Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bitto Kunwar v. *Kesho Pershad Misser, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 6th February* 1897.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The present Appellant is the widow and heir and legal representative of Sheo Dial *alias* Bacha Tewari the original Appellant. On the 24th of March 1886 the Respondent brought a suit against him and Raja Ajit Singh a purchaser from him to recover possession of property, consisting of houses and lands in the districts of Benares, Jaunpur, Azamgarh and Ghazipur, of which he was in possession. The Respondent in his plaint alleges that on the death of Bhawani Parshad Tewari the owner of the property in suit, who died in November 1842 without issue, Rani Kuar and Dharma Kuar the widows of his deceased brother Debi Parshad Tewari, and Ramkishen Misser the son of the niece of Bhawani, who lived in commensality with him, obtained proprietary possession of the property left by him. They performed the services and managed the affairs of a temple which had been built by him, and of a bhandara attached to it, and after payment

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of the expenses of these institutions enjoyed the rest of the income of the property. Some time afterwards, a dispute arose between them and the Appellant as to the right of heirship to the deceased; the dispute was settled by an agreement, dated the 4th January 1850, to the effect that Ramkishen and the Appellant should be the proprietors and should hold possession in equal shares. Ramkishen was accordingly in joint proprietary possession and enjoyment with the Appellant during his life. He died on the 22nd January 1870 without issue and his widow, Mitho Kuar, succeeded to the possession of the property as his heir. She died on the 26th September 1884, and on her death the Respondent was the lawful heir to the estate of Ramkishen. In 1875 in a suit brought by Mitho Kuar against the Appellant for half of the profit of one of the mauzas the Appellant set up a will dated the 7th August 1842 made by Bhawani, but torn up in his lifetime, and not in existence at the time of his death. The case of Bacha Tewari in his written statement, so far as it is now material, is that by the will Bhawani appointed one Avadh Lal to be his executor and entrusted him with the whole estate for charitable and religious purposes, and fixed salaries for the support of his heirs; that Bhawani never tore up or destroyed the will; and that Rani Kuar and Dharma Kuar and Ramkishen always admitted its existence and validity.

It was not disputed before their Lordships that the Respondent is the heir of Ramkishen. Of the issues settled by the Subordinate Judge, only two are now material: 4. "Of what right had Ramkishen Misser been in possession?" and 5. "Did Bhawani Parshad Tewari revoke the "will which he had made during lifetime and "was it acted upon after his death?" A copy of a will of Bhawani dated the 27th August

1842 and registered on the 30th of that month was filed in the suit. Bhawani having died in November 1842, the only evidence upon these issues was documentary.

It appears in the judgment of the Subordinate Judge that it was contended before him on behalf of the Defendants that the agreement of the 4th of January 1850 recognized the will and constituted Ramkishen a trustee of the property for certain trusts created by the will, and that the Respondent was estopped by a decision of a Division Bench of the High Court dated the 27th February 1878 from averring that the property was Ramkishen's own. This decision was in a suit by Bacha Tewari against Mitho Kuar and three others (two of them mortgagees and the third a purchaser at a sale in execution) to have a mortgage of the property made by her declared invalid, and a sale in execution of a decree thereon cancelled. From the judgment of the Subordinate Judge in the suit Bacha Tewari appears to have alleged that, under the agreement of January 1850, Ramkishen was declared proprietor of one half of the property and he of the other half, the estate being kept joint, and that Mitho Kuar, exceeding her power, had mortgaged the property contrary to the will of the ancestor and the interest of the Plaintiff. The 6th issue in the suit was "Whether the will "made by Bhawani Parshad was enforced or "whether he revoked the deed in his lifetime?" The Judge did not decide this issue saying that as Ramkishen transferred half of the share to Bacha Tewari and he had made certain transfers to Babu Balgobind he had no right to say that under the will the heir of Ramkishen had no power to transfer. A decree was made in favour of Bacha Tewari for a half share only of the house and villages in dispute. He appealed to the High Court which decreed the appeal on the ground that the agreement recognized that

the will of Bhawani Parshad Tewari vested the estates in Ramkishen and Bacha Tewari as trustees to carry out the provisions of the will, and secured to Ramkishen the management of the property, including the right to raise the necessary funds by mortgage, and consequently that Mitho Kuar was not competent to charge the estate. The question whether the agreement had this effect had not been raised either in the Lower Court or in the grounds of appeal, and there was no issue upon it. This statement is therefore not within Section 13 of the Code of Civil Procedure.

The parties to the agreement, Rani Kuar, Ramkishen and Bacha Tewari are described in it as heirs of Bhawani and it purports to be made upon a dispute in respect to the property owing to the claim of Bacha Tewari as cousin of Debi Parshad Tewari the husband of Rani Kuar and in direct lineal descent with him, and to avoid the property being wasted by litigation. It contains no reference to any will of Bhawani or to any trusts under such a will. The property is to be held by Ramkishen and Bacha Tewari in equal shares but is to remain joint and the provisions are naturally such as would be made in that case. Their Lordships are of opinion that the agreement does not recognize any trust.

There is another suit which has a very material bearing upon the question in this case. In 1880 a suit was instituted by two persons who are described in the plaint as managers of the Chetr Bhandara of the late Bhawani Parshad Tewari against Balgobind Das and Bacha Tewari which is described in the judgment of the Judge of Jaunpur as a claim for a declaration of right by removal of unlawful possession of debts by annulment of a miscellaneous order of the Subordinate Judge. It appears that on the 4th September 1877 Bacha Tewari had made a mortgage of the property now in dispute to

Balgobind who had obtained a decree upon it and had the property put up for sale in execution of the decree. The 1st and 2nd of the issues in that suit were, "1. Was the property in suit "bequeathed for public charitable purposes? 2. "Was the will revoked by the testator in his "lifetime?" Upon these the Judge found that the estate was not bequeathed for charitable purposes and that the will was revoked. The Plaintiffs appealed to the High Court at Allahabad and the Divisional Bench of two Judges by whom the appeal was first heard differing in opinion it was heard by a Full Bench consisting of the Chief Justice and four Judges the majority of whom affirmed the judgment of the Lower Court and dismissed the appeal. This decision is not conclusive against Bacha Tewari as the suit was not between the same parties as the present suit but their Lordships agree with the Subordinate Judge that it was admissible as evidence against him.

The Subordinate Judge with this evidence before him having found on the 4th and 5th issues in the present suit that Ramkishen had been in possession as proprietor by virtue of the agreement of 1850 and that the will of Bhawani was revoked by him in his lifetime made a decree for the Plaintiff the Respondent and the Defendant Bacha Tewari appealed to the High Court. They dismissed the appeal. Their Lordships upon the evidence which has been referred to agree in that result as if Bhawani left no will the property was not proved to be subject to any trust. But they feel called upon to make some observations upon the judgment of the High Court, in order that it may not be thought that they agree in the reasons given by the learned Judges. The Subordinate Judge having found that the will was revoked

by Bhawani the issue whether it was revoked was the first that should have been decided as it went to the root of the defence. Instead of deciding this issue the learned Judges begin by saying "Assuming without deciding the "question that that will was really made and "was not revoked Bhawani Parshad by it "bequeathed certain annuities and created trusts "for religious and charitable purposes and "devoted property to those purposes" and after stating some facts not now material they say it had been contended on behalf of the Appellant that Ramkishen and he took the property in question, that it was trust property, and having taken with notice and without having given any consideration for it to the trustee or to any person entitled to deal with it they must be held to have voluntarily taken upon themselves the trust created by the will of 1842 and that the question of trusteeship was concluded by the judgment of 27th February 1878. Then they say "It appears to us that in 1850 when "Ramkishen and the Defendant took this "property and executed the deed of 4th January "1850 they were plainly taking the property for "their own purposes and not for the purposes of "the trust and that they never had any intention "of acting as trustees or holding the property "otherwise than as adversely to the trusts of "the will. The deed of 1850 although it alludes "to some expenses which were to be met as "theretofore was a deed by which those two "gentlemen so far as they could appropriated "the trust property to their own private uses. "There is ample evidence on this record that "those parties never intended to deal with the "property as trust property and that they were "from a very early period acting adversely to "the trusts of the will." Further on they say

" We are of opinion unless we are bound by the " judgment of February 27th 1878 that Ram- " kishen and the Defendant never held or " volunteered to hold in any sense as trustees " and that in fact their holding was from the " first adverse to the trust title." They then proceed to consider that judgment and decide that they were not bound by it. Their Lordships are of the same opinion upon this question.

A judgment of the High Court of the 21st January 1876 was relied upon in the present appeal for the Appellant. It does not appear to have been considered by either of the Lower Courts and clearly does not decide the question whether there was a trust.

The learned Judges of the High Court appear to their Lordships to have been of opinion that assuming that there was a will and it was not revoked Bacha Tewari and Ramkishen could appropriate the trust property to their own private uses and that they did so and held adversely to the trust title and themselves acquired a title. At the end of their judgment they say " We have not thought it necessary and indeed " the points were not argued at any length before " us to consider whether the alleged will of " 1842 ever was revoked." Their Lordships can only understand their thinking thus by supposing they were of opinion that although there might be a trust Bacha Tewari and Ramkishen might acquire a title by having possession of the property and appropriating it to their own use. The learned Judges appear not to have had in their minds the statement of the law in Sections 63 and 64 of The Indian Trusts Act 1882. They have refrained from considering the fundamental question in the case, whether there was a trust, but having, though by an erroneous process, arrived at the right conclusion and dismissed

the appeal before them their Lordships will humbly advise Her Majesty to affirm their decree and to dismiss this appeal.