Privy Council Appeal No. 84 *of* 1925.

Oudh Appeal No. 10 *of* 1924.

Lala Indar Prasad and another - - - - *Appellants*

v.

Lala Jagmohan Das and another - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MAY, 1927.

Present at the Hearing:

LORD PHILLIMORE.
LORD SINHA.
LORD BLANESBURGH.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

This appeal arises out of a partition suit which has been pending in the Court of the Subordinate Judge of Lucknow for a period of nearly 12 years. The plaintiffs and defendants are, in each case, father and son, all members of a Hindu family governed by the Mitakshara School of Hindu law and at one time joint. The first plaintiff is the elder brother of the first defendant. The sons, being both of them infants during the greater part of the critical period, do not, except for one incident concerning the second plaintiff, enter into the story. It will be convenient, therefore, frequently throughout this judgment to refer to the respective fathers as if they represented the entire interest on either side. When their Lordships refer to them as plaintiff or defendant they will do so in this sense.

The family owned property, both moveable and immoveable, of considerable extent and value, including a banking and pawn-broking business. Some time in 1914 the first plaintiff left the

family house, not, as has been found, on account of any differences with the first defendant, but because of illness. Subsequently, however, differences arose between the brothers, so acute that the resumption of joint residence was apparently regarded by both as impracticable. It was in these circumstances that this suit for the partition of the entire family property, including that relating to the business, was commenced on the 23rd September, 1915. It has been proceeding ever since.

To the plaint are attached lists, particularizing the properties to be partitioned. These included the immoveable properties, the debts due, and the gold and silver ornaments pledged to the firm, together with brass and silver articles and other moveables in possession of the parties.

In the plaint it is also alleged that in kothris, in the family dwelling-house, there had been locked up by the first defendant joint property in the shape of jewellery and cash, and also ornaments pledged to the firm. These articles the plaintiff could not completely specify, but he claimed that with any other joint property later discovered they should be included in the suit. The existence or non-existence of this property so referred to is the dispute which has mainly led to the altogether inordinate prolongation of the proceedings.

At first it seemed that there would be no serious difference on any question. On the 31st January, 1916, there were filed in Court two petitions for compromise, intimating the intention of the brothers to partition the immoveable property amicably out of Court, and praying that a commissioner of partition should be appointed to divide the moveables. On that day a preliminary decree of partition was made. Peace was in the air, and so far as the immoveable properties were concerned it has not been broken. These were shortly afterwards duly partitioned by mutual agreement, and no further question arises with reference to them.

But with regard to the moveable property disputes were resumed and became highly embittered. The first defendant denied possession of any such further property as had been referred to in the plaint, and contested many payments alleged by the plaintiff to have been made on the joint account. The proceedings before the Commissioner were interrupted by proceedings in Court; there were several interlocutory orders; some of these were carried to appeal. The first plaintiff was examined and cross-examined in Court for nine days; the first defendant, called by the plaintiff, for 33 days. On the 6th May, 1921, the learned Subordinate Judge delivered a judgment in which, in a sense very unfavourable to the first defendant, he reviewed the history of the protracted litigation up to that date. The first defendant, he found, was in possession of and had not discovered moveable properties of very considerable value, and he made an order in the following terms:—

> "I therefore order that the Commissioners will find out from the statements of [the first plaintiff] and his wife the special items of properties

and their value. Any property on which the Commissioners can identically lay their hands will be taken in possession by them. The value of such property will be determined from the evidence of the first plaintiff and his wife already on the record and by obtaining expert opinion if necessary. Such of the properties as are not forthcoming will be valued so far as possible from the evidence contained in the statements of [the first plaintiff and his wife]. The value of them to the extent of the plaintiffs' share shall be debited against the share of the defendants to be arrived at as a result of the partition of the entire property which is the subject of the suit."

This was, of course, an order which, in an evidentiary sense, if their Lordships may be permitted such an expression, was highly favourable to the plaintiff, and the defendant appealed against it to the Court of the Judicial Commissioner, but on the 29th August, 1921, his appeal was dismissed as incompetent at that stage. The proceedings accordingly continued on the basis of the order appealed from. Lists and counter-lists were exchanged between the parties; the first plaintiff was further cross-examined for four days between the 28th February, 1922, and the 4th March, 1922, and, as a result of it all, the first plaintiff and first defendant on the 16th March, 1922, appeared before the Subordinate Judge and made the following statements, which where duly recorded by the Judge. The defendant, Jagmohan Das, said :—

" Whatever lists Indar Prasad (plaintiff) gives written with his own hand of the village collections, house rents and other accounts, including Ugahi, I shall accept as true and correct. And I shall admit whatever moveables with their value he says upon his belief remained with me."

The plaintiff, Indar Prasad, said :—

" I shall give written with my own hand to Lala Jagmohan Das whatever the accounts are, including village collections, house rents, Ugahi account, etc., and I shall write with my own hand and verify upon my belief, a list of moveables with their value that remained with Lala Jagmohan Das."

In pursuance of that agreement the first plaintiff, on the 30th March, 1922, filed seven lists, of which six only remain material. These six were all in his handwriting. With the exception of the immoveable property, as to which the dispute was ended, they covered the whole range of the suit. If they were conclusive, as by the agreement of the defendant they were to be, they would have secured for the plaintiff a decree for practically the whole of his claim and there would have been due to him from the defendant a sum exceeding two lakhs of rupees.

But, then, a strange thing happened. For some reason unknown—the Subordinate Judge describes it as " a fit of responsive generosity " on the part of the first plaintiff, he on the 30th March, 1922, when filing his lists, made in Court, in the presence of the first defendant, the offer on which everything now turns. It is thus recorded by the Subordinate Judge :—

" Lala Indar Prasad says he will give up out of his lists such items as Jagmohan Das denies before the Deity Lachmi Narsinghi. Jagmohan Das accepts this."

It would appear that, unexpected though the first plaintiff's offer must have been, the first defendant was not slow to see the advantage which this agreement gave him, and a few days later he took a further step to make it completely effective. The first plaintiff's son and co-plaintiff had recently attained majority, and on the 4th April, 1922, the first defendant applied that it should be placed on record whether he also relied or not on the special oath of the first defendant. On the 7th of April the young man appeared in Court. He had already intimated that he, too, rested the matter on the special oath of the first defendant as his father, the first plaintiff, had done, and he replied to the learned Judge, who explained the whole position to him, that he was willing it should be so, even if the first defendant struck out all the items claimed by the plaintiff. "Now," comments the Judge, "both the plaintiffs were within the eagle claws of the defendant No. 1."

On the 8th April, 1922, the Commissioner, appointed by the Judge in terms to be referred to later, went to the plaintiff's house, and in a kothri of the family deities and in the presence of the Dibba known as Lachmi Narsinghia Dibba he recorded the admissions and denials by the defendant Jagmohan Das of the items in the lists filed by the plaintiff.

On the 10th of April the Commissioner submitted to the Court his report of the proceedings, together with the first defendant's recorded statement. Plaintiff No. 2 had indeed been taken at his word. By admitting, as the Judicial Commissioners put it, practically all the items which involved any liability on the part of the first plaintiff, and denying practically all the items which involved any liability on his own, the first defendant had transformed lists which disclosed an indebtedness of over two lakhs from him to the plaintiff into a bill ultimately adjusted at Rs. 93,672 . 15 . 3 due by the plaintiff to himself and his son.

The plaintiff, now thoroughly alarmed, on the 11th April protested to the Subordinate Judge that the proceedings of the 30th March, 1922, and anything done thereunder, were not warranted by the Indian Oaths Act No. 10 of 1873 ; that the first plaintiff's offer of that day was vague and indefinite in its wording and did not contemplate a total denial of some of the lists as recorded by the Commissioner ; that the denial by the first defendant of the possession of any joint family property—this he had done—was opposed to the Court's finding in its judgment of the 6th May, 1921, and that the denials showed that the first defendant had taken undue advantage of the offer of the first plaintiff, and that the Court should not consider the result to be binding and conclusive on the plaintiff.

After a full hearing the learned Subordinate Judge, on the 22nd May, 1922, declared that the admissions and denials of the first defendant recorded in the presence of the deity Lachmi Narsinghi stood good, and he directed the Commissioner to make a report of the net result of all that had gone before. This report the Commissioner made on the 6th July, 1922, and thereon

a final decree was passed on the 25th July, 1922, awarding, as to the moveables to the defendant the above sum of Rs. 93,672 . 15 . 3 with future interest on that amount from decree until realization. The plaintiff appealed to the Court of the Judicial Commissioner, which by its judgment of the 10th March, 1924, upheld the decree of the Subordinate Judge. The plaintiff's present appeal is from that judgment.

Their Lordships have been at pains to set forth in some detail the facts which have led to the existing situation. They recognize that the appellants, by their own act, have completely thrown away the favourable position which in this litigation they had obtained for themselves by the order of the 6th May, 1921—a position which may well have induced the first respondent's concessions of the 16th March, 1922. Accordingly their Lordships have thought it right, before proceeding further with the consideration of this appeal, to assure themselves that the appellants had, to the full extent alleged, become bound by the agreement of the 30th March, 1922.

Their Lordships were, in the light of the earlier proceedings in the suit, particularly struck by one feature of that agreement as interpreted by the Courts in India. As so interpreted it binds the plaintiff by the special oath of the first defendant, not only to matters which were directly within the first defendant's own knowledge—for example, as to the jewellery, cash and ornaments retained by him—but even to matters immediately within the knowledge of the first plaintiff and testified to by himself, and only at second hand, if at all, within the knowledge of the first defendant. To their Lordships' minds this seems in the circumstances, a strange arrangement for the first plaintiff to have offered the first defendant, and they have scrutinized very narrowly the terms of the recorded agreement to see whether such is its effect, or whether it could not fairly be interpreted as directed, for example, to the plaintiff's list numbered 1, which comprised the property of the first-class, and as excluding, for example, list numbered 3, which recorded the first plaintiff's own transactions. But, on full consideration, their Lordships are, in this matter, constrained to adhere to the view of the agreement taken by the Courts below. It was common ground between the parties there that the recorded statements of the 16th March and the 30th March, 1922, were to be read together. So read these statements relate to all, and not to some only, of the plaintiff's final lists which as has been said covered the whole range of the suit. There is no room for any discrimination in either statement, each of which the Board must assume to be correctly recorded. Their Lordships accordingly must conclude that if the agreement of the 30th March, 1922, is effective for any purpose at all it is effective to the fullest extent of the six lists, so that the result in figures arrived at on that footing must inevitably follow.

But it is, however, contended by the appellants that, however the agreement be construed, they, for two separate and distinct reasons, are no longer bound by it. The first reason is that it has not been observed by the first defendant. The second is that the statements made by the first defendant and recorded as above set forth are not, as a result of defects in procedure, made binding upon the appellants by the Indian Oaths Act, 1873.

As to the first contention, it is said that in two respects the agreement was not observed by the first defendant in the proceedings before the Commissioner of partition. First of all, it is asserted, the Deity was not present on that occasion. His Dibba was in the kothri, but the Deity was not himself within it. To this assertion their Lordships can give no countenance. It was indeed only faintly made before them, although apparently strongly urged in the Court of the Judicial Commissioner. It cannot survive examination. The Deity in question was the family Deity of the plaintiff; the proceedings took place in the first plaintiff's presence in a kothra of the Deities in his house; the Dibba of the Deity was there by the first plaintiff's own direction; he knew exactly what the first defendant had to do, because he himself had dictated the procedure; he made no objection at the time to any irregularity or omission; he and the first defendant acted as if they both believed, as their Lordships cannot doubt they did, that the Deity was present in the Dibba. If, to the knowledge of the first plaintiff, the Deity was not so present, the whole proceeding was reduced to a farce, if not to something worse. There is, however, no affidavit or sworn statement by the first plaintiff or anyone else that the Diety was not actually present. The point was not, it seems, taken at all before the Subordinate Judge. It appears for the first time on the 3rd October, 1922, in the plaintiff's grounds of appeal to the Court of the Judicial Commissioner. Like that Court, their Lordships are unable to countenance the suggestion, which was, they think, to say the least of it, ill-advised on the part of the plaintiff.

But there is, it is alleged, another respect in which the agreement was not observed. It was thereby contemplated, so it is said, that the Deity would be actually invoked by the first defendant when he attended to make in the presence of the God his admissions and denials. And no such invocation was made. The agreement, therefore, say the appellants, has not been performed in an essential particular. Now it is the fact that on the occasion in question there was no invocation of the Deity. It is not, however, true to say that the agreement made between the parties called for any such invocation. Their Lordships feel no doubt that the actual proceedings before the Commissioner amounted to a literal compliance with the terms of that agreement. And a substantial compliance also. For their Lordships are of opinion that the learned Subordinate Judge

correctly interprets the views on this subject both of the plaintiff and defendant when he says that "the very presence—

> Of the god or idol on the spot when the statement was made, so to speak, within his sight and hearing was tantamount to his invocation by name in case of his absence. When the god or idol had been brought purposely on the scene to witness the statement of defendant 1, it was by no means necessary to call upon him to bear witness, for having been brought to the scene he could not be suspected to be inattentive or asleep."

The first objection therefore fails in both respects.

The second objection may be expanded thus: apart from such an invocation as has just been referred to and which was never made, and in the absence of anything done on the occasion that could properly be described as the administration to the first defendant of an oath or affirmation in the ordinary sense of these words, his admissions and denials are not, within the Indian Oaths Act, 1873, binding on the plaintiffs. As an aid to the consideration of this objection, which is much more formidable than any of the others, it will be convenient to set out, for facility of reference, the sections of the Indian Oaths Act, 1873, on which its determination must mainly turn.

The sections are the following:—

"5. Oaths or affirmations shall be made by the following persons:—

"(*a*) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or persons having by law or consent of parties authority to examine such persons or to receive evidence;

"(*b*) interpreters of questions put to, and evidence given by, witnesses, and

"(*c*) jurors.

"Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

"6. Where the witness, interpreter or juror is a Hindu or Muhammadan,

"or has an objection to making an oath,

"he shall, instead of making an oath, make an affirmation.

"In every other case the witness, interpreter or juror shall make an oath.

"IV. Forms of Oaths and Affirmations.

"7. All oaths and affirmations made under section five shall be administered according to such forms as the High Court may from time to time prescribe.

"And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use. . . . . .

"8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

"9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section eight, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or no the will make the oath or affirmation:

"Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

"10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a Commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

"11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."

The judgment of the learned Subordinate Judge makes a careful record of the Indian authorities on this subject. The result of them, their Lordships are inclined to think, is that the point now raised has not so far been the subject of express decision. Safe, however, it is to say, that in the decisions which have been brought to their Lordships' notice where a so called "special oath" has been upheld there is no clear indication one way or the other, whether the person who took that oath recited any formula by way of invocation, or did anything else which in the ordinary sense of the words amounted to the making of an oath or affirmation. The question, accordingly, now that it has been raised must be determined on principle, and to this task their Lordships' proceed.

It is not denied that the statements made by the first defendant here in the presence of the Deity were specially binding on his conscience by reason of the fact that they were so made. It is also recognized that the Subordinate Judge before he appointed a Commissioner was himself satisfied that the particular ritual to be followed fulfilled the conditions of Section 8 of the Act. Equally clear is it that the learned Judge intended to act in pursuance of Section 10, when on the 30th March, 1922, he made this order of appointment:—

"With the consent of parties I appoint Babu Mahesh Prasad pleader for going with the plaintiff's list before Lachmi Narsinghi in plaintiff's house and take defendant's admissions and denials of the list items before the deity."

The question, therefore, is whether the evidence of the first defendant, given in the presence of the Commissioner before the Deity, was, in these circumstances, evidence on oath or solemn affirmation administered by the Commissioner within the meaning of Sections 8, 9 and 10 of the Act, and their Lordships, in agreement both with the learned Subordinate Judge and the Judicial Commissioners, are of opinion that this question must be answered in the affirmative. In their judgment, upon a sound construction of the sections, neither an invocation nor an oath or affirmation in the technical sense of these words is in any way an essential part of the so-called oath or solemn affirmation referred to in Section 8 of the Act.

Their Lordships are led to this conclusion by reference to the sections alone. They are confirmed in it, however, by recalling the stage of development which the law of India had reached on the subject of oaths by the date when the Act came into force.

Upon the point of construction the cardinal consideration to note is that the "oath or solemn affirmation" referred to in Section 8 and following sections is something quite distinct from the oaths and affirmations referred to in Section 5. These are to be in such form as the High Court shall prescribe (Section 7). With regard to the oath or solemn affirmation referred to in Section 8, however, all that is said is that it may be "in any form common amongst or held binding by persons of the race or persuasion to which [the deponent] belongs and not repugnant to justice or decency." That is to say, it may be as infinite alike in form and content as racial custom or the dictates of any religious persuasion may, within the prescribed limits, sanction or require. But from its very nature and essence it can never be in any part of it dependent upon the direction or dictation of the High Court or of any other extra racial or secular administrative authority. It would or might at once lose its essential distinctive sanction if any such outside interference were permitted to have effect. And this brings their Lordships to the second matter which it is necessary to note in the construction of these sections. There is no suggestion either in Section 8, 9 or 10 that when the separate "oath or solemn affirmation" is permitted the ordinary oath or affirmation, as prescribed, or any part of it, is to be administered as well. The "oath or solemn affirmation" when permitted is a complete substitute for the other. There is in the sections no warrant for the suggestion that any part of a procedure which, be it remembered, is only appropriate where it is gone through before any evidence at all is given, and is designed to cover that evidence when given, is to be transferred to a taking of evidence which, as in the present case, is solemnized only by its being given, and while it is given in the actual presence and hearing of the Deity himself.

Indeed, this case shows that such a requirement, not, their Lordships think, made by the sections, would in many cases be entirely out of place. When, as here, the whole meaning of the procedure is that a statement made by a witness in the corporeal presence and hearing of his God will be true by reason of the fact that it is so made, introductory words of invocation, appropriate enough in other circumstances, become entirely unsuitable. For if the Deity be removed before the statement is made the words are nugatory; if the statement be made in his presence they are superfluous.

It is said further, however, that this construction of the sections attaches no adequate signification to the words "oath or solemn affirmation" in Section 8. Their Lordships, on consideration, do not agree. It appears to them that the use of the alternative expression "oath" and "*solemn* affirmation" as a description of the special ritual envisaged in Section 8, is intended to indicate

that the ritual is to be at least as solemn for the deponent and attended by the same consequences to him as is an ordinary oath or affirmation for and to an ordinary witness. The words, their Lordships opine, were selected primarily to put it beyond the possibility of doubt that the temporal consequences of corrupt falsehood would follow as inevitably for the one class of witness as for the other: they are descriptive of the nature and result of the ritual: they are in no way concerned with its form—a conclusion which is confirmed by the consideration that historically an affirmation, technically so-called, is merely a substitute for an oath: that the description includes both "oath" and "affirmation," although, except in the quality of solemnity these are quite distinct, the one from the other, and that its purpose is revealed by the addition to the word "affirmation" of the adjective "solemn," which is not in use in connection with affirmations in the technical sense of the word.

But, lastly, it is said that the "oath or solemn affirmation" must, as appears from Section 10, be something which either the Court or a Commissioner appointed by the Court can "administer" to the witness; it must, under Section 8, be something that can be "tendered" to him. Upon this it is to be remembered that "administer" is, in the law, a word of wide and not of restricted import. It would be for instance beyond question that an oath is "administered," not only where the English form is adopted, but where, in the presence of the Court, it is "taken" by the witness in the Scottish form. Their Lordships do not doubt that the terms of the section were here in this respect fully complied with when the admissions and denials of the first defendant were made, not only before the Deity, but in the presence of the Commissioner. The word "tendered," in Section 8, does not appear to their Lordships to create any difficulty.

On construction alone, therefore, their Lordships reach the same conclusion as the Courts below. That conclusion is, however, in their judgment, confirmed by a reference to the course of development of the Indian law on this subject. That law was derived from the English law, with some modifications suggested by Indian conditions. Just as in England, so also in India, it was at one time the rule that there could be no evidence without an oath in the strict sense of the word, and only gradually were exceptions grafted by statute upon that rule. Prior to 1840 the privilege of making an affirmation instead of taking an oath was enjoyed only by Quakers, Moravians and Separatists. By that time it had been found that the taking of an oath was highly objectionable to Hindus and Mahomedans, and Act V of 1840 was passed for the purpose of prohibiting the administration of oaths to persons belonging to those communities, a form of affirmation being substituted for an oath. With some extension in 1869 the law so remained until the Act VI of 1872 was passed. By that Act it was provided that every witness who objected to take an oath might instead make a simple affirmation, and in section 4 will be

found the statutory provision which, prior to 1873, enabled volunteers to make oaths in special cases. Sections 8 to 13 of the present Act of 1873 correspond to and have taken the place of that section, and their Lordships can have no doubt that long before that time the Indian view, embodied afresh in the Act, had come to be that which may, briefly, be taken from the words of the Lord Chancellor in *Omychund* v. *Barker*, 1 Atk. 22, and quoted by the Judicial Commissioners :—

> "The next thing is the form of the oath. It is laid down by all writers that the outward act is not essential to the oath. It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking."

For all these reasons their Lordships dealing on this branch of the Appeal with the one aspect of the matter brought before them by the appellant for consideration are constrained to agree with both Courts in India that the statements made by the first defendant in the presence of the family Deity and before the Commissioner were conclusive upon the plaintiff.

An objection was taken by the appellants to certain items in the accounts which their Lordships at the hearing intimated that they could not entertain for reasons which they then gave. They do not repeat these reasons. In their Lordships' judgment the order of the Judicial Commissioner objected to was in all respects right, and they think that this appeal should be dismissed with costs.

And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

LALA INDAR PRASAD AND ANOTHER

v.

LALA JAGMOHAN DAS AND ANOTHER.

DELIVERED BY LORD BLANESBURGH.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1927.