

(1932) 12 PAT CK 0004
In the Patna High Court

Lalita Prasad Chaudhury and Others

APPELLANT

Vs

Sarnam Singh and Others

RESPONDENT

Date of Decision : 14-12-1932

Acts Referred:

Contract Act, 1872 — Section 23
Transfer of Property Act, 1882 — Section 6

Citation : AIR 1933 Patna 165

Hon'ble Judges : Macpherson, J;Kulwant Sahay, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—These two appeals arise out of a suit instituted by the plaintiffs-respondents for a declaration of their title as reversionary heirs of one Bajrangi Lal and for recovery of possession of one-half share of the properties set out in the schedule attached to the plaint as being the estate of Bajrangi Lal to which defendants 1, and 2 and the husband of defendant 3, and defendant 63 were jointly entitled with the plaintiffs as the reversionary heirs on the death of Mt. Amola Kuar the widow of Bajrangi Lal, which event took place on 11th Asin 1324, F.S. (1916).

2. The following genealogy will be of assistance in understanding the facts of the case:

MADARI LAL | _____
_____ | | | | Hanuman Dutt Bhairo Dutt Ganesh Dutt Mahesh Dutt
Narain Dutt died in 1858. died in 1884. died in 1868. died in 1867. | | | Bighu
Lal | Bajrangi Lal died in 1849. Pekhu Lal | | (adopted son) =Mt. Anandi Kuar
died in 1861. Bajrangi Lal Naurangi Lal died in 1861. died in 1885. (adopted by
(adopted by =Mt. Amola Kuar Hanuman Dutt) Narain Dutt died in 1916. in
Kritrima form) | died in 1885. | | | | Jairam S.D. Achuta Nand Biswanth S. Adya
Dutt died in 1898 died in 1883. died in 1879. died in 1884 =Lachu Kuar =Mt.
Shyampati died in Katick Kuar. | 1293. | | | | | Bhagwati Pd. Gunjeshwari
Lakhi Pd. Sarnam S. Ramjatan Trilock Nath pltff. 2. Pd. Singh pltff. 3. pltff. 1.

died in Singh died in 1910. 1917. died in 1912. | Mahindra Kishore plttf. 4. |
| Jamuna Bindbasni Pd. Pd. defdt. 63. died in 1902. | | Awadh Bihari Brij
Behari died in 1889 died in =Ramkali Kaur, 1883. | | | Brahmadeo Narain
Baldeo N. Basdeo Narain defdt. 2. defdt. 1. died in 1919 | | =Chandrawati
Kapildeo N. Bisdeo N. Kuar defdt. 4. defdt. 5. defdt. 3. | Bechu Babu defdt. 6.

Madari Lal the common ancestor died possessed of considerable landed properties and leaving five sons surviving him. The five sons, Hanuman Dutt, Bhairo Dutt, Ganesh Dutt, Mahesh Dutt and Narain Dutt, admittedly separated amongst themselves after the death of their father, and therefore the share of each of the brothers was 3 annas 4 gandas in the ancestral property. Bhairo Dutt died first, leaving his son Bigu Lal who died in the year 1256 (1849) leaving a widow Mt. Anandi Kuar. Hanuman Dutt is said to have taken Bajrangi Lal, the son of Mahesh Dutt in adoption.

3. The fact of the adoption is admitted, the dispute is as regards the form of adoption. According to the plaintiffs the adoption was in the Dattaka form; according to the defendants it was in the Kritrima form. Bajrangi Lal died in the year 1268 (1861) leaving a minor widow, Mt. Amola Kuar, who was then of tender years. Narain Dutt died without any issue in the year 1275 (1867), and in the same year Mahesh Dutt also died. Mahesh Dutt had two sons, Naurangi Lal and Bajrangi Lal, the latter, as I have already said, having been adopted by Hanuman Dutt.

4. On the death of Narain Dutt without issue a dispute appears to have arisen between Ganesh Dutt and Naurangi Lal the son of Mahesh Dutt, in respect of the inheritance. Naurangi Lal claimed the estate of Narain Dutt as his adopted son; Ganesh Dutt claimed it as the next reversioner, being his brother, ignoring the fact of Naurangi Lal's adoption. Each of them applied to the Zilla Court of Tirhut for a succession certificate under Act 27 of 1860. There was a compromise between these two and on 7th April 1868, a petition was filed by Ganesh Dutt before the Judge in the Zilla Court as appears from Ex. B which is of great importance in the present case. It was stated by Ganesh Dutt in this application that a settlement had been arrived at between him and Naurangi Lal and compromise had been made in respect of of the allotment of shares in all the moveable and immovable properties left not only by Narain Dutt but also by Hanuman Dutt and by Bigu Lal the son of Bhairo Dutt.

5. The agreement between the parties was that out of the 3 annas 4 gandas share left by Narain Dutt 2 annas 2 gandas would go to Naurangi Lal and 1 anna 2 gandas to Ganesh Dutt. Out of the 3 annas 4 gandas left by Bigu Lal (which was then in the possession of his widow Mt. Anandi Kuar) 2 annas 4 gandas shall, on the death of his widow, belong to Ganesh Dutt and 1 anna to Naurangi Lal. As regards the 3 annas 4 gandas share left by Hanuman Dutt (which was then in the possession of Mt. Amola Kuar the widow of Bajrangi Lal), it was agreed that the whole of it shall, on the death of the said Musammat, belong to Naurangi Lal. It was thus settled that the entire 16 annas of the estate left by

the common ancestor Madari Lal would be divided between Ganesh Dutt and Naurangi Lal in the proportion of 6 annas 10 gandas and 9 annas 10 gandas, the former share going to Ganesh Dutt and the latter to Naurangi Lal. The 6 annas 10 gandas share which was to go to Ganesh Dutt was made up as follows:

As. Gs. His own share ... 3 4 Out of Narain Dutt's 3 annas 4 gandas ... 1 2 Out of Bigu Lal's 3 annas 4 gandas ... 2 4 _____ 6 10 Naurangi Lal's 9 annas 10 gandas was made up as follows: As. Gs. His own share ... 3 4 Out of Narain Dutt's 3 annas 4 gandas ... 2 2 Out of Bigu Lal's 3 annas 4 gandas ... 1 0 Bajrangi Lal's share ... 3 4 _____ 9 10

6. It appears from the order of the District Judge recorded on this petition that a similar petition was filed by Naurangi Lal. Ganesh Dutt died in the year 1291 (1884) and his son Pekhu Lal had predeceased him. Pekhu Lal had four sons Jairam Singh, Achuta Nand, Biswanath Singh and Adya Dutt. The plaintiffs' case is that these four sons had separated amongst themselves. Jairam died issueless in 1898, leaving a widow Lachu Kuar. Achutanand died in 1883 leaving a widow and three sons Bhagwati Prasad, Gunjeshwari Prasad and Lakhi Prasad. Bhagwati Prasad is plaintiff 2 and Lakhi Prasad is plaintiff 3 in the present action. Gunjeshwari Prasad died without issue in the year 1910. Biswanath died in 1879, leaving three sons Sarnam Singh, Ramjatan Singh and Trilok Nath Singh. Sarnam is plaintiff 1 in the present suit; Ramjatan Singh died in the year 1917, leaving his son Mahendra Kishore who is plaintiff. 4. Trilok Nath Singh died without issue in the year 1912. Adya Dutt died in the year 1884, leaving two sons Jamuna Prasad and Bindbasni Prasad. Jamuna Prasad is defendant 63; and Bindbasni Prasad died in 1902 without leaving any issue. In Mahesh Dutt's branch of the family, his son Naurangi Lal had two sons, Awadh Bihari and Brij Bihari. Brij Bihari predeceased his father. Awadh Bihari died in the year 1889, leaving three sons Baldeo Narain, Barhmdeo Narain and Basudeo Narain. Baldeo Narain is defendant 1 and Barhmdeo Narain is defendant 2. Basdeo died in the year 1919 and his widow Chandrawati Kuar is defendant 3. The widow of Bajrangi Lal, Mt. Amola Kuar, died in 1916, and the plaintiffs' case is that at that time the reversionary heirs of Bajrangi Lal's estate were plaintiffs 1, 2, and 3, Ramjatan Singh the father of plaintiff 4, Jamuna Prasad defendant 63, and the three sons of Awadh Bihari, viz., defendants 1 and 2 and the husband of defendant 3. As defendant 63, Jamuna Prasad, did not join in the suit, the plaintiffs, who would be entitled to four-eighths or one-half share in the estate, instituted the present suit for declaration of their title and for possession of their share of the estate. The other defendants are transferees of portions of the estate left by Bajrangi Lal, either from the widow Amola Kuar or from Awadh Bihari or his sons, or jointly from the widow and Awadh Bihari and his sons.

7. The defence of the defendants was that the adoption of Bajrangi Lal by Hanuman Dutt was not in the Dattaka form but in the Kritrima form and therefore on the death of his widow, the plaintiffs were not the reversionary heirs but that defendants 1 and 2 and the husband of defendant 3 were the only

reversionary heirs; and that the plaintiffs had therefore no title to the estate and were not entitled to recover possession of any share of the estate.

8. It was further alleged that on account of the settlement and the compromise entered into between Ganesh Dutt and Naurangi Lal in the year 1868, which is set out in detail in the petition Ex. B referred to above and which was in fact a family settlement, the entire 3 annas 4 gandas share of Hanuman Dutt's estate, which was in the possession of the widow Amola Kuar, passed on her death to defendants 1 and 2 and Basudeo Narain; and that the plaintiffs were bound by that settlement and were not entitled to claim any share in the estate.

9. It was further contended that the alienations by the widow were for valid necessities and were binding on the reversioners, and that the plaintiffs were estopped on account of certain acts on their behalf from questioning the alienations. The learned Subordinate Judge has found that the adoption of Bajrangi Lal by Hanuman Dutt was in the Dattaka form as alleged by the plaintiffs and therefore the plaintiffs have proved their title as the reversionary heirs of Bajrangi Lal. He has also found that the alleged settlement of the year 1868 is not binding upon the plaintiffs and they are not estopped from impeaching the alienations, and that the alienations were not proved to be for legal necessities. He has accordingly decreed the suit.

10. Appeal No. 250 is by defendants 1 to 6, viz., the descendants of Naurangi Lal, and Appeal No. 228 is by defendants 7 to 13, 14 to 15c and 24 to 29, some of the transferees who are interested in certain shares in the properties in claim. The first point for consideration is, whether the adoption of Bajrangi Lal by Hanuman Dutt was in the Dattaka form. If it is found that the adoption was not in the Dattak form then it is admitted that the plaintiffs have no title and the suit must fail.

11. The adoption is alleged to have taken place in the year 1852, at a time when Bajrangi Lal was an infant, according to the plaintiffs of five years, and according to the defendants, a few years older. At this distance of time it is difficult for the plaintiffs to adduce satisfactory evidence of the form of the adoption. (After considering the depositions of direct witnesses his Lordship proceeded). This is the whole of the oral evidence on the point. Great reliance has however been placed on some of the documents produced in the case and on certain circumstances appearing on the evidence.

12. The first document upon which great reliance is placed on behalf of the plaintiffs is the so-called will of Hanuman Dutt, dated 11th May 1857 (5 years after the adoption in 1852) and marked as Ex. 3 in the case. It is called a will but it purports to make an immediate disposition of the properties in favour of Bajrangi Lal (called in the deed as Bajrangi Sahay), and not a disposition which is to take effect after the death of Hanuman Dutt. This document begins with a recital that on account of being childless, Hanuman Dutt had adopted Bajrangi Lal, son of his brother Mahesh Dutt, as his son in his very childhood on 5th

Aghan 1259 F.S. (1852). The plaintiffs' witness. Kapileshwar has stated that the boy was aged 5 or 6 years at the time of the adoption.

13. It is contended that this fact shows that the adoption could not have been made in the Kritrima form but in the Dattaka form, inasmuch as in the Kritrima form the consent of the adoptee is necessary, while in the Dattaka form the adoption must be made at the age of 5 or 6 years and, at any rate, before the tonsure ceremony of the boy is performed. The will states that the tonsure ceremony of Bajrangi Lal was performed under the supervision of Hanuman Dutt. It is no doubt true that in the Kritrima form the consent of the adoptee is necessary; but the argument of the learned advocate for the plaintiffs is that such consent cannot in law be given while the adoptee is a minor.

14. The Hindu law does not prescribe any age of majority; all that the law says is that the adoptee must have attained years of discretion so as to be able to understand the responsibilities that he is undertaking in consenting to become the son of his adoptive father. Mr. Mayne in Section 201 of his Hindu Law and Usage says that the Kritrima son is thus described by Manu:

He is considered as a son made (or adopted), whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with (the) merit (of performing obsequies to his adopter) and with (the) sin of omitting them).

15. So, all that is necessary is that the adoptee should be acquainted with the merit of performing the obsequies to his adopter and with the sin of omitting them, and this is achieved when a boy attains years of discretion. In Section 202 Mayne says:

The consent of the adoptee is necessary to an adoption in this form, and the consent must be given in the lifetime of the adopting father. This involves the adoptee being an adult. Consequently there appears to be no limit of age.

16. Reliance is placed upon this passage; but Mr. Mayne was here considering the question not whether the adoption in the Kritrima form may or may not be performed when the adoptee is not an adult but whether such adoption can be performed when he is an adult as contradistinguished from the Dattaka form of adoption in which the adoptee must not be an adult and in which there is a limit of age as dealt with by him in Section 140 of his treatise. Trevelyan in his Hindu Law, Edn. 3, p. 171, says that the age of the son adopted in this form is immaterial and that the consent or, at any rate, the absence of express dissent of his parents, if living is necessary to this form of adoption when he is a minor, and he quotes for his authority W. Macnaghten's Hindu Law (ii) 196. This clearly shows that the Kritrima form of adoption can take place when the son is a minor. Mulla in his Principles of Hindu Law, Edn. 5, p. 475, says the same thing. He says that the adopted son must have attained the age of discretion and that his age is immaterial.

17. Reliance is placed on behalf of the plaintiffs upon the decision in *Kanhya Lal Sahu v. Mt. Suga Koer* AIR 1926 Pat 90, at p. 595 of 6 P.L.J.). In this decision a casual remark is made in these words:

No ceremonies or sacrifice are necessary to the validity of this particular form of adoption. All that is necessary is the consent of the adoptee which involves the adoptee being an adult.

18. The question whether a minor could or could not be adopted in the *Kritrima* form was not raised in that case and the question was not considered in the judgment, but a stray remark was made which however is not a decision which can be cited as an authority. I am therefore of opinion that the fact that *Bajrangi Lal* was a minor at the date of his adoption does not necessarily go to prove that the adoption was in the *Dattaka* form and not in the *Kritrima* form. It is contended that from the recital in the will that *Bajrangi Lal* was adopted with the consent of his parents, it would appear that the adoption must have been in the *Dattaka* form. The quotations from the text-books cited above, go clearly to show that the consent of the parents is necessary in the *Kritrima* form of adoption when the adoptee is a minor. This fact also does not necessarily show that the adoption must have been in the *Dattaka* form. It is next argued that the recital in the will that the adoption was made with the consent of *Hanuman Dutt's* wife, also goes to show that the adoption was in the *Dattaka* form.

19. It is true that in the *Kritrima* form the husband and the wife can each adopt without the consent of the other, and the adopted son will be the son of the husband or of the wife as the case may be; but it is also possible that a valid *Kritrima* adoption can be made jointly both by the husband and the wife acting together (see *Trevelyan's Hindu Law*, Edn. 3, p. 170; also *Mayne's Hindu Law*, Section 205). The above observation disposes of the argument that the recital in the will, that the *sradh* ceremony of *Hanuman Dutt's* wife was performed by *Bajrangi Lal* would support the contention that the adoption was in the *Dattaka* form, because if he was adopted jointly by both, then he could certainly perform the *sradh* of his adoptive mother. The passage in the will upon which the greatest reliance has been placed on behalf of the plaintiffs runs thus:

Therefore the said *Babu Bajrangi Sahay* ceased to have any relationship with the said *Babu Mahesh Dutt* and to have any concern with his brother and became my son.

20. It is contended that this recital shows that *Banjrangi Sahay* ceased to have any relationship with his natural father and brothers and this can only be the effect of a *Dattaka* adoption and not of a *Kritrima* adoption. It is no doubt true that in the *Kritrima* form of adoption the adopted son does not lose his connexion with his own family, and if it be proved that *Bajrangi Sahay* as a result of his adoption did in fact cease to have any connexion with his natural father and brothers, it would no doubt be a factor in favour of the contention that the adoption was in the *Dattaka* form.

21. Mr. Jayaswal, on behalf of the defendants-appellants, contends that this passage merely expressed the opinion of Hanuman Dutt on a point of law and that there is no evidence to show that Bajrangi Lal ceased all connexion with his natural family. He was only 6 or 7 years old at the time of adoption and he died when a mere lad of fourteen or fifteen and there is no evidence that he ceased to live with his parents and brother. On the other hand, the evidence is that after his death, which took place in 1861, his widow Amola Kuar was living with Naurangi Lal. It is admitted in para. 12 of the plaint that Naurangi Lal and his son Awadh Bihari were the managers and supervisors on behalf of Amola Kuar in respect of the properties which came into her possession on the death of Bajrangi Lal. Plaintiff 1, Sarnam Singh in his evidence states that Amola Kuar lived with defendants 1 to 6 or their ancestors. The plaintiffs' witness Kapileshwar Ojha states:

Defendants 1, 2 and Basudeo being the nearest agnates of Bajrangi, Ex. J, the deed of surrender was executed in their favour by Amola.

22. All these go to show that the parties always considered Bajrangi to have retained his connexion with his natural family and not to have ceased his connexion after his adoption. The recital in the will therefore that Bajrangi ceased to have any relationship with his natural father and brothers is not such a piece of evidence upon which one can say that the adoption must have been in the Dattaka form. On the other hand, Mr. Jayaswal, on behalf of the defendants-appellants, contends that certain recitals in the will go to support his contention that the adoption was in the Kritrima form. He says that the recital to the effect that the adoption was with the consent of the wife militates against the theory of the adoption being in the Dattaka form, because in the Dattaka form the husband can adopt in spite of his wife's objection.

23. He further refers to the recital in the will, that Bajrangi Lal should enter into possession and occupation of all the properties on the condition that he would on Hanuman's death perform his sradh ceremonies as a son, and contends that this goes to show that his inheritance or right to the properties by the devise under the will was to take effect only on the condition of his performing the sradh ceremonies, a condition which can attach only to the Kritrima form of adoption and not to the Dattaka form of adoption. The Kritrima form of adoption is made with the express object that the adoptee should perform the exequial rights of the adopter and that he should inherit the properties of the adopter. Although a Dattaka son also has to perform such ceremonies of his adoptive father, his right to inherit is not dependent on the condition of his performing the ceremonies.

24. Mr. Jayaswal says that this condition was imposed by reason of the fact that the adopted boy was then of tender years and, although his parents had given their consent to the adoption, he himself perhaps had not given or was not in a position to give his consent, and that any such consent can be given by the adopted son at any time during the lifetime of the adoptive father. Mayne in Section 202 of his book says that the consent must be given in the lifetime of the

adopting father. The contentions of the parties on the construction of the Ex. 3, will therefore go to show that the recitals contained therein are inconclusive and do not necessarily go to show that the adoption was in one form or the other. (After considering the petitions of Ganesh Dutt dated 7th April 1868 and 6th March 1878 his Lordship proceeded). The next document is the mukhtarnama (Ex. W) executed by Mt. Amola Kuar, on 30th November 1877. This was a mukhtarnama authorizing one Pheku Lal, patwari, to file an application on her behalf in the partition case Mahal Bakhri which was then pending before the Collector of Champaran. This was the mukhtarnama by virtue of which the application was filed on her behalf for the inclusion of her share in the takhta of Naurangi Lal, to which Ganesh Dutt had filed his objection (Ex. 1/3) referred to above. In this mukhtarnama Amola Kuar described herself as the widow of Bajrangi Sahay the heir and Karta-putra of Hanuman Dutt. Whether Karta-putra has the same significance as Kritrima-putra has been the subject of contention between the parties.

25. On behalf of the plaintiffs it is contended that Karta-putra is a general term for adoption whether it is in the Dattaka form or in the Kritrima form; whereas on behalf of the defendants it is contended that Karta-putra signifies the Kritrima form of adoption. Sarnam Singh (P.W. 1) in his evidence says that in villages Dattaka-putra is also called Karta-putra but in cross-examination he says:

Dattaka-putra is a so-called Kritrima-putra by people. In my idea these are different classes of adoption. Kritrima-putra is also known as Karta-putra.

26. Golapchandra Sarkar Shastri in his Hindu Law of Adoption, Edn. 2, p. 448, says that:

the word "Kritrima" is, seldom if ever, used by the people of Mithila in designating that description of son; the term which is in ordinary use is Karta-putra.

He however says that:

it seems that sometimes the word "Karta putra" is used to designate a Dattaka son; it is therefore not correct to suppose that wherever the word "Karta putra" is used, it means only the Kritrima son.

27. This may be true; but when the word "Karta-putra" is used by people residing in Mithila, as the parties in the present case do--then, according to what the learned author said first, Karta-putra must mean the Kritrima form of adoption. In any event, the description of Karta-putra in this document (Ex. W) would not go to show that the adoption was in the Dattaka form. The next document is the deed of surrender executed by Mt. Amola Kuar in favour of Baldeo Narain and others the defendants, on 27th November 1914, (Ex. J). There is a clear recital in this document that Bajrangi Sahay was adopted by Hanuman Dutt as his Kritrima-putra. This was however after the dispute between the parties had actually begun, and it cannot be of much importance to the

defendants. These are all the documents of importance on this point, and on a careful consideration. I am unable to say that they support the plaintiffs' version that the adoption of Bajrangi Lal was in the Dattaka form.

28. The plaintiffs refer to the fact that the family was governed by the Mitakshara law, that the parties had migrated to Mithila "from the west" and are Asthana Kayasthas, that they brought their own laws and customs with them, that the Kritrima form of adoption was not in vogue in this family, and that it is unlikely that Bajrangi Lal would have been adopted in the Kritrima form and it was more likely that he would be adopted in the Dattaka form which is the ordinary mode of adoption amongst families following the ordinary Mitakshara law. There is evidence to the effect that the original home of the parties was not in Mithila but in some country in the west of India. D.W. 5. Tribhunath Ojha, speaks to it. He further says that the family is governed by the Mitakshara Shastras.

29. But as was observed by the Privy Council in AIR 1925 280 (Privy Council) , the law of the Mithila School is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila School has departed from the law of the Mitakshara. The fact that the family is governed by the Mitakshara law does not raise any presumption that an adoption made in the family was in the Dattaka form and not in the Kritrima form. Moreover we find in this very family Naurangi Lal himself was adopted by Narain Dutt in the Kritrima form and there is no dispute between the parties on this point. Therefore there can be no presumption in favour of the plaintiffs that the adoption of Bajrangi Lal was in the Dattaka form.

30. In the plaint, the plaintiffs did not describe Bajrangi Lal as the Dattaka-putra of Hanuman Dutt. In para. 7 they merely stated that he was the adopted son of Hanuman Dutt. In the genealogical table annexed to the plaint, which in para. 2 of the plaint the plaintiffs asked to be treated as a part thereof, Bajrangi Lal was described as the Karta-putra of Hanuman Dutt. He was also shown in the table as the son of Naurangi Lal.

31. Subsequently an application was made for amendment of para. 7 of the plaint by describing Bajrangi Lal as the Dattaka-putra of Hanuman Dutt; but no amendment was made in the genealogical table. Reliance is placed upon this fact on behalf of the defendants; but this circumstance by itself is not of much importance inasmuch as the suit was based on the allegation that the adoption was such as to entitle the plaintiffs to inherit a portion of the estate of Hanuman Dutt.

32. On a consideration of the entire evidence on this point, I am of opinion that the plaintiffs upon whom the onus lay, have failed to prove that Bajrangi Lal was adopted by Hanuman Dutt in the Dattaka form. The evidence is inconclusive and not sufficient for such a finding. It is conceded that if the plaintiffs failed to prove that the adoption was in the Dattaka form the suit must fail. Upon the finding

arrived at by me the suit is bound to fail on this point alone, and the other points raised in the case would not arise; but as both parties have gone into the other points it is proper that I should deal with them as briefly as possible. I now proceed to consider the other points raised by the parties, on the assumption that the adoption was in the Dattaka form and the plaintiffs are some of the reversionary heirs of the estate of Bajrangi Lal.

33. The first point for consideration is the effect of the agreement entered into between Ganesh Dutt and Naurangi Lal, as evidenced by the petition of compromise (Ex. B). I have already set out the terms of the compromise in the earlier part of this judgment. By the agreement, Ganesh Dutt's own 3 annas 4 gandas share and Mahesh Dutt's 3 annas 4 gandas were not dealt with, these two branches of the family being entitled to their proper share. What was dealt with was the share of each of the other three branches of the family, viz., of Narain Dutt, Bhario Dutt and Hanuman Dutt.

34. As regards the 3 annas 4 gandas share of each of the branches represented by Bhario Dutt and Narain Dutt, it was agreed that Ganesh Dutt and Naurangi Lal would take them in certain definite shares. Narain Dutt's 3 annas 4 gandas, and Bhario Dutt's 3 annas 4 gandas were divided in such a way that out of the total 6 annas 8 gandas Ganesh Dutt was to take 3 annas 6 gandas and Naurangi Lal 3 annas 2 gandas. There was not much difference between the share taken by each, Ganesh Dutt taking 4 gandas in excess over that that was taken by Naurangi Lal. As regards Hanuman Dutt's 3 annas 4 gandas, it was agreed that on the death of Bajrangi Lal's widow, Amola Kuar, the whole of it should go to Naurangi Lal. The defendants upon this compromise as a family settlement which was duly acted upon. The plaintiffs, on the other hand, contend that this agreement amounted to dealing with properties to which Ganesh Dutt or Naurangi Lal had then no title, there being merely an expectancy or spes successionis which could not be dealt with by them, and that the actual reversioners on the death of the widow Amola Kuar could not be bound by the agreement. This contention of the plaintiffs is no doubt correct and is supported by ample authority and the statute law in India. Section 6, T.P. Act, prohibits the transfer of the chance of an heir-apparent succeeding to an estate, the chance of relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature.

35. In *Amrit Narain Singh v. Gaya Singh* AIR 1917 PC 95, Mr. Ameer Ali in delivering the judgment of the Privy Council observed as follows:

A Hindu reversioner has no right or interest in praesenti in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign, or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere spes successionis. His guardian, if he happens to be a minor, cannot bargain with it on his behalf, or bind him by any contractual engagement in respect thereto.

36. The action of the guardian referring to arbitration certain matters connected with his sons' reversionary interest was declared to be null and void. The same view was expressed by the Privy Council in *Annada Mohan Roy v. Gour Mohan Mullick* AIR 1923 PC 189. It is not necessary to multiply authorities, and indeed Mr. P.R. Das, on behalf of some of the defendants-appellants, conceded that the agreement between Ganesh Dutt and Naurangi Lal was void and could not be availed of by the defendants. Reference was made to the actings of the parties in relation to the estate of Bigu Lal on the death of Mt. Anandi Kuar, in order to show that the parties were bound by the agreement evidenced by Ex. B, on the doctrine of part performance. It is unnecessary to refer to the documents and evidence in this respect, because the agreement being void the doctrine of part performance cannot apply to it, as no amount of acting can validate a void agreement. Mr. Das accepts this contention.

37. It is however contended by Mr. Das that, although the transaction of 1868, treated as a conveyance, was bad, yet as a contract it was a good contract; that such a contract was not prohibited before the enactment of the Transfer of Property Act; and, that, although Section 23, Contract Act, read with Section 6, T.P. Act, renders such contracts illegal, they were not illegal before the enactment of the Transfer of Property Act, and the agreement of 1868 is not affected by the subsequent legislation. He contends that the agreement evidenced by Ex. B, constitutes not a conveyance of any reversionary interest, but only operates as a disclaimer for consideration and is a family arrangement binding on the parties, prior to the enactment of the Transfer of Property Act. He argues that the cases cited on behalf of the plaintiffs are cases of actual transfers, whilst in the present case Ganesh Dutta does not effect an actual transfer in so far as the share of Bajrangi Lal was concerned but he merely makes an admission that so far as the estate of Bajrangi Lal was concerned he could have no concern with it, as Bajrangi Lal was the Kritima son of Hanuman Dutt; and that it was a family settlement based on disclaimer and for consideration.

38. He relies on the decision in *Ram Nirunjun Singh v. Prayag Singh* (1881) 8 Cal 138 where it was held that there was nothing in Hindu law which makes illegal an agreement, entered into by expectants, to divide a particular property in a certain way, on the happening of a particular contingency, nor was such an agreement contrary to public policy. In that case one Thakur Singh died in the year 1859, leaving one son Prayag Singh by his first wife who had predeceased him, and three sons Ram Nirunjun Singh, Jang Bahadur Singh and Dund Singh, by his second wife who survived him. Prayag Singh claimed an 3 annas share of the estate, whilst Ram Nirunjun, for himself and his minor younger brothers Jang Bahadur and Dund Singh, asserted that the share of each brother was 4 annas. An agreement was entered into between the parties to the effect that Thakur Singh's estate should be divided equally between the four brothers and, that, if any of the brother should die without issue, then the surviving brother should succeed to his heritage in equal shares, none of them having any claim or contention against the other on the score of commensality and joint tenancy.

Jang Bahadur and Dund Singh died without issue and then a dispute arose between Prayag Singh and Ram Nirunjun Singh, each of them claiming shares of Jang Bahadur and Dund Singh, Prayag Singh basing his claim on the agreement. One of the questions raised was, whether the agreement was enforceable in law, because it was an agreement to convey an expectancy which the law did not permit. It was held that such an agreement was not illegal. The learned Judges treated the agreement not as a conveyance of an expectant right but as an agreement between expectants to divide a particular property in a certain way on the happening of a particular contingency, and they observed that there was nothing in the Hindu law which makes such an agreement void.

39. In *Nasirul Haq v. Fyazul Rahman* (1911) 33 All 457 it was held that Section 6(a), T.P. Act, merely provides that:

the chance of an heir-apparent succeeding to an estate ...or any other mere possibility of a like nature cannot be transferred.

This clause seems to strike at transfers of a mere possibility or expectancy not coupled with any interest or growing out of any existing property. It does not, for example, strike at agreements by expectant heirs, such as an agreement to divide a particular property in a certain, way on the happening of a particular contingency.

40. In that case, their Lordships referred to the decision in *Ram Nirunjun Singh v. Prayag Singh* (1881) 8 Cal 138. The decision goes further than the argument of Mr. Das, and holds that even under the Transfer of Property Act, agreement by expectant heirs to divide a particular property in a certain way on the happening of a particular contingency was not bad.

41. In *Sri K.L. Jagannada Raju Garu v. Sri Raja Prasad Rao Garu* (1915) 39 Mad 554, it was observed that, although in India, as in England, a mere chance of succeeding to an estate was a mere possibility incapable of assignment, in England it is settled law that in the case of such expectancies equity will enforce a contract to convey the estate when it fell in, and a similar rule has been applied in India in cases which were not governed by the Transfer of Property Act.

42. In *Annada Mohan Roy Vs. Gour Mohan Mallik, Mookerjee, Ag. C.J.*, held that so long as an estate is vested in a female heiress, the interest of the reversioner is a mere chance of succession and cannot form the subject of any contract, surrender or disposal.

43. At p. 550 of the Report however the learned Judge distinguished the decision in *Ram Nirunjun Singh v. Prayag Singh* (1881) 8 Cal 138 on the ground that it was decided before the Transfer of Property Act. These cases therefore support the contention of Mr. Das that although the compromise of 1868 cannot be treated as a conveyance it is binding on the parties as a valid agreement.

44. Mr. Parmeshwar Dayal, on behalf of the respondents, refers to the decision of the Privy Council in *Bahadur Singh v. Mohar Singh* (1901) 24 All 94. That was a

case in which the plaintiffs claimed certain estate on the death of a Hindu widow as the reversionary heirs of the last male-holder. Their title was disputed on the ground that they had failed to prove their relationship to the last male-owner. It was held by the Privy Council that the relationship had been established. The appeal was originally heard by the Privy Council *ex parte*, and the only question on which their Lordships were called upon to pronounce an opinion was whether the appellants had sufficiently proved their kinship. It appears that subsequently the respondents obtained leave to appear and put in a case. Their Lordships heard the respondents and proceeded to dispose of the whole case. It was found that there were certain settlement proceedings in the years 1847 and 1866 between the widow Pritu and the ancestors of the plaintiffs, and in the course of these proceedings the widow was asked by the Superintendent of the Settlement: Department to state who would be the owner of the estate after her death, and she replied:

If Zorabar, Bishen and Sandal, the claimants, undertake to pay the debt which is due by me on account of revenue, or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be owners of my estate after my death; but so long as I am alive I have every sort of power in respect of my estate.

45. The plaintiffs appeared to be the descendants of the three persons named as claimants in the proceeding. At the second hearing before their Lordships, it was contended on the respondents' behalf that the plaintiffs were estopped by what took place in 1847-48 from disputing Pritu's right to alienate the property; and their Lordships observed that:

this argument fails both in fact and in law that there was no evidence of any representation on which to found an estoppel, and even, assuming that the argument made by Mr. Ross, the Superintendent of the Settlement Department, amounted to a contract between the then claimants and Pritu, such a contract was not binding on the plaintiffs-appellants. According to Indian law the claimants of 1847 were but expectant heirs with a *spes successionis*. The appellants claim in their own right as heirs of Mohar when the succession opened, and it would be a novel proposition to hold that a person so-claiming is bound by a contract made by every person through whom he traces his descent.

46. It is contended by Mr. Parmeshwar Dayal that the contract in this case was before the Transfer of Property Act and it was held that this contract was not binding on the parties. The point to be noticed however is that the contract relied upon was an immediate disposition of property giving an estate to the widow with right of alienation and not a contract to come in force after succession opened. In this view of the case, this decision does not help the plaintiffs of the present case.

47. For the reasons given above I am inclined to hold that the compromise of 1868 and the agreement evidenced by it, between Ganesh Dutt and Naurangi

Lal, can be treated as an agreement which is binding upon the actual reversioners who are parties to the present suit. Section 6, T.P. Act, and Section 23, Contract Act, have no application to it, and although such an agreement, after the enactment of the Transfer of Property Act, is bad in law, the agreement made before that enactment must be upheld. (After considering certain matter not material to this report the judgment proceeded). One of the villages in dispute is Chitarpati which is claimed by the plaintiffs against defendants 14 to 15c. It appears from the statement contained in para. 18 of the plaint that this village was sold for arrears of Government Revenue in the lifetime of Amola Kuar and was purchased by the Kanti Concern in the district of Muzaffarpur, which obtained sale certificate. Before the revenue sale the property had been given in mortgage by Amola Kuar to one Kurkut Singh, the mortgage being in respect of 3 annas share. Another mortgage of the remaining 4 gandas share was executed in favour of one Sheogulam Lal.

48. After the revenue sale the heirs of the mortgagee Kurkut Singh instituted a suit on the basis of their mortgage. A mortgage decree was passed and in execution of the mortgage decree the decree-holders themselves purchased at an auction sale the property, viz., the 3 annas share, under a sale certificate, dated 18th July 1911. Thereafter the heirs of the said purchasers sold the share to Sheodhari Singh, defendant 14. It is unnecessary to consider whether the mortgage by Amola Kuar to Kurkut Singh was a valid mortgage. The property had been lost to the estate by reason of the revenue sale, and the plaintiffs had no title left to claim the property.

49. What passed by the revenue sale was not the life estate of Amola Kuar but the property itself: see *Banalata Dasi v. Monmotha Nath Goswami* 11 CWN 821 and *Khemesh Chandra v. Abdul Hamid* (1916) 48 Cal 46. The plaintiffs' suit in respect of this property must be dismissed irrespective of any other consideration. There is no evidence of legal necessity for the transfers to the transferee defendants and the transfers cannot be upheld on this ground. The result is that, even assuming that the adoption was in the Dattaka form, the plaintiffs cannot succeed in the present action.

50. The suit must therefore be dismissed and both the appeals allowed with costs in this Court as well as in the Court below.

Macpherson, J.

51. I entirely agree. I would only add that the evidence on record, with its indications great and small, both by itself and also when read in the light of my knowledge of such matters in all the Mithila Districts in the earlier and most impressionable years of a long service would lead me to go so far as to hold not only that the plaintiffs have failed to prove a Dattaka adoption but that the adoption of Bajrangi was certainly in the Karta (which malgre G.C. Shastri means there simply the Kritrima) form, which is overwhelmingly the usual form in Mithila, including east Champaran and Muzaffarpur, and in which his only brother

Naurangi was admittedly adopted (also by a sonless uncle, that being practically the invariable form in the case of uncle and nephew of any age). See also the reference in Ex. B of 1868 to the Karta-putra deed. I am certain that no reliance whatsoever can safely be placed upon the testimony of Kapileswar Ojha, who is just as much a put up witness as his brother Tribhunath who was engaged as the corresponding "expert" on behalf of the defence. As to the family being Asthana Kayasths from the west, which sub-caste of Kayasths or for the matter of that, which caste or sub-caste with any pretension at all to a "respectable" position, does not say that it came from the west? In any event, the sub-caste and practically every Hindu in the Maithil country (at least of Hindustani origin) follows the Maithil law, as indeed is evidenced in the case of this Kayasth family by the form in which Naurangi Lal was adopted.