

Privy Council Appeal No. 78 of 1927.
Allahabad Appeal No. 9 of 1924.

Misir Bhairon Prasad - - - - - *Appellant*

v.

Musammat Gopi Kunwar and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1930.

Present at the Hearing :

LORD ATKIN.

SIR GEORGE LOWNDES.

SIR BINOD MITTER.

[*Delivered by* LORD ATKIN.]

This is an appeal from the High Court at Allahabad in a suit which had been commenced in the Court of the Subordinate Judge at Mainpurj. in which the plaintiff claimed that he and his brother Jwala Prasad were members of a joint Hindu family, and claimed possession of the property from the widow of Jwala Prasad. The widow alleged in the case that she had given birth to a posthumous son of Jwala Prasad, and also that before the death of her husband there had been a separation.

The substantial issue in the case as it eventually developed was the question whether or not the widow had, in fact, given birth to a son. The deceased man had died on the 26th October, 1918. The child was alleged to have been born on the 7th July, 1919, and it is sufficient to say that if in fact there was a child born of the body of the widow, Gopi Kunwar, then that child must be taken to be the son of Jwala Prasad. There is no suggestion to the contrary, and the ordinary presumption of paternity would apply, and the times are quite sufficient to allow of the husband being the father of the child.

The substantial issue was whether or not, on the 7th July, 1919, the widow did, in fact, give birth to a son. Upon that there was a good deal of evidence. There is no doubt that she had given notice to the plaintiff, who is the brother of her husband, after her husband's death that she was pregnant. Her case was that after her husband's death she had continued to live in the house at Etah, where they had lived together, but that as the time of her delivery approached, some time early in June or the end of May, she, having at that time become engaged in a dispute with the brother, which had taken the form of a question as to the mutation of the property, desired to have her child born at her father's house, and so she removed to her father's house at Kheri-Lakhimpur, where the child, according to her, was born. In support of the birth of the child, she called the lady doctor, a Miss Mitra, who gave evidence that she had been summoned from Lucknow, and had delivered the lady of a son; she called the midwife, she called her mother, she called her father, she called the nurse who had nursed the child, and there was evidence which, if believed, was conclusive that she had given birth to a child. All this evidence was attacked by the plaintiff. It was said that she had never been pregnant, that this was a supposititious child, that Miss Mitra had been suborned to give this false evidence, and so had the nurse, and that the father and mother were speaking to a concocted story.

The plaintiff put in evidence in the course of the trial certain letters to be referred to later on, which, he said, were in the handwriting of the lady, and which were written to a man who appears to have been a servant of the family, and which, it was said, proved that two of them, at any rate, were in concert together for the purpose of planting a supposititious child upon the family.

A great deal of criticism was addressed by the learned Subordinate Judge to the evidence on the part of the defendant. He disbelieved the story, he was obviously impressed by the letters, and he found that there was no son born of the body of Gopi Kunwar at all, but there is one bit of evidence called on behalf of the defendant, which, if accepted, appears to dispose of the case. It was so treated by counsel for the appellant, and their Lordships think perfectly properly so treated.

The case for the plaintiff was that the lady never had been pregnant at all, and that this story about the birth of a child involved the introduction of a supposititious heir, nine months after the death of the husband, to a woman who had never been pregnant by her husband or anybody else. For the defence there was called a lady, a Miss Woodard, who belonged at the material time to the Missions hospital at Fatehgarh, and who said that in March of 1919 she had examined the lady, and she had found her six months gone with child, and had given a certificate to that effect, and the certificate was produced. She said she had examined the lady at the request of a Mrs. McGaw, who was a

lay missionary attached to the same mission, a lady who was a friend of Gopi Kunwar, and who had attended Miss Woodard at the examination, had introduced her to the lady, and had interpreted the questions that Miss Woodard had to ask the patient.

That evidence was given, and if it is to be believed, it is conclusive that the defendant was, in fact, pregnant at the time.

There are only three ways, their Lordships think, of disposing of that evidence. One is to suggest that Miss Woodard had been suborned to give false evidence; that she never had examined the lady and never found her pregnant, and that her certificate was a forged document, forged in the sense that it was created being knowingly false. That suggestion was obviously not made at the trial. Their Lordships have had read to them the examination and cross-examination. They do not think it really was made here. They are quite satisfied in any case that there can be no possible foundation for making it: not a word can be said against the credit of this lady, who belonged to this mission, and who was a lady with a medical degree granted her in America, and who had been in the medical profession for some eighteen or twenty years. She is a lady of repute. More than that, the High Court took an opportunity of calling her before them themselves, for the purpose of testing part of her evidence, and it is plain that they were entirely satisfied with her demeanour as being a witness of truth. No possible reflection, therefore, can be made upon her honesty and truthfulness. There remain two suggestions. One is that, though the lady is telling the truth when she says she examined Gopi Kunwar in March, 1919, yet, in fact, she was mistaken when she thought she had discovered the signs of pregnancy. That appears to their Lordships to be a contention which must fail. She is a lady of great experience. She gives in great detail the symptoms that she observed, the appearance and manipulation, and the sound of heart-beats of the foetus. If, in fact, those symptoms were present as she spoke of them, and she is a truthful witness, it is quite impossible that she could have been mistaken as to the lady being pregnant. As to the actual degree to which the pregnancy had advanced, of course, opinions might conceivably differ, but on the fact of pregnancy there can be no doubt at all. Therefore, the only remaining way of disposing of the case is to suggest, as was suggested, that the doctor may have been deceived, and that she had examined in the house of Gopi Kunwar a woman who was pregnant, and that that woman was not Gopi Kunwar, and was somebody who it was pretended was Gopi Kunwar. That seems to their Lordships to be also plainly disposed of on the evidence. In the first place, the precaution was taken, when Miss Woodard wrote her certificate, of getting the person who was examined to sign her name and give her thumb impression on the certificate. As it turned out after, that was a very useful precaution to have taken.

Gopi Kunwar was present at the High Court, and when Miss Woodard was examined before the Judges of the High Court, really that they might be satisfied on this very question of identity, the learned Judges took the thumb print of Gopi Kunwar and compared it with the thumb print upon the certificate. They were satisfied themselves that the thumb prints were identical, but they were, of course, not prepared to act upon that alone, and they submitted the two thumb prints to the parties for the purpose of enabling them to be tested and evidence to be given about them if it were desired. No application was made to direct evidence to any divergence between the thumb prints, and the Court naturally, in those circumstances, were prepared to rely upon their own view. Their Lordships have not had the prints before them, but it appears to their Lordships that they should be satisfied with the statement made by the learned Judges of the High Court upon that matter. There is also the signature of the lady, as to which no evidence was addressed to the lower Court or to the higher Court to show that there was any difference between that signature and the real signature. In addition to that, Miss Woodard's evidence is that Mrs. McGaw, the friend of Gopi Kunwar, was actually present at the examination, and, indeed, assisted her by interpreting her questions, and in that way took an active part in the proceedings. Therefore, it is quite impossible that Mrs. McGaw could have made any mistake about identity. She is the person who really knew the lady, and on whose initiative Miss Woodard had been called in at all. Unless, therefore, Mrs. McGaw is made a party to this alleged conspiracy, it is obvious that there can have been no mistake. It is not suggested that Mrs. McGaw, who is herself a lay missionary, was a party to any conspiracy or any fraud of any kind. In those circumstances it appears to their Lordships that the identity of the woman who was examined by Miss Woodard is established.

Now, that disposes of the only possible attack that could be made upon the correctness of the evidence given by Miss Woodard, and inasmuch as the attacks upon the certificate and her evidence fail, it must be taken as established that the lady was in fact in March of 1919 six months pregnant, if in fact she was pregnant at all, so that she could give birth to a child on the 7th July, and the case for the appellant fails. The result is that the decision at which the High Court have arrived must stand.

In that view of the case, inasmuch as their Lordships have a particular item of proof which is conclusive, it is unnecessary to consider all the various criticisms which were addressed to the other evidence in the case. One would only say this. There were some letters produced to which their Lordships have referred which were discussed very freely before the learned Subordinate Judge and in the High Court. Their Lordships think it sufficient to say that they are satisfied with the view of those letters taken

by the High Court. Even if they had been authenticated, they were not conclusive, and they could not, as it appears to their Lordships, outweigh the outstanding fact of Miss Woodard's certificate, but the view taken by the High Court was that they were not satisfied that the letters were the letters of the defendant at all, and their Lordships see no reason for differing from that view.

In the result, therefore, the finding that the boy who has now been added as the second defendant was in fact the son of Jwala Prasad, born of the body of Gopi Kunwar, must be affirmed. The only other point that arose was on the claim for a declaration that the parties were joint, and that there had been no partition. On that their Lordships feel bound to rest upon the statement made in the judgment of the High Court that the parties then made it plain to the Court that if the issue as to the legitimacy of the second defendant was once established in favour of the defendants they would not desire any further order from the Court. The High Court have referred to that matter, and on that footing, having established that the second defendant was in truth the son of Jwala Prasad, have said the right order was that the appeal to them should be allowed and that the suit should be dismissed. Their Lordships see no reason, therefore, for differing from that view.

In the result, therefore, their Lordships come to the conclusion that this appeal must be dismissed and that the appellant must pay the costs, including those of the petition to admit further evidence, and they will humbly advise His Majesty accordingly.

In the Privy Council.

MISIR BHAIKON PRASAD

v.

MUSAMMAT GOPI KUNWAR AND ANOTHER.

DELIVERED BY LORD ATKIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1930.