*Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Mussumat Soorujmookhi Konwar* v. *Mussumat Bhagwati Konwar, from the High Court of Judicature, at Fort William, in Bengal; delivered, Tuesday February 8th*, 1881.

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Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.

THIS is a suit brought by the Paintiff, the Appellant, as the widow of Ram Anoograha Thakoor, to recover a share in a property which formerly belonged to Bhugwan Dut Thakoor, who died in 1852. He left two sons, the husband of the Appellant, and Pulton Thakoor, the husband of the Respondent, both of whom were minors at the time of his death. Pulton Thakoor was the elder of the two brothers, being it is said 5 or 6 years older than Ram Anoograha. It appears that for some time during the minority of the two sons Ram Burksh Thakoor, who was a cousin, acted as their guardian, and that he ceased to do so in 1857, when Kumla Persad, who had married their sister, began and thence continued to act as such guardian. After the death of Anoograha, Kumla Persad was appointed mokhtar of the Plaintiff. Ram Anoograha died in June 1859, and Pulton in April 1869; and the case of the Plaintiff and Appellant is, that before the death of Anoograha, and in April 1858, a separation in estate took place between the two brothers, and that, consequently, the Plaintiff, as the widow of

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Anoograha, at his death became entitled to half of the property which had come to them from Bhugwan Dut, it being admitted that the parties are governed by the Mitakshara Law.

The Defendant's, the Respondent's, case is that there was no separation, and that on the death of Anoograha the whole property descended to her husband Pulton, that at Pulton's death she became entitled to it, and that the Plaintiff, Anoograha's widow, is only entitled to maintenance.

The onus, therefore, of proving the separation was upon the Plaintiff; and in order to establish that fact, several witnesses—five altogether—were examined on her part. Without going through their evidence, it is sufficient to say that they only speak of a division of movable property; and with regard to that they are not consistent in their evidence, as is pointed out in the judgment of the High Court. They do not agree as to what articles of movable property were actually divided; they do not agree as to the persons who were appointed arbitrators; the person who is said to have made out the list was not called as a witness, nor was any of the persons who were said to have been arbitrators. As evidence of a partition or division of movable property this kind of proof is very unsatisfactory and open to great observation. As evidence of a partition of the immovable property it amounts to nothing. One witness expressly says that the mouzahs were not partitioned; and their Lordships think that if the parties thought it right, according to this evidence, to make a formal partition of movable property, and if at or about that time, which is when it is alleged the partition took place, they were going also to divide the immovable property, it might be expected that there would be some evidence of a formal

division of it, and some trace of what was done at that time to divide immovable property; whereas there is nothing in the oral evidence which indicates that the parties did anything towards dividing it, and apparently the immovable property remained just as it was.

But the Appellant also relied upon certain documentary evidence. The first document to which their Lordships were referred is a proceeding in the collectorate of Tirhoot of the 27th of May 1858, which appears to be important only in this respect: that it shows that at that time, which was about a month after the separation, there was a question as to who was actually the guardian of Pulton Thakoor, who is clearly shown to have been a person then incapable of managing his affairs. The allegation of the Appellant indeed is that the partition was not made by Pulton Thakoor; that he was incapable of making it, being of unsound mind—and that it was made by Kumla Persad, acting as his guardian.

The next document is the mokhtarnamah from the Plaintiff to Kumla Persad of the 5th of November 1859, which obviously proves nothing against the Respondent with regard to a partition having been made. There is also a copy of a judgment of the Deputy Collector of Tirhoot of the 2nd of May, 1860, in a suit for rent, as to which the same observation may be made as is applicable to some of the other evidence in the case; namely, that it shows that there was an assertion on the part of the Appellant, who was the Plaintiff in that suit, of her right; and if rent had been paid to her it would be some evidence of possession by her.

The documentary evidence which is mainly relied upon by the Appellant are proceedings

in the Court of the Collector of Tirhoot, of the 19th of June 1862, and of the 2nd of August, 1862, in which it appears that in a suit for a partition there are entries and statements from which, if they were admissible in evidence against the Plaintiff, it might be inferred that some partition had been previously made; because there are entries which show that the Plaintiff, the widow of Anoograha Thakoor, was recognised as being entitled to and having a share, which would not be consistent with the brothers having continued joint until Anoograha's death, in which case the whole of it would have descended to Pulton. If he had been of sound mind, and capable of managing his own affairs, and had been himself a party to these proceedings, and had made or adopted these admissions, their Lordships think that they would have been evidence of considerable value upon the question whether a separation had been made at some previous period. But their Lordships must look at the circumstances under which these proceedings were taken. They appear to have been conducted, as far as Pulton Thakoor is concerned, by Kumla Persad, whose only authority for so acting was apparently an ikranamah which is said to have been executed by Ram Buksh in 1861. Now that could give no authority to Kumla Persad to act in this way as guardian, and to bind Pulton Thakoor by proceedings of this kind. It may further be observed that, assuming that Kumla Persad was properly acting as guardian, if there had been no separation before the death of Anoograha, although he might have authority to manage the estate, or possibly even to make a partition, it does not follow that he would have power to make admissions of previous transactions so as to affect the estate of Pulton. Whether the High Court thought

that these proceedings were not evidence against the Respondent, on the ground of the want of authority in Kumla Persad, or on some other ground, does not appear. Their Lordships are of opinion that they cannot under the circumstances be treated as evidence against the Respondent, and consequently they do not in any way supply evidence of a division of the immovable property, which the rest of the evidence in the case fails to afford. The case resolves itself into this: that in the oral evidence there is really no proof of a division of immovable property, and the proceedings which might have supplied that want and have shown by way of admission that there had been a previous separation cannot be used against the Respondent as evidence of such division.

Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be affirmed, and that this Appeal be dismissed.