

*Privy Council Appeal No. 104 of 1915.*

*Allahabad Appeal No. 20 of 1913.*

**Moti Lal and Others** - - - - - *Appellants,*

*v.*

**Kundan Lal and Another** - - - - - *Respondents,*

FROM

**THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN  
PROVINCES, ALLAHABAD.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 23RD JANUARY, 1917.

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*Present at the Hearing:*

LORD PARKER OF WADDINGTON.

LORD SUMNER.

SIR LAWRENCE JENKINS.

[*Delivered by* LORD SUMNER.]

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In this case the plaintiffs sued to recover proprietary possession with mesne profits of a 12-anna share in Mouza Hansi Mau, in the district of Cawnpore. They are members of a joint Hindoo family, the Tewaris, governed by Mitakshara law, and claim this mouza as part of their undivided property. The circumstances are such that the plaintiffs' right, if any, has not been barred by adverse possession and lapse of time. It is convenient to speak of one defendant, Suraj Kunwar, though there are others, his vendees. The property is small; it seems to yield 500 rupees per annum, but it has been fought for at prodigious length and cost.

In the first instance the burden of proof was on the plaintiffs, but they produced a conveyance, dated the 3rd August, 1863, under which the property in question was conveyed on sale to Musammat Babbo Kunwar, guardian of her son Suraj Parshad, then a minor, both being members of the Tewari family. There was also evidence that the purchase consideration was provided out of joint funds. The rights of Suraj Parshad have now descended to the plaintiffs, and it is not contended that Musammat Babbo Kunwar took any interest for herself. The

defendant produced no conveyance in his own favour, but claimed that the purchase of 1863 was in truth a *benami* transaction for the separate benefit of his wife, to whose rights he succeeded when she died in 1871. Thus the burden of proof passed to the defendant very early in the case.

His story was this. At the age of 8 or 9 years he was married to his wife, Musammat Sheorani Kunwar, who was about 3 years older. His "elders consented to this marriage from avaricious motives," and so he went to live thenceforward in his wife's father's house. Basti Ram, his father-in-law, died in 1860. In his later years he had lived a disreputable and extravagant life, and, as he neared his end, he was minded and entitled to make reasonable provision for his daughter out of family funds. The family wealth would pass to her brother, Suraj Parshad, and the family into which she had married, though "Kanaujia Brahmans of a superior grade," were poor. Suraj Kunwar testified that he recollected how Basti Ram, less than three months before he died, on the same day that he performed "gausat-dan" gave to Musammat Sheorani in his presence gold mohurs to the value of 10,000 rupees, saying to his wife, Musammat Babbo Kunwar, "You can purchase some village worth 10,000 rupees for our daughter." Suraj Kunwar was then a little over 13. He also called as a witness a friend, who, as a boy of 10, and an inmate of the household, remembered, or said that he remembered, this scene. What might well impress the husband of 13 was a more dubious matter in the recollection of his friend of 10.

Mouza Hansi Mau then belonged to one Ghasi Ram as his zamindari property. It was already in mortgage to Musammat Babbo Kunwar and two other ladies of the Tewari family, and 6,000 rupees out of the 10,000 rupees were invested upon a mortgage of it, partly by discharging the amount due on the old mortgage, partly by fresh advances. The new mortgages were dated in 1861 and 1862 and were in the names of Musammat Babbo Kunwar and her minor son, Suraj Parshad. The disappearance of the names of the other two ladies is used as an argument for saying that the transaction in question was not a joint family transaction. On the other hand, the fact that Musammat Babbo Kunwar was a party to these instruments as guardian of Suraj Parshad certainly points strongly the other way. Finally, on the 3rd August, 1863, the property was purchased, also in her name, for 7,660 rupees, the consideration being satisfied by discharging the principal and interest due on the prior mortgages. Musammat Babbo Kunwar's name, according to Suraj Kunwar, was inserted instead of her own at Musammat Sheorani's request. It was a *benami* transaction. Admittedly, until Musammat Babbo Kunwar died in 1890, ten years after her son, Suraj Parshad, the property was registered for Revenue purposes in her name, and only then was mutation into his own name applied for and obtained by Suraj Kunwar. He said that his

wife, Musammat Sheorani, regularly received the income till she died, and that he continued to receive it from her death onwards.

If this story was accepted, the defendant had discharged the burden of proof, and had established that the transactions of 1860 to 1863 were *benami* transactions, to the benefit of which he was entitled. The answer to it was a point-blank denial. He was examined and cross-examined day after day at great length, and the Trial Judge unhesitatingly believed him. On appeal his story was rejected as unworthy of belief, and judgment was entered for the plaintiffs. Hence the present appeal. The learned Judges of the High Court proceeded on the ground that the story was absurd, and that although, in spite of its inherent improbability, the Trial Judge accepted it, this was only because he threw on the plaintiffs the burden of showing that Mouza Hansi Mau was not acquired *benami* for Musammat Sheorani. They held that such documentary corroboration as was produced was either unsatisfactory or corroborated the opposite case, and that the conduct and, apparently, the character of Suraj Kunwar were both suspicious and open to censure.

It is true that the learned Trial Judge did say that the story was absurd, but the very sentence quoted by the Judges of the High Court shows his meaning, viz., "this story, with its bare nakedness and without any external support, seems improbable and absurd." It certainly was a story, which in itself alleged and involved the existence of corroborative material, and if that was not forthcoming, in so far as Suraj Kunwar could produce it, the story might well seem to be a hardy and palpable fabrication. Intrinsically, however, it was not inconsistent with human nature or the practice and sentiment of Hindoo families. It has commended itself, as such, to other Judges beside the learned Judge who tried the case. About 1900 those then acting in the present plaintiffs' interest quarrelled with Suraj Kunwar, and turned him bodily out of the family house, where he had lived, man and boy, for nearly fifty years. They then went to law with him. They sued him for possession of three mouzas, variously called Katharwa, Chhounki, and Kuibouli, and Kherwa, Jhunki, and Khijauli, which they alleged were the property of the Tewari family, and which he said were his own. In that suit he told the same story, and, although they then laid no claim to Mouza Hansi Mau, he made it an integral part of his case. On that occasion also the Trial Judge believed him, and his judgment was affirmed on appeal. It was only after this failure that the plaintiffs brought the present suit for Hansi Mau.

As has been said, the Tewari family was rich. It owned a large zemindari ilaka. There was an old-established money-lending business. There were dealings in grain and in precious metals. The various transactions were recorded in

minute detail in books of account as voluminous and complicated as the transactions themselves. Therein were to be found the various rents collected from ryots and the profits drawn from "sir" lands. Sums were entered ranging from hundreds of rupees to trivial amounts; there were entries of purchases of gold mohurs coined by many dynasties and of the expenditure of a few pence for sugar candy and a few pice for salt. The family had at least three shops, one at Pukhrayan and two in Cawnpore, the deorhi shop and the chouk shop. At Pukhrayan rents were collected, among others the rent of Hansi Mau. It was a subordinate establishment, and after deduction of its expenditure its takings were sent to one or other of the Cawnpore shops. With these books and these dealings the defendant was familiar. After Suraj Parshad came of age he employed Suraj Kunwar for some years as a karinda at Pukhrayan. When he died the family affairs passed into the hands of three purdahnashin ladies, Musammat Baboo Kunwar, his mother; Musammat Mithan Kunwar, his widow, who lived till 1898; and Musammat Dilaso Bibi, wife of his son Sitla Parshad, who died a minor in 1887. With these ladies Suraj Kunwar, long regarded as one of the family, stood in high favour. He became their sarbarakhar, held their power of attorney, and no doubt had much influence with them and in the management of all the family affairs.

Insignificant though the income of Hansa Mau was as compared with the whole Tewari income, it is impossible that it should have found no place in the family books of account. It was collected by the Tewari karindas at Pukhrayan and entered in the books there under the name of the mouza. It was then remitted to Cawnpore. Somehow or other the Cawnpore books must have dealt with it also. If it belonged to the joint family it stood as a receipt in the Pukhrayan books, and the Pukhrayan shop had to discharge itself. In the Pukhrayan books, accordingly, there were entries showing the remittances sent to Cawnpore, either separately or aggregated with other cash. The Cawnpore books in turn must have shown whether it was separately paid away for or to the use of individuals, or was treated as an item in the general family cash and included in its totals. Somehow this income, like other remittances, had to be accounted for. It is true that the business seems to have been carried on unmethodically, and the books were neither regularly kept nor regularly balanced, but they served their turn, and must have been capable of throwing much contemporary light, one way or the other, on the truth of Suraj Kunwar's story about Hansa Mau.

For a long and important period the books were forthcoming. They were examined before the trial by a commissioner, who, it is to be hoped, understood his report better than anyone else has been able to do. Many bullock-loads of account books were in the Court compound at the trial, and at

any rate a sufficiency of them were made available on the appeal. Selected entries were examined and explained in the evidence. Many, though not all, of them have been printed in the record. Some are clear and some are not. Assisted by copious and careful argument by counsel on both sides, their Lordships have done their best with them.

Unfortunately these books only begin about 1872. For the previous nine years they are not produced, and it was the plaintiffs' business to produce or account for them. When Suraj Kunwar ceased to be sarbarakhar and was turned out of the house, he left the family archives behind him. He says, though probably he exaggerates, that he was then too ill to walk unaided, and was not even allowed to take away his own papers. At any rate, at that time the plaintiffs, or those acting in their interest, must have come into possession of the business books of the Tewaris, whatever they were. An order for discovery was made upon the plaintiffs in this suit, but they produced none older than 1872. It may well be that the earlier books have been destroyed or have perished, but it was incumbent on the plaintiffs, and it would have been easy, to have given evidence of diligent search and of failure to find them, even if the fact and date of their destruction could not be proved. Such books must have existed, and must have been long preserved for business purposes. Nor is this matter one of mere mistake or oversight. In the earlier suit for possession of the three mouzas, the same course was taken by the plaintiffs, and the comments made on it by the Court were severe. On the repetition of it in the present suit, two consequences followed. Secondary evidence of their contents was let in, and such evidence Suraj Kunwar gave. He said that his wife, Musammat Sheorani, always had the Hansi Mau profits paid to her or paid away by her direction, and that she had an account which was kept in the books of the chook shop at Cawnpore. Next the presumption arises that the contents of the Tewari family books, which were not accounted for, were, as regards the issues in dispute, unfavourable to the plaintiffs. That could only be because they favoured Suraj Kunwar and supported his story. So far there is ground for saying that the learned Trial Judge was warranted in accepting his evidence. The High Court hardly seems to have appreciated this view of the matter.

The learned Judges seem to have thought that the question was, "Who made away with these books?" and that it was disposed of by acquitting the plaintiffs. To be sure, they say that they do not find Suraj Kunwar guilty, but as they add that he had the opportunity of getting rid of them if he chose to do so, they leave him under suspicion of misconduct entirely without evidence. Indeed, if Suraj Kunwar wished to suppress the facts and prepare the ground for an audacious fiction, he would not have spirited away the whole of the books before 1872 and spared all those of later date. He would have

confined his attention to eliminating or improving the relatively scanty entries relating to Hansa Mau.

Their Lordships have carefully considered the portions of the books produced, to which their attention was directed, and they are of opinion that, so far as they go, they tend to support Suraj Kunwar's story. It would be an unprofitable task, as it certainly would be a tedious one, to set out the details of these accounts at length. There are a few entries in the books of the Pukhrayan shop showing that the net proceeds of the Hansa Mau rents were taken to Cawnpore by Suraj Kunwar in the lifetime of Suraj Parshad. Suraj Kunwar said that they were his own moneys and were so treated by him, nor is there any entry produced from the Cawnpore books to show that on the contrary they were treated as part of the family funds. It is true that these entries by no means occur in every year, and that in the years in which they do not appear there is not, as might have been expected, credit of such sums to the personal account of Suraj Kunwar kept in the books of the Pukhrayan shop. It is noticeable also, and is unexplained, that in, at any rate, one instance a similar entry appears in connection with another mouza, mouza Umran, with which the defendant does not claim to have had anything to do. Still, unless Suraj Kunwar was merely the carrier of these moneys to Cawnpore, in which case the Cawnpore books must have credited them to Pukhrayan as remittances on the family account, these entries, such as they are, were an open assertion of right by Suraj Kunwar, which might naturally have been expected to have challenged enquiry and even litigation by Suraj Parshad. In the absence of any evidence of such challenge, these entries again tend to corroborate the defendant's story and are inconsistent with the plaintiffs' right.

Suraj Kunwar further produced, in support of his case, two sarkhats, one stating an account from 1864 to 1869, when Musammatt Sheorani died, and the other, in continuation of it, running from 1869 to 1871. They purported to relate to the income of Hansi Mau on the credit side, and showed entries on the debit side of sums "sent to Katharwa," the village where the family of Suraj Kunwar lived; some purchases of jewellery, some losses in grain and cotton businesses, outlays for Musammatt Sheorani's "dashah" ceremony, outlays on the occasion of her "barisi," and other sums. The judgment of the High Court disposes of these sarkhats as "most suspicious," apparently because they are not entries in a book but are written on separate sheets of paper, and says that they could easily have been fabricated. This may be so, but the uncontradicted evidence is that the first is wholly and the second partly in the handwriting of a man, who died in 1874, and, if he fabricated them with a view to their employment at a trial in 1909, Suraj Kunwar's case displays a foresight and care in its preparation which is remarkable even in Indian litigation. Again, the defendant explained these entries of moneys "sent to Katharwa" by saying that his

wife settled 5 bighas in Hansi Mau upon his family, which is not borne out by any document and is inconsistent with his having sold to his co-defendants the entire 12-annas share without reservation. Still their Lordships are not satisfied that these sarkhats, though they may deserve to be regarded with suspicion, ought to be disregarded altogether. So far as they go, though they are not very clear, they support the case of Suraj Kunwar, and are certainly inconsistent with that of the plaintiffs.

There were three occasions on which the conduct of those then entitled to the family property or employed in the family interest, was inconsistent with any knowledge or belief on their part that Hansi Mau could be claimed as family property, though, if it had been so treated since its acquisition, these persons could hardly have been ignorant of the fact.

When Suraj Parshad came of age he found that the mouzas belonging to the family stood in the names of his mother, Musammat Babbo Kunwar, and of two other ladies of the family. He claimed that he was entitled to mutation, sued to establish his right of succession and ownership under Hindoo law and succeeded. Though keenly alive to his rights he made no claim to Hansi Mau. His mother's name stood on the khewat of Hansi Mau as pattidar and lumbardar as long as he lived to the knowledge, at any rate, of his attorney, and so remained till she died long after him. Again, after those who represent the present plaintiffs had put the defendant out of the house, and certainly must have been minded to oust him from all property to which they conceived the family to be entitled, they brought the prior suit, already mentioned, to recover possession of three other mouzas, but made no claim to Hansi Mau, presumably because they then believed that they had no claim. Lastly, when Musammat Babbo Kunwar died, Suraj Kunwar claimed mutation of Mouza Hansi Mau into his own name. He supported this claim by producing a taliknama, executed by Musammat Mithan Kunwar and Musammat Dilaso Bibi, in which they set out in detail the story which he told at the trial of the present case, and on the strength of this obtained the desired mutation. This document was put in before the Trial Judge. Their Lordships agree with the High Court in thinking that it was of little, if any, value; but one circumstance connected with it is somewhat significant. It was prepared with the knowledge of a certain Adhari Lal, a collateral member of the Tewari family, who in certain events would become personally interested in the family property, and had for some time been in the family employment as a karinda, and held, jointly with the defendant, the ladies' power of attorney. He took no exception either to the statements in or to the use of the taliknama.

Their Lordships are fully alive to the fact that there was much to be said against the case which Suraj Kunwar made, and that persons in his position, who make such claims as he

made, must expect their stories to be narrowly, and even sceptically, scrutinised; but the question is not whether their Lordships would have believed his story, had they tried the case, but whether there is sufficient in the evidence to show that the High Court was right in holding that the Trial Judge had misdirected himself as to the onus of proof, or had misjudged the weight of the evidence, or wrongly accredited certain of the witnesses called before him.

In the result their Lordships answer this question in the negative, and will, therefore, humbly advise His Majesty that the appeal should be allowed, with costs, and that the judgment appealed from should be set aside, with costs, and the decree of the Trial Judge should be restored.

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In the Privy Council.

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MOTI LAL AND OTHERS

*v.*

KUNDAN LAL AND ANOTHER.

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DELIVERED BY LORD SUMNER.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

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1917.