more boldness than plausibility. It was that Banwari

1904
SRISH
CHANDRA
ROY
v.
BAN. MALI
ROY.

1904
 SRISH
 CHANDRA
 ROY
 v.
 BANOMALI
 ROY.

Lal had received the full benefit of the compromise by being armed with the *ekrar* as a shield against the attacks of Krishna, and therefore the agreement in suit was for an executed consideration, with the result that the respondent was in the position of a trustee for them. Their Lordships are not prepared to lay down as an abstract proposition that there is any necessary inconsistency in a party, who has unsuccessfully tried to rescind an agreement, afterwards claiming performance of it. But in the present case they think that Krishna not only tried to deprive Banwari Lal of the benefit of the agreement, but in a large measure succeeded in doing so. The security of his title to the zemindari was of immeasurably greater importance to Banwari Lal than the mere question of the *patni*. And their Lordships have already expressed their opinion that the principal consideration to Banwari Lal for the agreement was to obtain such security and immunity from future attacks. In short they do not give the *ekrar* the restricted effect suggested by the learned Counsel, but they think that its language necessarily imports an agreement by Krishna to abstain from questioning the validity of the adoption for the future.

Their Lordships are of opinion that there has been a failure of the consideration for the agreement in suit, and also that the conduct of Krishna was at variance with, and amounted to a subversion of, the relation intended to be established by the compromise.

They will therefore humbly advise His Majesty that this appeal should be dismissed, and the appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.