Bejoy Singh Hazari Vs. Srimati Mathuriya Debya, Widow of RamdIn Hazari and ors.

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Court : Kolkata

Decided On : Feb-06-1920

Reported in : 56Ind.Cas.97

Judge : Richardson and ;Syed Shamsul Huda, JJ.

Appellant : Bejoy Singh Hazari

Respondent : Srimati Mathuriya Debya, Widow of RamdIn Hazari and ors.

Judgement :

1. In the suit out of which this appeal arises, the plaintiff seeks for a declaration that as the adopted son of one Ramdin he is entitled to an eight-annas share of certain properties situated in the District of Chittagong and for a further declaration that the defendant No. 6 has not been validly adopted to Ramdin by the latter's widow. The plaintiff also seeks to set aside a consent decree in a previous suit to which he was a party as a minor represented by his father.

2. The Subordinate Judge has arrived at the following conclusions:

(1) that the plaintiff is not the adopted son of Ramdin;

(2) that Ramdin's widow had no authority to adopt a son and that the adoption by her of the defendant No. 6 is, therefore, invalid; and

(3) that the plaintiff is bound by the con-sent decree.

3. In the appeal before us (No. 1.51) the plaintiff appeals from the first and third of these findings.

4. The defendant No. 6 has also preferred an appeal (No. 145), the hearing of which we deferred at the instance of the parties.

5. The genealogical table which follows will be found convenient for reference:

Bhagaban Singh Hazari (deceased)

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Son, Anup Singh Hazari (deceased)

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1st son Ganga Prosad (dead) Bhola Singh (dead) Lachman Singh Bahuri Prosad Bhaban

wife, Bapeh (dead) wife, Gouri (dead). (dead). (dead)

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Son Gumani Singh (dead) ----------

wife, Kousalya (dead). |

| | |

1st son Kamala Prosad 2nd son Kanta Prosad 3rd son Bhagirath

(dead) (dead) wife, Srimati (dead)

| Chhatan Kumari |

| defendant No. 3. |

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1st son Raghubar (dead) 2nd son Ram Das (dead) 3rd son Ramnath (dead) |

wife, Mohaniya (alive.) unmarried. wife, Kousalya (alive) |

defendant No. 4. defendant No. 5. |

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1st son Ramdin (dead) 2nd son Sheo Dayal 3rd son Chintaman 4th son Ram Charan

wife, Srimati Mathuriya defendant No. 2=Jahnabi (dead). (dead)

defendant No. 1. | predeceased father,

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| | |

let son Sheo Gobin 2nd son Gajaraj alias Bejoy Singh 3rd son Gopal Singh

(dead). plaintiff. (dead).

6. The Hazari family to which the plaintiff belongs originated in the village of Bisenda (the name is variously spelt) in the Banda District of the United Provinces, and is governed by the Benares School of Mitakshara Law. The family for the most part still lives there, but one or other of its members acquired considerable properties in the Chittagong District, which, according to the plaintiff's case, devolved on the three sots of Bahuri Prosad Bhabani, by name Kamala Prosad, Kanta Prosad and Bhagirath. The only living representatives of Kamala Prosad's branch are the widow of his eldest son, and Kousalya, the widow of his third son, Ram Nath, these ladies being the defendants Nos. 4 and 5 in this suit. Kanta Prosad's widow, the defendant No. 3, is an old lady. Bhagirath, like his brothers, is dead. The principal defendant is the defendant No. 1, Mathuriya, the widow of his eldest son Ramdin. His second ton, Sheodayal, is the defendant No. 2 and Sheodayal's son, Bejoy or Gajaraj Singh, is the plaintiff.

7. There seems to be no question that the family possessions at Bisenda are joint undivided family property. According to the plaintiff, the much more valuable properties at Chittagong are also joint properties, and it is the family practice to send an intelligent member to Chittagong to manage them in the interests of the family as a whole. This post, the plaintiff says, was filled by Kanta Prosad Hazari, and though it is disputed whether he acted as manager or as proprietor, it is common ground that, in one capacity or the other, he controlled the Chittagong properties in his lifetime. It is also common ground that, having no son of his own, he adopted his brother's son, Ramdin.

8. Kanta Prosad died on the 25th September 1904 leaving a Will dated a few days earlier (18th September), by which he gave all his properties, moveable and immoveable, to Ramdin to be 'Malik thereof, the properties being described in comprehensive terms, bat not in detail. The gift was subject to certain bequests to his widow and other persons. Whether it was in consequence of the Will or in consequence of the family practice or in consequence of both combined, Ramdin succeeded to the control of the Chittagong properties.

9. The plaintiff was born at Bisenda on the 18th November 1895 and he alleges that some 13 days later, on the 1st December 1895 (17th Aghran 1302 B.S.), he was adopted by Ramdin, who had been summoned by telegram from Chittagong. Shortly afterwards, it is said, Ramdin took his wife Mathuriya and the plaintiff and his natural mother to Chittagong, It may be mentioned that Sheodayal's eldest son died at the age of three or four years, a few months after Bejoy's birth. After spending, say, two

years at Chittagong with Ramdin,' the plaintiff and his mother returned to Bisenda where Sheodayal had been living. The plaintiff remained there for some years and was then sent back, when he was 8 or 9 years old, to Ramdin at Chittagong, where he was admitted to the Upper Primary School in April 1906. The admission register describes him as Bejoy, son of Sheodayal, and refers to Ramdin as his 'guardian'. It may well be that he was destined to succeed Ramdin, much as Ramdin had succeeded Kanta Prosad, but the main question in the case is, whether Ramdin had actually adopted him.

10. On the 5th November 1906 Ramdin died suddenly. His Sradh was performed by the plaintiff, though Sheodayal had arrived before the ceremony. It was Mathuriya, however, who stood forth as her husband's heiress. She had her name registered in the Collectorate in place of Ramdin's and assumed the management not on behalf of the plaintiff as Ramdin's adopted son, but on her own behalf and in her own right. Sheodayal and the plaintiff lived with her, and the evidence shows that Sheodayal was cognizant of her proceedings and raised no finger in protest. After some months at Chittagong he returned to Bisenda.

11. He was back in Chittagong about the spring of 1908. Meanwhile, he had married a second wife, by whom, we are told by Kausalya, he has a daughter. His statement is that it was not till September or October 1908 that he discovered, while visiting estates in the Mafassal, that Mathuriya had had her name registered as proprietor. The discovery, he adds, led to a quarrel. The statement is disingenuous and untrue, but the question whether the Chittagong properties were joint family properties or not probably entered the stage of serious controversy about this time.

12. It also appears that Chhattan Kumari and Mathuriya were not on good terms. The elder lady was dissatisfied because her allowance for maintenance was irregularly paid, or not paid in full. In a suit instituted in 1910 against Mathuriya, Sheodayal and Bejoy, she obtained a decree for arrears of maintenance which is referred to in the plaint of a similar suit instituted in 1912 (Exhibit 21).

13. The time was, therefore, ripe for the inevitable litigation, and in February 1909 Sheodayal, on behalf of himself and his son, whom he represented as next friend, instituted Suit No. 223 against Mathuriya and Chhattan Kumari. The plaint asserted the rights of the plaintiffs as members of a joint undivided Mitakshara family and prayed for a declaration of their title as such to the Chittagong properties in suit, and as against Mathuriya for recovery of possession. There was also a prayer for the appointment of a Receiver pendente lite. The adoption of Bijoy by Ramdin was not mentioned or suggested, The two ladies filed separate written statements. Chhattan Kumari insisted on her right to maintenance and had no objection to the properties being managed by Sheodayal. She went on to say that Bejoy had been adopted by Ramdin, and that statement, so far as we know, is the earliest reference in writing to the adoption. In her plaint of 1912, to which we have just referred (Exhibit 21), she made a similar statement. Mathuriya's written statement has not been printed, but the case she made is succinctly stated as follows in her deposition taken by a Commissioner in June 1910:

Previously my father-in-law was owner of the properties that are in Chittagong. Before the death of my father-in-law he gave the properties to my husband by a Will. My husband having left no issue, I have become the owner. During my father in law's lifetime he was Malik Dakhilkar of these properties: After my father-in law my

husband became the Dakhilkar. After my husband I have become the Dakhildar. My father-in-law had been in possession for 40 or 50 years (volunteers), He had adverse Maliki possession....I did not see any one in the same mess with my father-in-law. In our family there was no one except my father-in law. My husband worked under orders of my father-in-law.

Q, Excepting this, was there any one in joint estate with your father in-law or not?

A. No.

14. Such being the oases set up by the parties respectively, a compromise was arrived at which is embodied in a petition dated 6th July 1910. Sheodayal and his son were to have a decree for a moiety of the properties in dispute, and Mathuriya was to have a life-interest in the other moiety, The properties were to be partitioned on that footing. Mathuriya was also to be entitled to adopt a son,' and if she adopted a son, that son was to get her moiety of the properties 'in absolute right from the date of adoption.' Provision was made for the payment of maintenance to Chhattan Kumari at the rate of Rs. 1,000 a year, such maintenance to be paid by the plaintiffs and Mathuriya in equal shares. It was further provided that Mathuriya should have no claim to the properties in the Banda District which were to belong to the plaintiffs. The leave of the Court was obtained to compromise the suit on behalf of the minor plaintiff, Bejoy, on these terms, and a decree was drawn up accordingly. The partition was carried out by Commissioners appointed by the parties, and their award was confirmed by the Court with certain modifications in a final decree dated 19th January

15. The names of Sheodayal and his son were duly registered in the Collectorate in respect of the moiety assigned to them by the compromise, and after the partition they entered into possession and enjoyment of that share.

16. It is this compromise which the plaintiff Bejoy now seeks to set aside, and the circumstances immediately leading to the present litigation may be shortly stated.

17. In April 1913 Mathuriya announced her intention of taking a son in adoption. Upon that a suit (No. 17 of 1913) was instituted by Bejoy, represented by his natural mother as his next friend, for an injunction to restrain Mathuriya from carrying out her intention. The plaint asserted the adoption of Bejoy by Ramdin. The temporary injunction for which the application was made was refused by the Court and on the 1st May 1913 Mathuriya purported formally to adopt her brother's sod, the defendant No. 6. The suit, therefore, became infructuous, and on the 19th May 1914 it was withdrawn by Bejoy himself, who had come of age in November 1913.

18. The present suit was filed on the 12th June 1914.

19. Before dealing with the questions discussed at the Bar, it will be convenient to take stock of the plaintiff's position from the death of Rimdin to the compromise of 1310. During this period Sheodayal and the plaintiff were the only surviving male representatives of the family.

20. If the Chittagong properties were the separate and self-acquired properties of Kanta Prosad, which devolved on Ramdin, and if Ramdin adopted the plaintiff, then the latter was exclusively entitled to the properties as Ramdin's heir and the compromise was undoubtedly injurious to his interests, which, in such case, were in

direct conflict with those of his father.

21. But it is not, and never has been, the plaintiff's case that the properties belonged exclusively to Kanta Prosad. It would have been a dangerous case to put forward, because, if he failed to prove the adoption, he and his father would have had no part or parcel in the properties at any rate during Mathuriya's life time.

22. His case is that the properties are joint family properties. If so, and if Ramdin adopted him, his title was to an eight-annas share on partition, the other eight annas going on partition to Sheodayal and any other sons Sheodayal might have. On this hypothesis the disparity of interests between the plaintiff and his father would be less, but there would still be conflict. The plaintiff would have a vested right to an eight annas share on partition, a share not liable to be diminished by the birth of other sons to his father. Though before partition Sheodayal might well claim to be manager or Karta of the whole in succession to Ramdin, nevertheless, the fact of the son's adoption would require consideration in connection with any com-promise that might be arrived at on his behalf. It would confine the father and his other son or eons to an eight annas share on partition, and it would leave to Mathuriya only the right to maintenance.

23. If the properties were joint and the plaintiff was not the adopted son of Ramdin, then the interests of father and son coincided and in any dispute that arose there could be no conflict between Sheodayal's personal interest and his duty to his son.

24. Now it was contended by Sar Rash Behari Ghose, appearing for Mathuriya, that until the compromise was set aside the plaintiff was not at liberty to raise the question of his adoption. In our opinion that is not so, because the main question agitated in the suit of 1909 was whether the Chittagong properties were joint or not, It is that question which formed the subject of compromise and the question of the plaintiff's adoption was not brought into discussion. (See the evidence of the Pleader Prasanna Kumar Dae.) In order to determine whether the compromise binds the plaintiff, it is necessary first to ascertain whether he was or was not adopted in fact. The point possibly requires a little amplification in connection with what we have said as to the plaintiff's position.

25. It seems clear that nothing was said about the adoption when the leave of the Court to compromise the suit on Bejoy's behalf was obtained. There was no doubt the assertion made by Chhattan Kumari in her written statement. But, though a defendant, she was not a principal actor in the suit. She was mainly concerned with her allowance for maintenance and there is every reason to suppose that her reference to the adoption was not brought to the notice of the Court. The principal actors were Sheodayal and Mathuriya. No hint of any adoption is to be found in the plaint filed by the former, and the adoption is entirely inconsistent with the case made by the latter. No issue was framed on the subject. Chhattan Kumari was examined at length on commission. No question was put to her regarding the adoption, though she did say, when asked how Mathuriya had been managing the properties, that Sheodayal and Ram Narayan (a dependent of the family and salaried manager also known as Bara Baccha) were managing the properties on Bejoy's behalf, and that she had heard that they were being managed in his name. Both statements were untrue, and even assuming that this evidence was read to the Court it would not have attracted attention. There were interlocutory proceedings in the suit. The trial Court by order appointed a Receiver. There was an appeal to the High Court which

discharged the order. The judgment of the learned Judge dated 6th December 1909 begins by saying that for the purposes of the case 'the contest may be taken to be limited to be one between the plaintiff No. 1 Shibdayal Singh and the defendant No. 1 Mathuriya Debya.' Bejoy is not even mentioned. The decision rests on the ground that Mathuriya was in exclusive and bona fide possession of the estate. If there had been any question of Bejoy's adoption, the learned Judges would hardly have spoken of the lady's bona fides in terms so positive.

26. If Bejoy was adopted by Ramdin, no one knew the fact better than Sheodayal, his natural father, or Mathuriya, his adoptive mother, and if they did not put the Court in possession of a fact so pertinent to the interests of the minor, they were guilty of a deliberate suppression of the truth, which could only be attributed to interested and unconscientious motives. The terms of the compromise would be grossly misleading not only by way of concealment but also in the clause stating that Mathuriya 'shall be entitled to adopt a son,' by active suggestion of the falsehood that there was then no adopted son in being.

27. If, then, Bejoy was adopted by Ramdin, the adoption was sedulously kept from the knowledge of the Court. That being so, the leave or consent of the Court to the suit being compromised would be no true con-sent and the minor would not be bound. Moreover, the obvious inference. from the facts is that the case was presented and dealt with on the footing that Sheodayal and his son were sailing in the same boat, that their interests were identical. If that was rot so and Sheodayal's position was such that his personal interest conflicted with his duty to his sod, then, unless at any rate he showed uberrima fides, he was not competent to act as his son's next friend. The result would be that Bejoy was not properly represented and that the decree would not be binding upon him [Order XXXII, rule 4 (1); Unnoda Dabee v. Maria Louisa Stevenson 22 W.R. 290].

28. On the other hand, if there was no adoption of Bejoy by Ramdin, though it might have been better if Chhattan Kumari's statement to the contrary had been openly and candidly denied, Sheodayal's conduct of the suit on his son's behalf would not be open to serious criticism, It is even possible that the statement was not brought to his notice or that of Mathuriya. Or he or Mathuriya might pass the statement by as a mere invention designed for use as a possible weapon against both or either of them, or at best, as the translation of what might or would have happened if Ramdin had lived into a fact accomplished before he died. Certainly Bejoy was not entitled to have a false claim put forward on his behalf. Minority has its privileges but that is not one of them, and it is no dereliction of duty on the part of a guardian to refuse to litigate on his ward's behalf a claim which he knows to be false and unfounded in fact. We may add that there is no reason for supposing that any attempt was made by Sheodayal or Mathuriya to persuade Chhattan Kumari to hold her tongue about the adoption. The maintenance provided for in the compromise does not exceed the amount assigned to her as widow in Kanta Prosad's Will, Mathuriya seems to have been as irregular in her payments after the compromise as before.

29. On the hypothesis of no adoption, the interests of father and son would coincide, and the latter could not successfully challenge the compromise decree. If there was no adoption, we are not prepared, on the materials before up, to say that Mathuriya's claim as her husband's heiress was not an honest and bona fide claim, or to pronounce it frivolous or vexatious. In that case regard being had to such circumstances as Kanta Prosad's Will and the position which Mathuriya assumed,

unchallenged, on Ramdin's death, Sheodayal might well consider it wise, as much in his son's interests as in his own, to come to terms with her. The agreement arrived at, sanctioned as it was by the Court on the minor's behalf, would be a valid and binding family arrangement.

30. We repeat, therefore, that the disputed adoption lies at the threshold of the case, and that the dispute must be determined on the available evidence before the Court can pronounce on the validity of the com-promise which affects the plaintiff.

31. The plea that whether the compromise bound him or not, the plaintiff ratified it after he came of age, may be dismissed in a few words. The plea rests (1) on a statement by the plaintiff in the witness-box and. (2) on a mortgage which he effected of an eight-annas share in a certain property for the purpose of raising money required to carry on this litigation. As to the former, the plaintiff in the course of his evidence quite correctly stated his claim in accordance with his plaint which no doubt was settled for him by big legal advisers, but he went on to say that he claimed a twelve-annas share of the entire properties made up apparently of the eight-annas share to which he would be entitled as adopted son of Ramdin, together with four annas of the eight annas share to which he and his father became entitled under the compromise decree. The claim is fantastic and inconsistent and can only be due to some confusion in his mind as to his legal rights. As to the mortgage, the property mortgaged is item No, 94 in the 1st schedule of the plaint. The plaintiff's case is that the properties' listed in that schedule are in the joint possession of his father and himself (plaint paragraph 14. The schedule includes the entirety of certain properties among which is No. 94. This appears from Mathuriya's written statement, in which she denied that the plaintiff and his father were in possession of the whole of these properties and asserted possession of a moiety on behalf of the defendant No. 6. For the present purpose, therefore, the mortgage can be explained as a mortgage of the moiety of No. 94, to which the plaintiff would be entitled in his own right as adopted son of Ramdin. Differing from the learned Subordinate Judge we are opinion that these materials are not sufficient to justify the conclusion that the compromise was ratified by the plaintiff.

32. The further plea that the compromise can-not be set aside because the parties cannot be restored to their original position, rests on a foundation even more slender. The question is cot one between Sheodayal and Mathuriya. If the plaintiff is not bound by the compromise, it is voidable at his instance and if he is Ramdin's heir, he is entitled to his legal rights as such, whatever those rights may be. The suit constitutes an election to substitute those rights, if established, for the rights obtained under the compromise.

33. On the other hand we cannot accede to the contention of Mr. Das for the appellant that the order of the Court giving leave to compromise on his behalf was insufficient in point of form. The terms agreed upon by Sheodayal and Mathuriya were put in writing and then a special application was made by Sheodayal asking for the leave of the Court to compromise the suit on behalf of Bejoy. The application stated that the suit was a heavy one, and that there would be great difficulty and loss in carrying it on. Upon that the Court made an order, dated 6th July 1910, in the following terms:

Read the petition on behalf of plaintiff No. 2, minor, for permission to enter into the compromise proposed. Heard the Pleader. The permission is granted.

34. Exception was taken because the order does not state in so many words that the Court considered the compromise to be for the benefit of the minor. It is usual and per-haps desirable in giving leave to use words to that effect, but it is not essential. All that Order XXXII, rule 7, requires is that the leave of the Court should be 'expressly recorded in the proceedings.' The rule corresponds to Section 462 of the Code of 1882 in which the words italicised were not included, but their addition has not changed the pre-existing practice [Manohar Lal v. Jadu Nath Singh 33 I.A. 128 : 8 Bom.L.R. 489 : 10 C.W.N. 898 : 4 C.L.J. 8 : 16 M.L.J. 291 : 3 A.L.J. 710 : 28 A. 585 : 9 O.C. 219 : 1 M.L.T. 210 (P.C.). J The Courts had insisted on the leave being recorded. The existing rule is express but no set incantation or formula is prescribed for utterance [Virupakshappa v. Shidappa 26 B. 109, 3 Bom. L.R. 565.] The order in question distinctly states that the Pleader was heard, and it must be presumed that the Court on the materials placed before it considered that in the interests of the minor leave should be given.

35. So far we have not had much difficulty, but when we come to the question of fact the ground is more debateable. In support of the adoption there is a considerable body of direct and positive evidence coming from witnesses who for the most part are persona of respectable position in the village to which they belong. There is no direct evidence on the other side, except that of Mathuriya to rebut these witnesses, but the story which they tell is attended by improbabilities, inherent and extraneous, which cannot be lightly brushed aside. Apart from Chhattan Kumari's written statement in the suit of 1909 and her plaints of 1910 and 1912, the adoption is not supported by any scrap of paper, formal or informal. The question depends almost entirely on oral evidence.

36. For the plaintiff nine witnesses were examined on commission in the District of Banda, who all speak to the adoption. In addition Chhattan Kumari was examined on commission in Chittagong and gives corroborative evidence. Sheodayal was examined in Court, but owing to the part which he had played, he outs a sorry figure the witness-box, and his evidence can count for little or nothing.

37. It is true that we are in as good a position to judge of the credibility and veracity of the witnesses examined on commission as the learned Judge in the Court below. It does not. however necessarily follow that we shall not accept his valuation of their testimony. We ought not to differ from him unless we are satisfied that he is wrong or that justice was miscarried. It will appear that we are far from being so satisfied.

38. It may be again that some of the reasons by which the learned Subordinate Judge supports his conclusion are weaker than others, but weak reasons are sometimes offered in support of a right conclusion In its broad aspects we concur in his reasoning.

39. The story of the adoption in its main outlines is as follows:

When Bijoy was born, Ramdin was at Chittagong, His wife had been for two years at Bisenda, where Sheodayal and his wife Jahnabi bad also been living. Six months before the child's birth, Ramdin had expressed the intention of adopting him if he should prove to be a son. Very shortly after the birth, before the umbilical cord was severed, the mother placed the child in Mathuriya's lap. A telegram was then sent to Ramdin who hurried forth. The necessary arrangements were made and when the child was thirteen days old, he was adopted by Ramdin in the presence of a multitude

of people with the usual ceremonies and concomitants, such as the feeding of Brahmins and so forth. On the occasion the plaintiff's name was changed from Gajaraj, the name given him on his sixth day, to the name by which he is now generally known, Bejoy. The sequel has already been set out.

40. The Subordinate Judge was criticized for first making up his mind that the story was improbable and then disbelieving the witnesses. But the order cannot be inverted. A story is disbelieved because it is improbable, not improbable because it is disbelieved. Not every probable story is true, nor every improbable story untrue, but improbability at least suggests untruth and compels scrutiny. No doubt a story is best appreciated in its setting. But there are two tests applicable. There are the internal merits or demerits of the story and the relation it bears to external and known facts. Both tests in the present case lead to the same result, that the story is artificial.

41. If we take first the course of the family affairs after Ramdin's death, it is not, and cannot be, disputed that the main current of these affairs is totally inconsistent with the adoption. Sheodayal stood by in complete silence while Mathuriya assumed the position of proprietor of the Chittagong properties in her own right as heiress of her husband. Her name was registered as proprietor in the Collectorate. The management of the properties became a matter of almost public concern. Mathuriya appointed a committee of five respectable citizens to advise and assist her. It does not seem to have occurred to any of them that she was a usurper, robbing an adopted son of his rights. By an instrument; dated 12th November 1907 she also appointed Sheodayal her. Am Mukhtar and one of the plaintiff's witnesses, Kailas Chandra Das, a Pleader and a member of the committee, states that the committee 'worked for one year' and that Sheodayal 'was a servant under the committee',' (see also the evidence of the Pleader Narendra Nath Sen). Sheodayal may have done little, but we cannot accept his assertion that he knew nothing of the Am Mukhtarnama.

42. As to the suit of 1909 and the compromise in which it resulted, we have already said enough and we need not go over the ground again.

43. Much reliance was placed on the fact, as found by the Subordinate Judge, that it was Bejoy who performed the Sradh ceremonies for Ramdin. Sheodayal was not in Chittagong when Ramdin died, but he arrived before the Sradh, and it is argued that as the nearest male Sapinda in blood, he had a prior right to officiate at that ceremony unless Bejoy was Ramdin's son by adoption. It would seem that according to the Bengal ritual in default of a son the widow would ordinarily precede both the brother and the brother's son (Sastri's Hindu Low, 3rd Edition, page 202). If that's had been the rule of this family, which was not suggested, it would have strengthened the argument for the appellant. In the suit of 1909 Chhattan Kumari speaking of the family usage said this: ''If anybody in our family dise leaving a wife and a son, then his son performs the Sradh, not the wife. In default of sons, nephews do it. In default of them wife does it.' That statement, if accepted and if it means that a nephew would come before his own father, would explain why Bejoy took precedence of Sheodayal. The deposition was exhibited in the present suit by the plaintiff, but in the course, of her long examination for the purposes of this suit, Chattan Kumari's attention was not called to the point, and we cannot say that it is free from obscurity. We can only say that Bejoy's conduct of the Sradh is by no means conclusive in his favour. Regard being had to what followed, we have no doubt that it is capable of explanation in a manner consistent with his natural relationship to Ramdin. The performance of the Sradh is not, properly speaking, a right of the performer but a pious duly to the

deceased, and if the person on whom the duty first fall?, fails for any reason to discharge it, we presume that the duty devolves on the person next in order according to the rule observed. Under the Mitakshara at any rate that order has no necessary relation to the order of succession to property.

44. If we turn back to the story of the adoption as narrated by the witnesses, it is on the face of it improbable, The Subordinate Judge, a Hindu, describes it in stronger terms as 'extremely absurd and very much opposed to common experience of human affairs,' It is not illegal to adopt an infant in arms, but there is no Hindu who would not be surprised or startled to bear that a child had been formally taken in adoption at the early age of thirteen days. It may be that, so far as the father was concerned, the period of ceremonial impurity, terminated on the twelfth day, or one or two days before (he adoption. But by family usage at least the mother remained ceremonially impure till the thirtieth day. It is idle to say that she took no part in the ceremony. She is said to have handed the child to the natural father who passed him on to the adoptive father.

45. The child moreover was still in need, and would continue for many months longer to be in need, of the services of his natural mother. The facts would be in daily conflict with the convention that the adopted child became from the moment of adoption the child of his new parents, According to the story, the two mothers with the child accompanied Ramdin to Chittagong. After two years the natural mother rejoined her husband at Bisenda, taking the child with her, and it was some years before he returned to Chittagong.

46. Where was the necessity for all the haste displayed, which might well be characterised as unseemly or indecent P It is true that Ramdin had been married for twelve or fifteen years and had no issue-It is suggested that he was impotent, though the suggestion was carefully safeguarded at the Bar. He was impotent, but not from birth. There is no evidence when he began to suffer, if he ever did suffer from this affliction, and there are other ways of accounting for lack of off-spring. There is no evidence that Ramdin was in bad health or that he anticipated an early death. We were reminded more than once that he was an adopted son himself, though we were not told that the precedent extended to his being adopted in infancy or at Bisenda or to his name being changed at the time. He may well have contemplated or spoken of adopting his brother's son. In all likelihood, however, he would not commit himself to an actual or formal adoption, while any reasonable possibility remained that he might have a eon of his own to succeed him.

47. Further, as the Subordinate Judge remarks, Kanta Prosad was still alive. Ramdin had not yet succeeded him in the control of the Chittagong properties. Even from the point of view which Sheodayal would naturally take, the time for the adoption had not yet come.

48. We may add that if anything was said or done between the two ladies principally concerned, at or about the time of Bejoy's birth, bearing on his future destiny, that would not by itself constitute a legal adoption

49. As to the name of Bejoy given to the plaintiff in substitution for, or in addition to, the name originally given to him, we are of opinion that the new name has no necessary connection with his adoption, at any rate his formal adoption, by Ramdin. It is true that the documents to which the Subordinate Judge refers in this connection

came into existence after the compromise of January 1910 and that while he was at school he seems to have been known as Bejoy, but we have heard before of Hindus having two names. The Subordinate Judge evidently thought that the change might be accounted for otherwise than by supposing an adoption.

50. It may be objected that the narrative of the adoption which we have given is too brief and bald. In our opinion no artifice of language would remove the difficulties which lie in the way of accepting it.

51. It is said that the witnesses are not shaken in cross examination. That is subject to qualifications which we will mention, Bat the story, though it might be spun out, is simple in its details. It follows the regular and known procedure of a formal adoption. The scene is set, as far back in time as possible, at a place remote from the place where the suit was tried. The conditions multiply the difficulty of testing the veracity of the witnesses by cross-examination.

52. It is said again that the story is no rebutted. Well, it is contradicted by Mathuriya, who knows as much about the matter as Sheodayal or any one else. She is, no doubt, a partisan in her own cause, and she is not supported by any witness from Bisenda. The latter comment at first sight seems to possess considerable force, but on examination it narrows down and ceases to have much, if any, constructive value on the plaintiff's behalf.

53. The respectability of the witnesses may be conceded. The learned Subordinate Judge may have done them some injustice in treating them as mere villagers of little or no account in comparison with the professional men to be found at the headquarters of a district. They were not examined before him, and the ground on which he ascribes ignorance in a matter of religion to one of them may be misconceived. It cannot be said that if the facts were true, witnesses of a higher social status could have been found to speak to them. Unfortunately, however, truthfulness does not always go with respectability of position and after careful consideration we have come to the conclusion, with the Subordinate Judge, that the evidence from Bisenda must be rejected. Sheodayal had lived there, and no doubt possessed some influence with his neighbours. The course, which Ramdin would have taken, or might have been expected to take had he lived, fell in with their views of the fitness of things and of the interest of an old family, well known in its original home. The witnesses rose to the requirements of the occasion. It is not necessary to postulate bribery. In neighbourly kindliness they treated that as done which in their opinion ought to have been done but which in fast was not done. We are not defending their conduct, which is nonetheless lamentable and wicked because it was dictated by good nature. We are endeavouring to find the reason which induced them to give evidence which we regard as false.

54. Concluding as we do with the Subordinate Judge that there was no adoption of the plaintiff by Ramdin and that no reason is shown for setting aside the compromise decree in the suit of 1909, we are glad to find at any rate that the conduct of that suit by Sheodayal was not so unnatural as he and his son would now have us believe.

55. We might stop there, bat it is perhaps desirable that we should gather up some of the arguments addressed to us with which we have not dealt or not fully dealt.

56. As to the witnesses cited on the plaintiff's behalf, Kausalya is the widow of Kamala

Prosad's son, Ramnath, and resides at Bisenda. Her interests are on the side of Sheodayal. If the evidence of Mathuriya is to be discarded or discounted as intersected and unreliable, much the same exception may be taken to the evidence of Kausalya and Chhattan Kumari. The latter, in her desire to thwart Mathuriya goes so far as to deny that Ramdin was adopted by Kanta Prosad, a fact which is not disputed by any one else.

57. Gayadin Pandit says that the adoption was the only occasion on which he was invited to be present at a ceremony of the Hazari family. Yet he says he saw Ram-din's wife on the day of Bejoy's birth and was present when Ramdin explained his reason for adopting a son, a reason which, even if true in fact, he would hardly care to publish to strangers.

58. Ramnath Pandit says he was 23 or 24 years old at the time of the adoption. His grandfather was Kanta Prosad's Guru bat died, he says, some years before the adoption. Jugal, who was also the Purohit of Ramdin and Sheodayal, was present bat took no part in the ceremony.

59. Ramnath Misser is another priest on whose evidence no great stress was laid.

60. Mahi Pal is the family Bhat whose duty it is to invite people to the house on occasions of ceremony. He succeeded his father in that office.

61. Bela Bhadra Prosad is a Khas Darbari and a member of the District Board. He pats the ceremony in Sheodayal's new house. The other witnesses place it in the old house. The new house apparently was not in existence at the time of the adoption.

62. Baldeo Singh says that he has litigation with Mathuriya.

63. Hanuman Singh is invited to almost all ceremonies at Sheodayal's house, and Sheodayal is invited to ceremonies at his house. Ram Adhin Singh and Ramnath Misser are also friends and neighbours.

64. These observations are intended merely to supplement the reasons we have already given for not crediting the story of the adoption.

65. As to the Banda witnesses, which it was suggested Mathuriya might and should have examined, only three names were ultimately insisted or, Baghunanda, Jagad Lambardar and Sheodayal, not the plaintiff's father but the husband of Mathuriya's cousin. Baghunandan is no doubt Mathuriya's priest, but Bala Bhadra Prosad says that he was not present at the ceremony. As to Sheodayal, Baldeo Singh says that 'no relation of Mathuriya through her father or any villager of her father's village was present at the time of adoption of Bejoy.' It would not, therefore, be of much moment if Mathuriya's relations came forward to say that they were present at no ceremony of adoption. Then remains Jagad Lambardar and he might be deterred from giving evidence by the number of witnesses on the other side coming from his neighbourhood. As the Subordinate Judge remarks, Mathuriya had lived long in Chittagong and was out of touch with the people at Bisenda. She was not likely to have many, if any, friends in the village on whom she could count.

66. Something was said of Mathuriya's failure to produce Ramdin's books of account. We are not satisfied that any serious attempt was made to have the books in Court. If

there was anything in the accounts which threw light on the plaintiff's claim, the fact would probably have been known and the production of the accounts would have been insisted on.

67. Some, but not all, of the Chittagong witnesses say that Ramdin spoke of the plaintiff as his adopted son. We may refer to Kali Sankar Chakerbutty, the Editor, Kailas Chandra Das, the Pleader, and Joyanta Kumar Das, the Kabiraj, on the one hand and the Pleaders Narendra Nath Sen and Soshi Bhusan Sen on the other. Narendra Nath Sen was very intimate with Ramdin, and his statement that Ramdin never had occasion to tell him' that he had adopted the plaintiff is, though of a negative character, significant. He saw Ramdin after he was seized by his last illness and before he lost consciousness and died, If the adoption were a fact, we should have expected more conformity in the witnesses and a much more certain and confident tone in the evidence. If Ramdin treated his nephew kindly and generously, that is not in itself proof of a formal adoption. It would be dangerous and unwise to treat the display of natural affection as proof of any such thing.

68. We do not attach much importance to the plaintiff being described in various documents as the son of Sheodayal. It appears that Ramdin himself was sometimes so described and most of the documents produced relate to the period after the compromise of 1910.

69. There was some argument about the precise nature of the plaint in Suit No. 17 of 1913. In paragraph (3) the statement; occurs 'the late Babu Ramdin Hazari brought the minor plaintiff and adopted him as his son.' For the respondent it is urged that the words imply that the plaintiff was brought to Chittagong before he was adopted. The other side points to the first sentence of paragraph (5) which correctly and literally translated runs: 'The minor plaintiff is the adopted and brought son of the late Ramdin Hazari', Paragraph 19 Ind. Cas. 515 : 40 I.A. 132 : at p. 139 : 17 C.W.N. 765 : 11 A.L.J. 589 : 18 C.L.J. 1 : 15 Bom. L.R. 626 : 14 L.T. 1 : (1913) M.W.N. 5757 : 25 M.L.J. 150 : 36 M. 295 (P.C.), it is said, rectifies paragraph (3). That may be so but the point is not one of any importance. Words are sometime loosely strung together.

70. There remains one matter with which we conclude. If the compromise decree were set aside, it would no doubt be open to the plaintiff to re-open the question whether the Chittagong properties were joint or not. The learned Subordinate Judge, holding that the plaintiff was not adopted by Ramdin and that he was bound by the compromise decree, advisedly refused to come to a finding on that issue. Having come to the same conclusions on the main questions involved, we have followed his example. While the compromise was in the balance, it was inevitable that our attention should be invited to various matters bearing on the character of Kanta Prosad's possession. But if the compromise is binding, the issue cannot be raised. It is closed by agreement. The whole purpose and value of such settlements would be destroyed if, apart from fraud or collusion or any vitiating circumstance, the question settled could afterwards be revived in Court for judicial determination. Miles v. New Zealand Alford Estate Co. (1886) 32 Ch. D. 266 : 55 L.J. Ch. 801 : 54 L.T. 582 : 34 W.R. 669, Rameswar Pershad Singh v. Ram Bahadur Singh 34 C. 70 : 11 C.W.N. 178 : 5C.L.J. 175 : 17 M.L.J. 59 : 2 M.L.T. 165 (P.C.).

71. In the result this appeal is dismissed with costs.