Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussammat Sundar v. *Mussammat Parbati, from the High Court of Judicature for the North-Western Provinces at Allahabad; delivered 20th July* 1889.

Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

In this case, the Subordinate Judge of Saharanpur and the High Court for the North-Western Provinces, though arriving at different results, did not differ as to the facts, which may be shortly stated.

The Appellant is the junior and the Respondent the senior widow of Baldeo Sahai, a Hindu zemindar who died without issue in the year 1878. The deceased had formally adopted a boy named Praimsukh, who was his sister's son, and, possibly because he entertained doubts as to the validity of the adoption, he made a will on the 5th July 1875, by which, subject to provisions for the maintenance of his mother and of his widows, who are the parties to this suit, he bequeathed his whole estate of every description to Praimsukh, "whom I have brought "up and educated as my son from his infancy, "and have made my heir and successor."

Praimsukh survived the testator, and died in minority and unmarried in December 1879. On

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the death of Baldeo Sahai the two widows assumed the possession and management of his whole estates, moveable and immoveable, for behoof of his minor heir, and their names were put upon the register as being the mothers of Praimsukh. After the death of Praimsukh, as found by the Subordinate Judge, "they obtained "possession of the zemindari estates and other "immoveable and moveable properties, and "they described themselves sometimes as the "widows of Baldeo Sahai and sometimes as "mothers of Praimsukh." It is obvious that, if the adoption of Praimsukh was not valid according to the principles of Hindu law, neither of the parties to this case could have any right of succession to him; and, on the assumption that he was legally adopted, it is equally clear that, the estates having passed to Praimsukh under his adoptive father's will, they could not on his decease pass to the present litigants as widows of Baldeo Sahai.

No question is raised in this case with respect to the zemindari estates, which are registered in the joint names of the widows, the Respondent, as the senior, being lambardar. A dispute arose between them as to possession of the family residence, gold and silver ornaments, and other articles of value, which they submitted to arbitration, the result being that, on the 15th July 1880, the arbiters issued an award, being in substance a decree of partition, in virtue of which each of the widows has since been in possession of her separate share of the subjects then in controversy. In consequence of fresh disagreements this suit was instituted by the Appellant, in May 1883, for partition and separate possession of house property which does not form part of the zemindari, and also of certain moveable effects which were not included in the arbitration.

Of the issues framed by the Subordinate

Judge, the only one which it is now necessary to consider is the sixth, which is in these terms:— "Has the Plaintiff a right to have the property "in dispute divided in equal shares as she "claims?" The learned Judge answered that question in the affirmative, and gave the Appellant a decree of partition, but his decision was reversed on appeal by the High Court for the North-Western Provinces, consisting of Petheram, C. J., and Brodhurst, J., who gave judgment dismissing the suit. The carefully framed and articulate decree of the Subordinate Judge does not appear to be in any respect erroneous, if the Appellant has a right to insist upon partition being made.

The Subordinate Judge purposely abstained from expressing any opinion either as to the validity of the adoption of his sister's son by Baldeo Sahai, or as to the efficacy of his will to carry the estates to Praimsukh, if not duly adopted, who in that case would not be an heir of the testator. He considered it unnecessary to determine either point until the estates are claimed by a kinsman of Praimsukh's paternal line, or by a reversioner or collateral heir of Baldeo Sahai. He held that, in all questions *inter se*, both widows were estopped by their own previous acts and admissions from alleging the invalidity of Praimsukh's adoption; and, on that footing, their respective rights and interests being of precisely the same quality, he was of opinion that neither of them was in a position to resist a demand for partition.

The Chief Justice, in whose judgment Brodhurst, J., substantially concurred, was of opinion that the adoption of his sister's son by Baldeo Sahai, who was admittedly a Brahmin, was altogether invalid, the adoption of a child, whose mother he could not have

lawfully married, being contrary to the text of the Mimansas, and also to a course of decisions in the Indian Courts. The Chief Justice then deals with the present Appellant's alternative contention (which was the same with that submitted here) to the effect that, inasmuch as the widows "are in possession of the estate, they "are competent to maintain a suit for the partition "of the estate between themselves." He refers to the well known case of Armory *v.* Delamirie (1 Smith L. Ca., 301), where it was ruled that the finder of a jewel, though he does not acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and therefore to maintain trover; and also to the case of Asher *v.* Whitlock (L. R., 1 Q. B., 1), in which it was held that a person in possession of land without other title has a devisable interest, and that the heir of his devisee can maintain ejectment against any person who has entered upon the land and cannot connect himself with some one having title or possession prior to the testator. The Chief Justice thus states the result of these authorities:—"Possession is a good title against "all the world except the person who can show "a better title. By reason of his possession such "person has an interest which can be sold or "devised." But he thus proceeds to distinguish these cases from the present. "In this case," he says, "there is nothing of the kind. Parties "come and claim an estate to which they are "not entitled. They set up a false claim. They "have no estate in law which they could divide. "To do so would be to recognize an illegal trans-"action, and we would be dividing an estate "which has no legal existence."

If it were necessary to determine the point, their Lordships would probably have little

difficulty in accepting the opinion of the High Court that a Hindu Brahmin cannot lawfully adopt his own sister's son. But apart from that question, and also from any question touching the legal effect of Baldeo Sahai's will, the fact of joint possession by the two widows of the estates which belonged to the testator, ever since the death of Praimsukh in 1879, appears to them to be sufficient for disposing of this suit in favour of the Appellant. Their Lordships are at a loss to understand, at all events to appreciate, the grounds upon which the Chief Justice endeavours to differentiate between the authorities which he cites, the import of which he correctly states, and the position of the parties to this action. Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Praimsukh or of Baldeo Sahai, one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them. It is impossible to hold that a joint estate is not also partible; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be reversed, and that of the Subordinate Judge restored. The Respondent must pay the costs of this Appeal.