Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Baboo Dooli Chand and others v. *Baboo Birj Bhookun Lal Awasti, from the High Court of Judicature at Fort William in Bengal; delivered February 4th*, 1880.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal by the representatives of two Hindoos, Baboo Himmut Ram and Baboo Moorli Sahoo, (who appear to have been jointly interested in a conveyance taken in the sole name of the former), against a decree of the High Court affirming the decree of the Lower Court, which had dismissed their suit. The Respondent and Defendant, Birj Bhookun Lal Awasti, is the representative of one branch of a family descended from a common ancestor, Deo Kishen Awasti; and the object of the suit was to recover from him one-half of the property of Chintamun, who was formerly the representative of the other branch of the family, to which Birj Bhookun Lal Awasti succeeded on the death of the surviving widow of Chintamun. In the year 1848, and shortly after the death of Chintamun, Kanhya Lal Awasti, the father of the Defendant, brought a suit alleging that this family, descended from the common ancestor, Kishen Awasti, was a joint and undivided Hindoo family, governed by the law of the Mitacshára; and seeking to recover the possession of Chintamun's share from his widows

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upon that title. His suit so far entirely failed. It was proved that there had been a partition under which Chintamun held his share as separate estate, to which his widows were entitled to succeed, Kanhya Lal Awasti being only presumptively the reversionary heir next in succession to them. The decree made was a somewhat extraordinary one. It did not dismiss the suit; but, after affirming the rights of the widows, went on to declare the right of Kanhya Lal Awasti to succeed upon the death of the survivor of them; and, further, directed that they should pay the costs of the Plaintiff, whom they had substantially defeated. The only plausible reason for so singular a direction that suggests itself is that the widows may have raised a question which has been raised in other cases, to the effect that, under the Mitacshára law, a Hindoo widow taking by inheritance her husband's separate property takes it absolutely and in the nature of stridhun. It does not appear on this record that such a contention was raised in the suit; but there was no appeal against the decree, which must therefore be taken to stand. Shortly after it was passed Kanhya Lal became insane. His wife seems to have taken care of him and of his property, and to have acted as the natural guardian of her infant son. In that state of things she executed the kobala of the 17th July 1851, in favour of Himmut Ram, upon which the alleged title of the Plaintiffs depends. The widows of Chintamun lived for several years after the execution of that deed; the last of them dying in 1870. Birj Bhookun, who was then of age, thereupon applied in the first instance for execution of the declaratory decree in favour of Kanhya Lal, claiming as the representative of his insane father. His application failed because it was

ruled by the Courts that on the death of the surviving widow he, and not his father, who, though alive, was disqualified by insanity, was the heir of Chintamun next in succession. He then brought, in his own right, a suit against certain persons who claimed the property or portions of it under conveyances from the widows of Chintamun, and ultimately succeeded in recovering the whole estate, with, perhaps, one small exception. All these facts are stated by the Plaintiffs in their plaint; which accordingly admits both the possession and the title of Birj Bhookun, but seeks to recover from him half the property that descended to him from Chintamun by virtue of the transfer alleged to have been made to them by the deed of the 17th of July 1851. Under these circumstances the Plaintiffs, of course, had to establish, first, that the deed under which they claim did purport to pass half the interest of Birj Bhookun; and secondly, that, having been executed as it was by his mother and guardian, it was a transaction within the rules which enable a guardian effectually to alienate the property of an infant ward. A further question was raised in the suit, viz., whether the interest of Birj Bhookun at the date of the deed could be the subject of such a conveyance, inasmuch as it was then a mere expectancy.

It being essential for the Defendants to prove that there was a justifying necessity for this conveyance, the first thing which strikes their Lordships is the total absence of proof upon that point. It seems to them that on this ground alone the present appeal must fail. It has been argued by Mr. Doyne that there may have been some miscarriage of the Judge, by reason of which neither Court has dealt with this issue, but has disposed of the case upon the other points raised in the cause. It is true that one of the grounds of appeal to the High Court is

that the proper issues had not been framed. But it appears to their Lordships that, though the first issue is not perhaps as happily expressed as it might have been, it does distinctly raise the question whether there was a justifying necessity for the sale in question. On the other hand, it nowhere appears upon the record that the Lower Court was not prepared to try that issue, or had reserved it for future trial in case its dismissal of the suit upon the other grounds should be found to be erroneous. They have further to observe that, when they look to the record of what was done in the case by the Plaintiffs, they find evidence of an intention to prove some justifying circumstances other than those which are stated on the face of the deed to have been the grounds and reasons for the transaction. The latter are, first, the expediency or necessity for bringing against the widows in possession a suit for waste, a suit which could only be brought by the aid of Himmut Ram. That suit was afterwards brought, and it failed. Therefore, as far as the event went, it seems to have been a suit which can hardly be said to have been for the benefit of the infant or of his estate. The other is a suggestion that Kanhya Lal had incurred debts to Himmut Ram, that Himmut Ram had said that he would bring a suit, and that there was risk that the infant's estate would thereby be damaged. But the passage at page 14 of this Record which states what the Plaintiffs were about to prove, and the purpose for which they asked that their witnesses should be summoned, points to an alleged necessity of a different character. They there state: —"The witnesses named under this heading shall "prove that Mussummat Badamon Koer was "the guardian of Birj Bhookun Awasti"—that is a question on which there is no point raised;— "that Kanhya Lal, the father of Birj Bhookun

" Awasti, was insane "—that, further, was an admitted fact; " that Birj Bhookun Awasti was " under age "—that seems to be also an admitted fact; " that besides the aforesaid Mussummat " there was no other lawful guardian; that the " income from the estate was very trifling; that " the Mussummat aforesaid was in need of " maintaining, supporting, and educating her " minor son, for which reason she proposed the " sale to the ancestor of the Plaintiffs; that the an- " cestor of the Plaintiffs, having ascertained the " necessity, negotiated the sale with the aforesaid " Mussummat; and other particulars." They then give the names of the witnesses who are to prove those facts. Then we find at page 16 a statement that certain witnesses there named, some of whom had been mentioned at page 14, had appeared in Court, but had been allowed to go away; and that the Plaintiffs could not get them without warrants to be issued upon them in order to bring them in. The Judge made an Order for the issue of the warrants, and there is nothing to show why these witnesses were not afterwards produced and examined. The record, therefore, shows that the Plaintiffs not only proposed to prove a different case from that which on the face of the deed appeared to have been the cause and justification for the alienation of the minor's interest, but entirely failed to prove the new case set up.

In these circumstances, their Lordships are of opinion that the suit must on this ground be taken to have failed, and that they would be exercising a very unsound discretion if, without more explanation why evidence upon this material issue was not produced, they were to send the case back, and remand for a new trial a claim to property which seems to have been already the subject of much vexatious litigation.

It lay upon the Plaintiffs to excuse their non-production of these witnesses, and it appears to their Lordships they have wholly failed to do so.

The conclusion to which their Lordships have thus come renders it unnecessary to consider the grounds upon which the Courts in India have proceeded. The point on which the Lower Court in part proceeded, and which has only been treated as doubtful by the High Court, namely, whether such an interest could be the subject of a sale at all, is of general importance, and one which their Lordships, who do not sit here to determine abstract questions of law, would be unwilling to determine in a case in which no decree in favour of the Plaintiffs can be passed. They are certainly not prepared to affirm that such an interest can be made the subject of a sale, still less that it can be made the subject of a sale, highly speculative as any such sale must be, by a guardian acting or purporting to act on behalf of an infant. The decision of this Board, which has been cited by the Judge of the Lower Court, is not precisely in point; but it goes far to show that the principle of English law which allows a subsequently acquired interest to feed, as it is said, the estoppel, does not apply to Hindoo conveyances.

With reference to the construction of the deed, their Lordships deem it sufficient to say that there is, in their opinion, much on the face of it which favours the construction put upon it by the High Court, namely, that what it dealt with was the supposed rights of Kanhya Lal, and through him of his infant son, under the decree of 1848; but that, inasmuch as the Appeal must be dismissed on the other grounds which have been stated, it is unnecessary either to affirm or disaffirm that construction.

On the whole, they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this Appeal with costs.