Privy Council Appeal No. 88 *of* 1932.
Oudh Appeal No. 13 *of* 1930.

Bhagwan Bakhsh Singh and another - - - - - *Appellants*

v.

Mahesh Bakhsh Singh and others - - - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH OCTOBER, 1935.

Present at the Hearing:

LORD THANKERTON.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR JOHN WALLIS.]

In this case Bhagwan Baksh Singh, the first plaintiff, hereinafter referred to as the plaintiff, who gives his age as 21, instituted the present suit on the 7th March, 1929, to recover possession with mesne profits of the share of Chatarpal Singh, his mother's husband, in the suit properties belonging to the joint family of which Chatarpal was a member, impleading the first and second defendants, who are surviving members of the joint family, and the third and fourth defendants, who are widows of deceased members. To raise money for this litigation he has alienated a half share of the properties in the suit to Thakhur Mahadeo Singh, the second plaintiff.

It is not now in dispute that at the time of the plaintiff's birth, his mother, Musammat Dilwant Kuer, the daughter of Nakched Singh, was the lawfully married wife of Chatarpal Singh, but it is alleged by the defendants in the written statement that, before the *gauna* or consummation ceremony, it came to light that Chatarpal's wife was pregnant as the result of an illicit connection, that consequently she never came to Chatarpal's house, the *gauna* ceremony never took place, and Chatarpal and his wife never lived together as husband and wife. It is further alleged that in June, 1929, when the written statement was filed, the plaintiff was at least 24 years old, that

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is to say, he was born in 1905, and that, as Chatarpal would not then have been more than 32, if he had lived, he was 11 years old at the utmost when the plaintiff was born. If, however, Chatarpal would have been only 32 in 1929, he must have been born in 1897 and would have been only 8 years old in 1905, when according to the defendants the plaintiff was born. The written statement therefore raised the two-fold defence of non-access and of Chatarpal's physical incapacity to procreate at the time when the plaintiff was begotten. As the plaintiff was admittedly born after his mother's marriage to Chatarpal, the onus of establishing these defences lies heavily on the defendants under section 112 of the Indian Evidence Act which, so far as material, is in the following terms :—

> " The fact that any person was born during the continuance of a valid marriage between his mother and any man . . . shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

As regards the meaning of the word " access " in this section, the learned Judges of the Chief Court have held that access in this section means effective access, as is shown by the use of the words " when he could have been begotten," and the proposition that physical incapacity to procreate, if established, amounts to non-access within the meaning of the section has not been disputed in the argument before their Lordships.

The Subordinate Judge dismissed the suit on the ground that in the case of this marriage the *gauna* or consummation ceremony never took place, because Dilwant Kuer was found to be already pregnant, and that the husband in fact never had access to his wife, but refrained from recording a finding as to question of physical incapacity. The learned Judges of the Chief Court, whilst not dissenting from this finding, have found that Chatarpal must have been approximately 13 years of age when the plaintiff was begotten, and that at that time the husband was physically incapable of procreating issue. They accordingly affirmed the decree of the Subordinate Judge dismissing the suit. The Chief Court having refused to grant the necessary certificate, the plaintiff obtained special leave to appeal to His Majesty in Council. Unfortunately the defendants have not entered appearance and the appeal has been heard *ex parte*.

Their Lordships think it better at once to clear the ground by stating that in their opinion the defence based on the alleged physical incapacity of the husband is not made out. To brand a child born to a wife in lawful wedlock with illegitimacy on this ground, it would be necessary in the first place to prove the precise age of the husband at the date of conception, and in the second place to negative the

possibility of premature virility at that age owing to precocious development. In their Lordships' opinion it is impossible to arrive at a finding as to the precise age of the husband at the date of conception on the evidence in this case. As was perhaps only to be expected, there has been great exaggeration on both sides. The defence on this question is based entirely on oral evidence given at the trial, supplemented by the oral evidence in the inquiry by the Revenue Court in the mutation proceedings immediately after the husband's death, which it is now contended was inadmissible. They have been unable to produce any documentary evidence on the question of the husband's age in the shape of birth certificate, horoscope or otherwise. For the plaintiff an extract from a register of births maintained by a village chowkidari, who could neither read nor write, has been exhibited, giving the date of the plaintiff's birth as the 10th September, 1907, and also an extract from a school register for 1903 which gives the husband's age at the date of admission on the 10th July, 1903, as 11 years and six months. According to this entry he must have been born in January or February, 1892, which would make him more than 15 and a half at the time of the plaintiff's birth as given in the register of births, and so fully establish his physical capacity at the date of the plaintiff's conception. The Subordinate Judge, however, has hesitated to act on this register which has not been produced from the proper custody; and the Chief Court after carefully examining the school register have satisfied themselves that it has been tampered with for the purposes of this case and is utterly useless. The evidence of Indian witnesses on questions of age is notoriously often very vague and unreliable; and in their Lordships' opinion it would be very unsafe to base a finding of physical incapacity on the part of the husband on the evidence in this case. Further, if the finding of the Chief Court that the husband in this case was 13 at the date of conception could be accepted, and the defendants had failed to prove non-access in the ordinary sense of that term, their Lordships would hesitate to hold that incapacity to procreate at that age could safely be inferred from the sole fact that Lyon's Medical Jurisprudence, a work dealing with Indian conditions, accepts as applicable to India Taylor's statement with reference to this country where climatic conditions are so different, that 14 is the earliest age at which procreative power has been recorded.

Their Lordships will now proceed to deal with Mr. de Gruyther's contention that concurrent findings of the lower courts should not be accepted, because the depositions exhibited by both sides of witnesses who gave evidence at the inquiry in the mutation proceedings, but died before the trial, were inadmissible in evidence. The Subordinate Judge has stated in his judgment that

they were admissible under section 32, clause 5, of the Indian Evidence Act, but they were clearly inadmissible under the proviso to that section because they were made after the present dispute arose. They were admissible, if at all, under section 33 as statements made in judicial proceedings between the same parties; and under the third proviso to this section such statements are only admissible if the questions in the mutation proceedings were substantially the same as the questions in issue in this suit. Mr. de Gruyther has contended that the questions were not substantially the same because in the mutation proceedings the Collector was required by statute to base his decision, as he did, on possession and not on title. He has further contended that statements which are inadmissible under this section cannot be made admissible by consent of the parties to the suit as evidenced by the fact that depositions of witnesses in the mutation proceedings were exhibited by both sides. As regards the latter contention it appears from the notes on this section in Ameer Ali's and Woodruffe's Indian Evidence Act that three of the Indian High Courts have decided the other way; and in view of the facts that the objection was taken for the first time at the hearing before the Board and has not been argued on the other side owing to the absence of the respondents, their Lordships do not propose to decide it, because in their opinion under section 167 of the Indian Evidence Act the finding of the Subordinate Judge that Chatarpal had no access to his wife prior to the plaintiff's birth may be supported on the other evidence in the case excluding the depositions to which objection has been taken.

Their Lordships will now proceed to deal on this footing with the question of non-access. In dealing with this question in a case of child marriage among Hindus much depends on the question whether the case presented on either side is reconcilable with the established customs and usages of Hindus as regards these child marriages, and their Lordships have derived great assistance in deciding it from the fact that both the lower courts in judgments written by Hindus concur, as will be seen, in finding that the plaintiff's case as to alleged access is irreconcilable with such customs and usages.

The families of the husband and wife reside respectively in the villages of Muraini and Bhawain, said to be twenty miles distant from one another; and it is admittedly the custom that after the celebration of the marriage the wife continues to reside for some years in her own family. She then goes to stay with her husband's family for the *gauna* ceremony and the consummation of the marriage, and shortly afterwards returns to her parents' house; and after staying there for a period, it is said, of one or two years, goes to her husband's family for the *thauna* ceremony, and thereafter lives permanently with him. The

case presented by the defendants' family in their objections to the wife's application after her husband's death for mutation of names in the plaintiff's favour was that, owing to the discovery that the wife, who was about a year older than the husband, had become pregnant as the result of an illicit connection, the *gauna* ceremony and consummation of the marriage never took place, that from that time the husband had nothing to do with her or her son, the plaintiff, who was admittedly born in her parents' house, and that he shortly afterwards married another wife. The case put forward by the plaintiff's mother on his behalf in answer to these objections was that she had always lived with her husband but visited her father now and then; that, while she was on a visit to her father her husband died, and that when she returned to her husband's village his second wife, with the help of other persons, compelled her to return to her father's village with the object of acquiring the whole property of the husband. There could, however, have been no such motive, as in the absence of male issue the husband's share would have passed by survivorship to the joint family, and the second wife would only have had a right to maintenance. In her deposition at this inquiry, on which she was cross-examined at the trial, the plaintiff's mother stated that the *gauna* and *thauna* ceremonies were duly performed, and that the plaintiff was born ten years after the marriage at her father's house; and her evidence at the trial was substantially to the same effect.

As to the further period of ten years which, according to the plaintiff's case, elapsed between the plaintiff's birth and the husband's death, the plaintiff's mother stated at the inquiry that six months after the plaintiff's birth she went back to her husband, and that afterwards she remained in her husband's house. At the trial, after her brother and some other of the plaintiff's witnesses had given evidence that after the plaintiff's birth she and the plaintiff continued to reside with her father at Bhawain, she was put into the box at the close of the case, and admitted that this was the case, and consequently that her statement at the inquiry was false. Apparently to account for her not having lived with her husband after the plaintiff's birth for the remaining ten years of his life, it was alleged in the plaint that after the plaintiff's birth a dispute arose in the *gohin* ceremony between her husband's and her own father which resulted in the husband's father marrying him to Birjpali Kuer as his second wife. But according to the evidence given for the plaintiff at the trial, the quarrel between the two fathers arose, not as rather suggested in the plaint in connection with herself or her son, but in connection with the marriage of her sister. According to that evidence the husband's father was angry because on this occasion he did not receive the present of a horse, and for this cause refused to have anything further to do with either mother or son. Their Lordships agree with the lower courts that this explanation is

absurd and incredible. There was at the time no male child in the husband's family which was threatened with extinction unless resort was had to the unsatisfactory substitute of adoption, and there was, therefore, every reason for welcoming the birth of the plaintiff if he had really been the husband's son. Further, it is not to be supposed that the mother's father would have acquiesced, as he apparently did, in this repudiation of his daughter and her son for such an inadequate reason. The whole position is well summarised in the following extract from the judgment of the Chief Court.

> "We cannot fail to be impressed by the conclusions drawn by the lower court from the conduct of the family. As it happens there is no other male heir in the family if the plaintiff cannot establish his title. Yet he has never at any time been acknowledged by his father, by his grandfather or by his granduncle Dalpat Singh, who survived until 1926 and who was for many years the head of the family. No adequate reason is alleged for the refusal of Chatarpal Singh to admit to his home Dilwant Kuer and her son if he believed the boy to be his own child. A suggestion is made that Chatarpal Singh's father Jang Bahadur had some quarrel with Nakchhed Singh, the father of Dilwant Kuer. The evidence as to this quarrel is feeble and inconsistent. In the plaint, paragraph 7, the suggestion clearly is that the dispute arose either at the *gauna* or some other ceremony connected with the marriage of Chatarpal Singh and Dilwant Kuer. According to Dilwant Kuer the quarrel arose on the occasion of a ceremony connected with the marriage of her sister. In any case it appears to have been a trivial matter and one which would surely have been forgotten after the death of Jang Bahadur which took place many years before the death of the son Chatarpal Singh. It also appears to us strange that the family of Dilwant Kuer, namely, her father and her brother, did not press for her recognition and the recognition of her son. In fact the only satisfactory explanation offered to us of the conduct of both families is that given by the defendants that the plaintiff is an illegitimate child."

The Subordinate Judge also regarded it as incredible that, in the case of a first-born son, the wife should have been allowed to go to her father's house when pregnant and be confined there.

The Subordinate Judge in his judgment has most carefully weighed and sifted the evidence of the witnesses on both sides, giving in each case his reasons for rejecting witnesses whom he considered unworthy of credit. Nine witnesses for the defendants, whom the Subordinate Judge apparently saw no reason to disbelieve, have given evidence that the *gauna* ceremony which according to the custom is a necessary preliminary to consummation was never performed because the wife was found to be with child as the result of illicit intercourse; that the husband and his family repudiated the plaintiff's mother and never acknowledged the plaintiff as her husband's son; and that both mother and son continued to reside in her father's house and never went to her husband's village. Their Lordships see no reason for

rejecting this evidence, confirmed as it is in the manner already mentioned. It has not been suggested that the husband could have had intercourse with the wife before the *gauna* ceremony which would never have been permitted by the respective families and was practically rendered impossible by the fact that the husband and wife lived in villages far apart from one another. For the reasons already given their Lordships are satisfied that the defendants have sufficiently discharged the onus of proving non-access, and are of opinion that the appeal should be dismissed. They will humbly advise His Majesty accordingly.

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In the Privy Council.

BHAGWAN BAKKSH SINGH AND ANOTHER

v.

MAHESH BAKHSH SINGH AND OTHERS

DELIVERED BY SIR JOHN WALLIS

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