Privy Council Appeals Nos. 54 *and* 55 *of* 1932
Allahabad Appeals Nos. 9 *and* 10 *of* 1930

Bhojraj - - - - - - - - - - - - *Appellant*

v.

Sita Ram and Others - - - - - - - - *Respondents*

Same - - - - - - - - - - - - *Appellant*

v.

Musammat Gomti and Others - - - - - - *Respondents*

(*Consolidated Appeals*).

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER, 1935.

Present at the Hearing:

LORD ROCHE.
LORD SALVESEN.
SIR GEORGE RANKIN.

[*Delivered by* LORD ROCHE.]

These are consolidated appeals from two decrees of the High Court of Judicature at Allahabad dated 26th March, 1930, which reversed the judgment and decree of the Subordinate Judge of Mainpuri and dismissed the plaintiffs' suit with costs.

The dispute was as to the property of one Tej Raj, a wealthy Brahman landowner, which was situate at Kusyari and elsewhere in the district of Mainpuri. Tej Raj died in 1855 leaving surviving him three widows and a deceased son's widow to whom Tej Raj's widows gave a portion of the property in lieu of her right to maintenance. These four ladies at various dates from 1873 onwards alienated the property in favour of the predecessors in title of the defendants and by 1924 when Musummat Bakht Kunwar, the youngest widow of Tej Raj and the last survivor of the four ladies died all the property in question in the suit was in the possession of the defendants. In 1890 a declaratory suit had been brought by plaintiffs other than the present plaintiffs purporting to claim as reversioners to the property of Tej Raj and seeking to challenge the validity of the alienation of such property. This suit failed owing to the operation of the rules of limitation applicable to such declaratory actions and no question of pedigree was ever debated or decided in that suit. On the death of the last

surviving widow, Musummat Bakht Kunwar, the present suit was filed on 17th November, 1924, claiming possession of the properties formerly belonging to Tej Raj and then held by the defendants. The main issues which arose for decision and were decided by the Subordinate Judge were:

(1) Were the plaintiffs entitled to maintain the suit as having or taking title from the next heirs or reversioners to the property of Tej Raj?

(2) Were the transfers to the defendants and their predecessors in title effected for legal necessity and valid?

There were other issues which were subsidiary or have now ceased to be of importance. The only one of these which need be mentioned is an issue as to certain houses and groves in respect of which the Subordinate Judge excepted the houses, though not the groves, from the operation of his decree which was otherwise in accordance with the plaintiffs' claim.

The Subordinate Judge found on both of the issues (1) and (2) in favour of the plaintiffs and in consequence granted them the relief they sought. Upon appeal the Judges of the High Court agreed with the Subordinate Judge on issue (2) in holding that the transfers were not for legal necessity or valid. They also held as to the minor matter of the houses that the transfers were not for necessity and were not valid. But the main divergence of view was on issue (1). As to this the High Court held that the plaintiffs had failed to establish their pedigree and dismissed the suit on that ground. The appellant seeks the restoration of the decree of the Subordinate Judge and the defendant-respondents seek to support the decree of the High Court both on the grounds upon which the Judges of the High Court based it and also by contending that the transfers were for necessity and are binding. This last matter can be shortly dealt with. There are concurrent findings in the Courts below in favour of the plaintiffs and their Lordships see no reason to doubt that those findings are correct. It was contended on behalf of the defendants that owing to the lapse of time, as a matter of law, necessity should be presumed and in support of the contention the case of *Chintamanibhatla Vinkata Reddi* v. *Rani of Wadhwan* L.R. 47 I.A., p. 6, was relied upon. The judgment in that case does not in the opinion of their Lordships support the contention of the respondents. Here, as in the case cited, regard must be had to the amount of evidence likely to be available after the lapse of a long time and presumptions should be allowed to fill in gaps disclosed in the evidence but in this case there is evidence justifying the conclusions of the Courts below. Presumptions not to supplement but to contradict the evidence would be out of place.

On the minor issue of the houses their Lordships are of opinion that the view of the High Court was preferable to that of the Subordinate Judge.

The issue as to the plaintiffs' pedigree and right to maintain the suit is one of very considerable complexity and difficulty both by reason of the lapse of time between the death of Tej Raj and the present suit and by reason of the differences of view on the facts and evidence that have emerged in the Courts below. In both Courts very careful and able judgments have been delivered reviewing the evidence in detail and giving reasoned grounds for the conclusions arrived at. But after full consideration of those judgments and assisted by a close examination of the evidence by counsel their Lordships have arrived at a clear opinion that the view of the Subordinate Judge on this issue is to be preferred to that of the Judges of the High Court. The reasons which have led their Lordships to this conclusion are as follows:

The material evidence was mainly oral evidence. Certain books of a bard and a priest upon which the plaintiffs sought at one stage to rely were not relied upon by the Subordinate Judge who based his judgment on his acceptance of a large body of oral evidence adduced to prove the plaintiffs' pedigree. The Judges of the High Court expressed some doubt as to the effect of the findings of the Subordinate Judge in the matter of credibility but the position seems to be this: The learned Judge stated clearly what witnesses he did not believe whether for the plaintiffs or the defendants. His narrative of facts based on the evidence of witnesses other than these rejected witnesses was an acceptance of the evidence for the plaintiffs and the learned Judge in some cases added a specific refusal to reject the evidence of certain witnesses for the plaintiffs on the score of criticisms urged on behalf of the defendants. Their Lordships do not doubt that it is open to an Appellate Court to differ from the Court which heard the evidence where it is manifest that the evidence accepted by such Court of first instance is contradictory or is so improbable as to be unbelievable or is for other sufficient reasons unworthy of acceptance. But in the opinion of their Lordships no grounds exist here justifying a conclusion as to credibility opposed to that of the Judge who had the very great advantage of both seeing and hearing the witnesses. The evidence was not contradictory or in any substantial degree shaken in cross-examination nor was it in the opinion of their Lordships inherently improbable or unworthy to be accepted. The main drift of it which was to establish the pedigree relied upon and annexed to the plaint was confirmed by various circumstances appearing from the evidence of the deponents and was also to some extent corroborated by evidence and circumstances external to and independent of the plaintiffs' evidence and by evidence and documents adduced by the defendants.

The following points amongst others have weighed with their Lordships in arriving at their conclusion in this respect:

The pedigree evidence was admissible evidence and the improbability of the memory of the witnesses extending so far as it did seems to their Lordships to be much less than it appeared to the Judges of the High Court to be. The reasons assigned for a similar conclusion in the case of *Debi Pershad Chowdhury* v. *Rani Radha Chowdhrain* L.R. 31 I.A. 160 are applicable to this case. The evidence of the plaintiff Debi Prasad: of Jaggannath, a witness out of the plaintiffs' line of descent and presumably disinterested or even interested against the plaintiffs' attempt to establish their pedigree: of Puran Mal: of Ganga Sahai: and of Bisheshar Dayal seem to their Lordships to be of especial importance and to be credible as the Subordinate Judge deemed it to be. The Judges of the High Court evidently regarded it as got by rote or learned by heart and therefore unreliable. The criticism that the evidence bears that appearance is justified in the case of one or two of the witnesses but not, by any means, in the case of all of them and though not without weight such a criticism is by no means conclusive. Evidence substantially true not infrequently assumes too perfect a form and witnesses such as children not infrequently get a story by heart which is none the less a true story. The real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. Here the plaintiffs' main evidence was consistent with itself and in many respects now stands unchallenged. At first the plaintiffs' evidence as to pedigree was attacked at many points both in cross-examination and by evidence. Those attacks in general have been proved to be unfounded and are not now persisted in. The only remaining point of attack is as to whether one Laljit who was the plaintiffs' ancestor was a son of Tej Raj's great grandfather Man Dhata and a brother of his grandfather Ajit. Evidence proved to be correct in all other respects is not lightly to be disregarded in this respect, the more as the evidence itself contained matters confirmatory of the lineage pleaded and relied upon. Such matters were the evidence of kinship as shown by the food or dining terms spoken to as subsisting between various classes of persons in the Tej Raj line and the plaintiffs' line. Even more important was the evidence of the performance of funeral and similar rites for Tej Raj and his kin or widows by persons in the plaintiffs' line of descent. A determined effort was made by the defendants to disprove the latter evidence by evidence of the performance of certain of these ceremonies by the son of Tej Raj. This son was however proved to have predeceased his father and the effort failed.

As to matters external to the plaintiffs' own evidence: The descent and lineage of Kallu Singh the father of two

of the plaintiffs was impeached but the defendants themselves put in documents of their title witnessed by Kallu Singh. Such documents were: mortgage deed dated 18th September, 1873, executed by two of Tej Raj's widows and witnessed by Kalyan Singh (Kallu) son of Udit Singh—caste Brahman; mortgage bond dated 3rd October, 1874, executed by the same two widows and again witnessed by Kallu Singh son of Udit—caste Brahman. The circumstances and reasons for such execution and attestation were dealt with by the defendant Damodar Das in his evidence and this evidence is subsequently referred to. It is sufficient to say that after the fact of such attestation and the evidence it is not surprising that the general attack on Kallu Singh's purity of lineage failed and the evidence for the plaintiffs was in general believed by the Subordinate Judge.

Some observation should be made upon the suit of 1890 already referred to. The High Court attached great importance to this suit adversely to the present plaintiffs. Their Lordships do not attach the like importance to it. It is true that in that suit a line other than the present plaintiffs' line sought to assert a claim to be Tej Raj's heirs but that claim was never litigated or determined and having regard to the contentions and pleadings in that case on the subject of limitation it seems clear that the parties who sought to defeat the rules of limitation by assertion that they did not know of the matters complained of would desire to keep clear of Kallu Singh and his line of descent (which is the plaintiffs' line of descent) since Kallu as witness to the transfers which were the subject matter of complaint was clearly aware of their execution. Any inference adverse to the present plaintiffs which may be drawn from the 1890 proceedings seems to their Lordships to be more than compensated for by the fact that Jaggannath Prasad who is in the line of direct descent from the 1890 plaintiffs, was in this suit an important witness for the present plaintiffs.

With regard to corroboration of the plaintiffs' pedigree from external sources:

A rubkar of 1840 showed that certain land in Kusyari was at that date held by Tej Raj and by ancestors of the plaintiffs in common though in unequal shares. This fact in spite of the inequality of the shares seems to their Lordships in the circumstances of the case to be more consistent with family connection between the co-sharers in the property than with any other explanation. More important however is the support afforded by the defendants' witnesses and documents to the plaintiffs' case. It is not quite clear that the defendant Damodar Das was vouching Kallu Singh as a relative who consented to the transfers of property in question though the evidence is open to this interpretation but it is clear beyond doubt that he was vouching him as did the attestation clause to the transfers already referred to as a responsible and well born person and not of that

illegitimate lineage which the defendants at the hearing sought to establish. The answers of the defendants' witness Meenda to the Court to the effect that Kallu was a descendant of Mandhata were so adverse to the defendants that they sought to treat him as a hostile witness—suborned by the plaintiffs. In the opinion of the Judge of the Subordinate Court he was not such a witness and the subsequent course of the witness's deposition supports this opinion and their Lordships think that this admission was the truth and is strikingly corroborative of the plaintiffs' case in the one and only respect in which it remained open to attack.

Their Lordships will therefore humbly advise His Majesty that these appeals should be allowed and the decree of the Court of the Subordinate Judge should be restored with the instruction that there should be added to the list of properties decreed to be recovered by the plaintiffs the houses already mentioned. The appellant should recover the costs of the hearing in the High Court and of these appeals from the defendant-respondents.

(32515—3A) Wt 8034—41 180 12/35 P. St. G. 338

In the Privy Council.

BHOJRAJ

v.

SITA RAM AND OTHERS

SAME

v.

MUSAMMAT GOMTI AND OTHERS

(Consolidated Appeals).

DELIVERED BY LORD ROCHE.

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1935