Privy Council Appeal No. 68 of 1935.

Bengal Appeal No. 13 of 1934.

Nutbehari Das - - - - - - *Appellant*

v.

Nanilal Das and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1937.

Present at the Hearing:

LORD ROCHE.

SIR SHADI LAL.

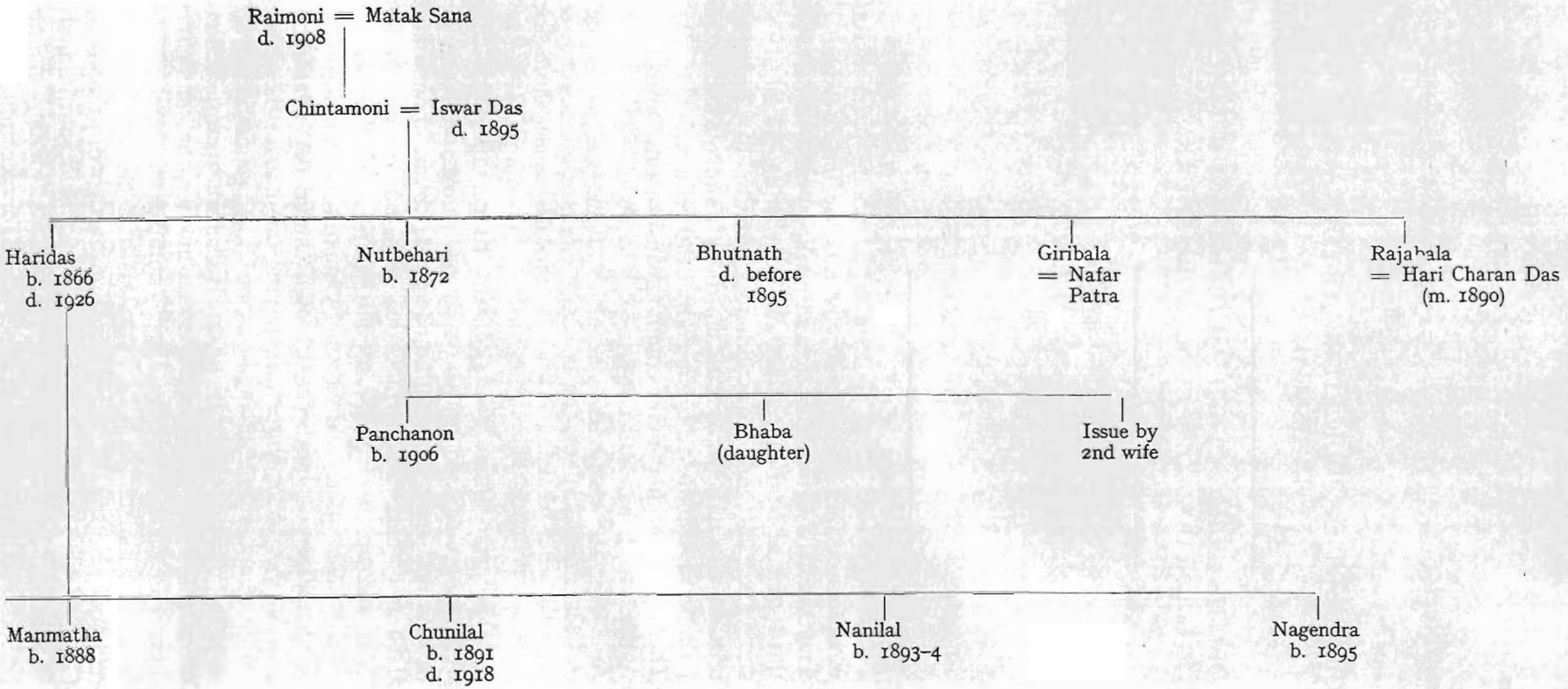
SIR GEORGE RANKIN.

Delivered by SIR GEORGE RANKIN.

This appeal arises out of a partition suit between members of a Bengali family governed by the Dayabhaga. The contest is between uncle and nephews—that is between the appellant Nutbehari, who was the first defendant in the suit, and the three respondents, sons of his deceased brother Haridas, viz., Nanilal (the plaintiff), Manmatha (second defendant) and Nagendra Nath (third defendant). These three brothers make common cause against Nutbehari. As McNair J. has noticed:—

> "The real protagonists are Nutbehari and his nephew Manmatha Nath, who are admittedly contractors in a large way of business. Manmatha, although he is not the plaintiff, admits that he is financing the suit."

The trial Judge (Subordinate Judge, 4th Court, 24 Perganas) dismissed the suit save as regards a small plot of land measuring about 3 bighas and 4 cottas, upon which the family had been living: this land, but not the house built thereon, he treated as joint property of the parties, though he refused to divide it by metes and bounds. By way of partition he directed that it should be valued and that on the uncle, Nutbehari, paying one-half of the value for division between the nephews, he should retain the whole of the land for himself. The High Court at Calcutta (Mitter and NcNair JJ.) reversed this decision and gave decree for partition of a large number of immoveable properties and moveables, as well as of a grocery business or modi shop. In agreement, however, with the Trial Court the High Court dismissed the claim for partition so far as regards two contract businesses and a money-lending business. It also dismissed the claim for accounts.


Raimoni = Matak Sana
d. 1908
Chintamoni = Iswar Das
d. 1895
Haridas
b. 1866
d. 1926
Nutbehari
b. 1872
Bhutnath
d. before
1895
Giribala
= Nafar
Patra
Rajabala
= Hari Charan Das
(m. 1890)
Panchanon
b. 1906
Bhaba
(daughter)
Issue by
2nd wife
Manmatha
b. 1888
Chunilal
b. 1891
d. 1918
Nanilal
b. 1893–4
Nagendra
b. 1895

Concurrent findings by the Courts in India have displaced the case made by the respondents on the pleadings and the learned Judges of the High Court have deliberately decided to give effect to a case which the respondents by their memorandum of appeal had expressly disclaimed.

The claim made by the respondents upon their pleadings and by the evidence which they adduced was to the effect that Haridas and Nutbehari had inherited from their father Iswar a certain amount of property which formed the nucleus of their joint property and by their joint labour had added thereto; both of them being owners of a contracting business begun in 1906 in the name of Nutbehari in partnership with a stranger to the family called Haricharan Das, son of Dinu Das Mistry: both being owners also of a second contracting business begun in 1913 in the name of Manmatha, of a money-lending business in Nutbehari's name, and of a modi shop carried on in a part of the dwelling house of the parties: that the two brothers and their families all lived jointly on the land inherited from Iswar, Nutbehari acting as the karta, receiving the profits of all the joint family businesses and other income, investing the family savings sometimes in his own name and sometimes in that of Manmatha, building masonry structures on the family homestead, and on other lands which were let to tenants—generally, but not always, in Nutbehari's name. This case the trial Court rejected root and branch, and in the High Court the very outline of this case has been disbelieved. In agreement with the trial Judge Mitter and McNair JJ. in separate but concurring judgments have held that Iswar left no property, that Nutbehari and Haridas had no nucleus of ancestral property, that the contract business begun in 1906 was Nutbehari's alone, and that of 1913 was Manmatha's, having been started for him and given to him by Nutbehari; that Nutbehari did not act as karta; that the moneylending done in his name was done on his separate account; and that the land at Mudiali and the house built thereon by Nutbehari are his separate property. The learned Judges of the High Court have, however, held that all the other immoveable properties acquired either in Nutbehari's or Manmatha's name (Sch. *Ka* to the plaint as amended) and all the moveables in Sch. *Kha* are joint family property of the parties. This they have held on the strength of an argument which each learned Judge has separately stated. McNair J. puts it thus:—

> " That Nutbehari acquired certain properties which would in the ordinary course of events be his own self-acquired properties and handed them over to the joint family and later blended with them other self-acquired properties; so that in the result the mixed properties assumed the condition of joint family property."

This argument the learned Judge admits not to be the case made in the plaint, not to have been considered by the trial Judge, and to have been expressly disclaimed by the present respondents before the High Court. He observes, however,

that " there is no suggestion that any further evidence could or would be produced if the doctrine of blending had been specifically set up."

Mitter J. puts the argument by saying:—

> " That the defendant No. 1 blended the earnings of defendant No. 2 out of his business with his own separate account and the effect of such blending was to cause the income from the two businesses to become joint to the extent that any immoveable properties which were purchased from such mixed fund was meant to be joint property of both brothers Nutbehari and Haridas."

And in another passage the same learned Judge states his conclusion thus:—

> " That Nutbehari mixed up his own earnings with Manmatha's earnings and by blending his self-acquisition with the joint family business which Manmatha says his business was, and that the properties purchased from such joint fund were joint family properties of defendant No. 1 and his brother."

Though it appears from his judgment that on the hearing of the appeal this case had been expressly disclaimed in argument by the Advocate-General on behalf of Manmatha, Mitter J. did not consider that it was a new case and referred to a passage in the written statement of Manmatha (para. 11) which averred in effect that receipts from the 1913 contract business, like all other joint family receipts, came to the hands of Nutbehari as the karta. With great respect to the learned Judges it is difficult to feel complete confidence in this method of approach. If on a disputed and complicated question of fact embarrassed by defect of materials and by not a little false swearing, the parties claiming partition do not make a particular type of case, it is not easy to see why the party resisting partition should be troubled with it, whether it be new or not. If it be disclaimed, the disclaimer itself is strong evidence on the other side. But if it be both new and disclaimed, can the party who has had no chance to meet it be told that the state of the evidence makes it useless to give him a chance? Not, it would seem, unless the circumstances are highly exceptional and the conclusions exceptionally clear.

Their Lordships will now set forth the main facts which they hold to be established as regards the history and transactions of the family. The pedigree prefixed to this judgment is not complete, nor are all the dates therein given precise, but it exhibits the main facts about the family of Iswar Das so far as they are necessary for the present case.

Iswar was all his life a poor labouring man. Whether he is more accurately described as a riveter or as a riveter's labourer, as a skilled or an unskilled labourer, he and his family managed with difficulty to earn their living. They lived in huts of which the walls were made of mud and bamboo and the roof thatched with leaves. Before 1894 they had moved from one plot of land to another several times. Haridas, the eldest son, got a little education. Nutbehari, the second son, got none and is even now illiterate: at nine years old he began to earn his living as

a punkha puller at a pay of two annas per day. Iswar's mother-in-law, Raimoni, however, made a little money as a vendor of fried rice to workpeople, and in 1894 a plot of 3 bighas 4 cottas at Fatehpur was purchased by her for Rs.387 and has ever since been the family homestead (bastu). It was really two plots, one of 2 b. 14 c. and the other of 10 c. and the interest purchased was a permanent tenure at a fixed rent of Rs.8 per annum. In 1895, when Nutbehari was 23 years old, Iswar died in debt. Haridas, who was five or six years older than his brother, may have been still in work as a riveter at a wage of 8 or 10 annas per day or he may have given it up for lighter employment. Nutbehari had become a mate mistry earning Rs.1—8—0 per day. The family of Haridas was fairly large and they were having so hard a struggle that the three boys were put to work in a cotton mill at a very early age. In 1898 Haridas took a "ticca" tenancy or cultivating lease for three years of $2\frac{1}{2}$ bighas of land, really garden land, near to the homestead at an annual rental of Rs.9. The unregistered deed (Exh. AA(1)) mentions no salami. In 1902 Raimoni mortgaged the homestead land for Rs.485 and bought a plot of 3 bighas to the east of the homestead in the name of her daughter Chintamoni. By this time—viz. from about 1900—Nutbehari's earnings had become more substantial. He had proved himself a capable workman and was now entrusted with the execution of various works required by a steamer company to be done outside Calcutta. He went to Balasore, Sonachara, Barisal and Chandpur, returning at the end of each job with some hundreds of rupees. By 1904 the mortgage of 1902 was paid off and Nutbehari's money was used to erect masonry structures on the homestead. He was maintaining his own and his brother's family. On 18th December, 1904, one Dwarkanath Adak executed an unregistered document granting a "ticca" tenancy in the names of Haridas and Nutbehari (Exh. AA2) of some garden land in Fatehpur—being 2 bighas, 12 cottas less the area of two tanks excluded from the lease. Whether this was taken in Nutbehari's absence and whether on his objecting to it the lease was surrendered is a controversy that need not now be decided. No salami is mentioned in the document and though the term is five years there is a provision for determination at any time on payment for the vegetables, &c.

In 1906 Nutbehari became a contractor under the steamer company before-mentioned in partnership with one Hari Charan Das, a son of Dinu Das, his old employer. Haridas and his family had no share whatever in this business and no one of them except Manmatha ever worked in the business. The registered partnership deed between Nutbehari and Hari Charan is in evidence (Exh. F). Each was to have a half share: Nutbehari was to have a monthly salary of Rs.30 and Hari Charan was to supply the funds at 15 per cent. interest. For the benefit of the sons of Haridas, other than Manmatha, Nutbehari soon afterwards

set up a grocer's (modi) shop in one of the buildings on the homestead and Chuni was put in charge. This business was Nutbehari's, he was liable for its debts and apparently he found capital for it three times at least. When Chuni died in 1917 Nanilal (the plaintiff) was put in charge. The profits were not enormous at any time but Nutbehari let his nephews have the profits. In 1906 Nutbehari bought for Rs.292 the permanent right in the garden land which had been rented by the lease of 1898 in the name of Haridas. In 1907 he bought for Rs.2,500 the permanent right in the land of the tenancy of 1904 including, however, the two tanks which had been previously excluded. This land was thereafter let out by him in his own name for residential purposes to tenants whose kabulyats, &c., are in evidence. Notwithstanding opinions expressed by the High Court their Lordships can discover no ground for supposing that because he bought the mokarari interest in the lands of the ticca leases of 1898 and 1904 he was doing so on joint account presenting Haridas with a half share in the corpus which at any moment he could take away by partition. Even if it be taken that the lease of 1904 was subsisting in 1907, that it had really been taken on joint account, and that Nutbehari's main object in buying the tenure was to have some land for Haridas to cultivate and some tanks for Haridas to fish, the inference of jointness remains unjustified. In 1908 Raimoni died and her daughter Chintamoni succeeded to her stridhan property. In 1909 Nutbehari bought two small plots (1½ bighas and 10 cottas) of hogal (reed-bearing) land near the homestead, and in 1910 a further plot of 7 cottas, 6 chittahs adjacent thereto. From this period onwards at frequent intervals Nutbehari was investing his money in land of the immediate neighbourhood. Several reasons combine to explain this course which was a very natural one. He was also adding to the dwelling house. On 8th April, 1911, Chintamoni executed a registered deed releasing to Haridas and Nutbehari the original land (3 bighas, 4 cottas) which Raimoni had bought in 1894. On the same day Chintamoni executed a deed of gift of the 3 bighas to the east thereof which had been bought in her name in 1902 in favour of Panchanon, Nutbehari's son, whose mother had recently died (1909). Haridas and Nutbehari joined in the deed as consenting to the gift. It should here be noted that Nutbehari had married a second time soon after his first wife's death, and by his second wife has a family of two sons and a daughter—a fact which should be considered before imputing to Nutbehari an intention to part with a half share of his self-acquired properties to Haridas.

1913 was a critical year in the history of this family. Nutbehari's partner, Hari Charan, retired from the contract business which had begun in 1906 leaving Nutbehari as sole owner. In this year Nutbehari received an offer which led the steamer company, for whom he had been carrying out contracts, to allow him to start another contract business.

This he did on 10th December, 1913, in the name of Manmatha, who had for some years been working for him at an ordinary wage. Nutbehari found the money necessary to start the new business, he supervised its beginnings and the promised contracts were forthcoming. In this way he provided for Manmatha who became sole owner of a successful and profitable business, though not so lucrative as Nutbehari's own. Their Lordships think it desirable to examine this matter somewhat more closely. In a passage already quoted Mitter J. speaks of Nutbehari blending his self-acquisitions "with the joint family business which Manmatha says his business was." Now the case and the evidence of Manmatha and the plaintiff was that the 1913 business, though in Manmatha's name, belonged really—like the original business of 1906—to the joint family of Haridas and Nutbehari. This story has been rightly negatived by concurrent findings of the Indian Courts. But, that story gone, there is no case left on which the business of 1913 can be supposed to be now, or ever to have been, owned by a joint family. It was the separate property of Manmatha. After the death of Haridas in 1926 Manmatha and his brothers may well have been joint since their father left some land and money if only a little. But the 1913 business was no asset of Haridas. The gift of a paternal uncle is not even ancestral property and this was not really a case of gift of property. What Nutbehari had done was to arrange for contracts, lend some money, and supervise and direct for a time the work on Manmatha's behalf. The profits of the new business were Manmatha's self-acquisitions. It is not easy to see why a separate business should have been started if in the end the profits of both businesses were to be so mixed that all investments of either owner can safely be taken to have been made on joint account. But if that be made out in this case, it gives no right whatever to the plaintiff Nanilal nor could Manmatha prosecute his rights thereunder in this partition suit. This may account for a certain nervousness on the part of the Advocate-General in reference to the case which found favour with the learned Judges.

From 1913 to 1927 both businesses prospered, but the oral evidence as to the conduct of the parties and their dealings with the profits is conflicting and partisan. What is certain is that a number of properties were purchased in the name of Nutbehari and a smaller number in Manmatha's name.

The list given below is not exhaustive nor can it readily be related to the particular items of Sch. *ka* of the plaint, but it shows the dates on which purchases were made:—

	Nutbehari	*Manmatha*
9th Nov., 1914 ...	3 c., 5 ch. from Molla ...	—
7th Mar., 1915 ...	2 b., 14 c., 10 ch. Fakir Naskar.	—
11th Oct., 1915 ...	12c., 10 ch. Bejoy Hasra ...	7 c., 10 ch. from Bejoy Hasra.

	Nutbehari	*Manmatha*
21st Dec., 1915 ...	—	1 c., 10 ch. from Idris Gasi.
26th May, 1916 ...	13 c. Aghore Ghosh ...	—
29th Sept., 1916 ...	—	3½ b. from Umasastri.
13th May, 1917 ...	1 b., 15 c. Banerjee ...	—
27th April, 1918 ...	A. Patra	—
26th Feb., 1920 ...	1 b., 10 c. Nirmala	—
27th July, 1920 ...	—	5 c. from Nandarani.
4th Oct., 1921 ...	M. N. Patra	—
1922-22 ...	Howrah land	—
10th Feb. 1926 ...	—	Land at Jorehat from Nafar Das.

The plaintiff and Manmatha say that all the properties are joint. Nutbehari says that he owns the properties which stand in his name and those which stand in Manmatha's name are Manmatha's. The evidence of Manmatha at the trial was that all purchases had been made by Nutbehari and that he (Manmatha) was not even aware of any of the purchases effected in his name save that from Umasashi. The trial Judge made an elaborate examination of each purchase in Manmatha's name and discredited this story; holding that Manmatha's transactions had been done by himself on his own account—including both purchase, sale, and exchange of properties, moneylending on promissory notes, purchase of shares, obtaining of decrees, ornaments and the making of separate income tax returns. The High Court, moreover, found that the land and house built thereon at Mudiali were the sole property of Nutbehari and that his moneylending business was his own. Mitter J. gives as his reason:—

> " There was plenty of money in the hands of Nutbehari which he might have disposed as he liked and which he need not have incorporated in the joint fund."

Notwithstanding these circumstances, the High Court have held it proved that (save for the Mudiali house and land) all the immoveables standing in either name are joint family property—that is property of a Dayabhaga joint family in which till 1926 the co-sharers were Haridas and Nutbehari and after 1926 were Nutbehari and his nephews. The evidence on which the High Court proceeded must now be examined.

The books of account of the two contract businesses ought, of course, to make impossible the dispute which has occupied the Courts in this case. When first the quarrel broke out, viz. in August, 1927, books of account both old and current were in the dwelling house at Fatehpur. Whether Nutbehari is concealing important books of his own business or whether his nephews have taken possession of them and suppress them is a question which Mitter J. found it difficult to decide. Books purporting to be Pay (Mahina Khasra) books of Manmatha's business (Exh. a Series) were produced on his behalf but have been discarded by both Courts on the ground that they contain false entries fabricated for the purposes of this case. As part of the original case that both contract businesses belonged to the joint family of which Nutbehari was karta, the oral

evidence and the false entries were to the effect that all monies of both businesses went into Nutbehari's hands. Nutbehari countered with a round denial: no such thing ever happened: all monies were kept separately by each. No books of the 1913 business, showing payment to Nutbehari in the usual course, have been produced, but Manmatha and his brothers produce as evidence two books of Nutbehari's contract business called Jabda and Khatian. These are in effect books for the year 1916 only and they purport to show that during that year over Rs.15,000 of Manmatha's money, received by him for work done, was paid into Nutbehari's hands and some Rs.12,000 paid back to Manmatha, leaving a balance due to him of Rs.2,824. Nutbehari in his evidence declared that no such books were kept in his firm. This seems to be untrue and though the entries now relied upon are open to considerable criticism according to McNair J., their Lordships will assume that the books are genuine and prove the facts of these payments and repayments. What is the effect, save that Nutbehari's evidence, like that of his nephews, is unreliable and that in the third year of the new business of this workman turned contractor he was very sensibly letting his uncle, who financed him, act as his banker or cashier? This is no evidence of "blending." So far as it goes it is evidence the other way. Even in the case of a karta mixing his own monies with family monies the mere fact of a common till, or a common bank account, need of itself effect no blending so long as accounts are kept. This can be seen from a careful examination of Lord Buckmaster's judgment in *Suraj Narain* v. *Ratan Lal* (1917) 44 I.A. 201, and a more explicit statement will be found in the judgment of Reilly J. in *Periakaruppan Chetty* v. *Arunachelam Chetty* (1926) I.L.R. 50 M. 582, 591-2. It is odd that the two books for this short period only, and no similar books for other years, should have been obtained by the respondents. No proof is offered that a single pice of the outstanding balance was not repaid or accounted for, nor is the purchase of any land traced directly or indirectly to any balance of Manmatha's money. Nor are there any books of Manmatha's to show that he did, or that he did not, provide the price in any single instance. Nor do the Jabda or Khatian show that Manmatha's money was going towards general expenses of a joint family. So far therefore as account books are concerned it is not made out that uncle and nephew blended their funds: still less that they presented the blend to the joint family.

Great reliance was, however, placed on an admission made by Nutbehari in 1924 when giving evidence for Manmatha and others who had in 1916 purchased certain hogal land near to the homestead at Fatehpur from a widow called Umasashi. The transaction was attacked as invalid and both Nutbehari, Manmatha and the sircar Sashi Koer gave evidence at the trial before the Subordinate Judge. At first Nutbehari had intended to buy these lands and had

paid Rs.100 as earnest money and executed an agreement for sale (bainapatra). In the end it was bought in three parts by Manmatha, Hari Charan Das and Asutosh Hasra, who paid Rs.1,260, 800 and 630 respectively—total Rs.2,690. Manmatha's evidence was:—

> " My paternal uncle Nutbehari paid the earnest money on his own behalf intending to purchase the property himself. But eventually he did not purchase it. He said ' I have no need of the property.' I requested Nutbehari to let me purchase the property."

In cross-examination:—

> " My father is alive. I have got an uncle too, whose name is Nutbehari. My father and my uncle live in joint mess. I too live with them in joint mess in the same bari. . . . After my purchase I have kept the land in my khas possession. My uncle Nutbehari's lands are on three sides of it."

Sashi Bhusan Kuar said:—

> " The purchase was made with Manmatha's money and the property belongs to him."

Nutbehari said:—

> " I paid Rs.100 as earnest money. I did not, however, buy the lands. . . . I had paid earnest money without seeing the lands. When I found that the lands were scattered and were not contiguous to my lands I gave up the idea of buying them. The price settled seemed also to be a bit too high and this was another reason for my backing out."

In cross-examination comes the passage now particularly stressed:—

> " I am illiterate and cannot even sign my name. . . . My nephew Manmatha lives with me in joint mess and our properties too are joint except the property in suit. Manmatha has purchased one or two properties himself. I told Manmatha that the price of the lands in suit seemed to be too high. But he said that he would not grudge paying a higher price as the hogal land in suit was contiguous to our hogal lands. These hogal lands are the ejmali property of Manmatha and myself."

This language is the Judge's note in English of the effect of the witnesses' answers to questions—put and answered, presumably, in Bengali. Mitter J. takes it as proof that *all* Nutbehari's properties were joint with Manmatha and then interprets that as meaning joint not with Manmatha but with Haridas under the Dayabhaga school of law. This he supports by taking against Nutbehari his explanation given in the present case:—

> " I then said of our properties, except that of that suit, being joint with Manmatha, having in view only the properties covered by mother's deed of release and the kobala executed by the Hasras "—

the former reference being to Chintamoni's deed of 1911 and the latter reference being to a sale of hogal lands dated 11th October, 1915, whereby 12 cottas, 10 chittahs was conveyed to Nutbehari and 7 cottas, 10 chittahs to

Manmatha for a lump price of Rs.467-4-0 by the same deed. Manmatha in the present case says:—

> "Uncle had paid earnest money for the land of Umasashi in order to purchase the entire land for our entire family."

which contradicts his evidence in the previous case. Sashi Bhusan likewise contradicts himself, now saying that Nutbehari paid the money on the purchase in Manmatha's name. McNair J. has noticed that so far back as 1916 the 7 cottas, 10 chittahs purchased in Manmatha's name in October, 1915, had been exchanged by Manmatha for other land with certain brothers named Rakshit: he does not think therefore that that land can have been in Nutbehari's mind when he deposed as he did in 1924. It is more than probable that in 1930 Nutbehari had no real recollection of what he had said or what he had meant in 1924. But it is clear that in 1916 each was taking his own way as regards Umasashi's land, and that as the Subordinate Judge held [Order No. 27, 6th February, 1928], "from the deposition of Manmatha it is quite clear that he did not claim Nutbehari's land." But for Manmatha's deposition their Lordships would incline to agree with McNair J. that Nutbehari's evidence showed that some of the hogal lands near to the homestead [perhaps those bought by Exh. P (1) of 1917 or A.(9) of 1920] were ejmali between Nutbehari and Manmatha. But the evidence must be taken fairly and as a whole and it is most noticeable that each party makes clear that the other has lands of his own. No doubt on his own case Nutbehari should have said "I am joint with his father as to the homestead and lands nearby belong to both of us but in separate plots. Also each of us has other property." But the Judge's translation of the effect of an illiterate man's answer to a pleader's questions in cross-examination is a product of several factors and in this case it is not so different from his present case that it can be regarded as disproof. In any case the conclusion that the lands of both deponents (Umasashi's land excepted) belonged to the joint family, cannot in their Lordships' view be drawn.

As the oral evidence for the respondents cannot possibly be relied upon, it only remains to notice certain documents which are said to throw doubt upon the case that the purchases of uncle and nephew were made by each on his separate account. In their Lordships' view these come to very little. The deed of 11th October, 1915, has already been referred to whereby two brothers Hasra, inhabitants of Fatehpur, sold for Rs.467-4-0 two plots of land—one to Nutbehari and one to Manmatha. This proves little enough, but it proves even less if it be coupled with the fact that, when Manmatha in 1916 exchanged his plot for adjacent land with the Rakshits, the deed (Exh. N) recited that he had been owning and possessing the same since the purchase from the Hasras "without any share therein being owned by anyone else in respect thereof and without any right or concern on the part of anyone else." It is possible to have too great belief in the truth of recitals in deeds,

but these transactions were with neighbours, close neighbours who could hardly have failed to know of the jointness of Nutbehari with Haridas or Manmatha if there be any truth in the respondents' case. Again Exh. A.20 is a registered kobala whereby certain Muslims called Gasi transferred to Manmatha on 21st December, 1915, a one-third share of 5 cottas (1 c., 10 ch., 13 g., 1 k., 1 kr.) for Rs.333-5-5—viz., at Rs.200 per cotta. It is said to be remarkable that in a deed of release dated seven years afterwards (11th July, 1922), by which Haripada Jathi (Nutbehari's sircar) disclaimed having any interest in certain lands in Howrah acquired by his master in his name, there is added at the end a reference to a plot of mokarari homestead land at Fatehpur measuring in the entire 16 annas, 1 cotta, 14 chittahs more or less. It would indeed be remarkable. If the properties be the same it would suggest that the entry in the deed of release was a fictitious entry to enable registration to be effected at the Registry at Behala. This it may well have been in any case. But the measurements and the boundaries are given in both documents and neither correspond: nor are they identifiable in any other way, so the argument comes to nothing.

On 24th November, 1922, Haridas joined in a deed conveying to Panchanon Roy a half share in a Calcutta house which share Nutbehari had bought at an execution sale in 1917. The tenor of the deed shows that the explanation given and supported by the evidence of a pleader's clerk is in all probability correct. If Haridas and Nutbehari had been joint in estate generally or even as regards this transaction the deed would have been worded very differently and there would have been no point in describing Haridas as living in joint mess with Nutbehari—a limited phrase of distinct negative significance. That Haridas should join for safety's sake at the purchaser's instance is a very ordinary matter.

On 27th July, 1920, Nandarani, widow of Rajendra Manghi, transferred certain land for a price of Rs.550 to Manmatha, who for the same price sold it on 28th April, 1921, to Naba Karmakar. Rajendra had mortgaged it in 1914 to Tinkari Dandapat, who was paid off on 11th January, 1920, by Upendra Nath Das (Rs.195 due for principal and interest). Upendra was paid off by Nutbehari on 5th July, 1920 (Rs.222-4-0 = Rs.195 and interest thereon). Upon the completion of the purchase by Manmatha this sum was deducted from the purchase price and what was paid according to the statement on the deed of sale was the balance only. Manmatha's evidence now is that he knew nothing of the transaction, it being done entirely by his uncle. Nutbehari says he got his money back with interest, which seems to be incorrect, also that he got it from Nandarani out of what Manmatha paid to her. The deed is not so expressed. Upendra says he paid off Tinkari because he intended to buy the land for Rs.400 but that Nutbehari paid him off and he understood that Nutbehari was offering a higher price. Rajendra, the pleader's clerk, says the consideration money

was paid by Manmatha, but he seems to be hazy on the subject. To make anything of this particular case the respondents must succeed in proving that Nutbehari never directly or indirectly got his money back. As no one believes Manmatha's evidence on the matter in this suit and as he solemnly recited at the time in his conveyance to Naba Karmakar that he had been enjoying the property ever since Nandarani's conveyance " without any share being owned by anyone else in respect thereof," the respondents can hardly ask the Board to come to any firm conclusion in their favour, still less to treat this matter as decisive of the case as a whole.

Attention has been drawn to one or two other transactions but these contain nothing that can be regarded as decisive or even important.

The High Court's decree proceeds on the footing that even before Manmatha's contract business was begun in 1913 Nutbehari was bringing his separate self-acquisitions into the joint family estate. It includes all the moveables in Schedule *Kha* to the plaint, though this matter is not discussed sufficiently for their Lordships to be certain that they understand the view taken on this point by the learned Judges. Since the suit was brought the modi shop has apparently been conducted in the name of the respondents and by one or other of them. The appellant is not much concerned with it and an order to partition it will do as much harm as good to the respondents. It does not follow that they are entitled to such an order merely because their uncle started the shop to provide for them a profitable employment.

In the result their Lordships are of opinion that this suit for partition cannot succeed save as to the homestead. The moveables (Sch. *Kha*) and the other immoveables are not shown to be joint family property. The directions given by the trial Judge as to the manner in which the homestead should be dealt with by way of partition have been set aside by the High Court. As they do not seem to have been supported by learned counsel on behalf of Nutbehari they will not be restored. The proper method of partitioning the homestead will be left open for determination by the commissioner or other authority entrusted with the carrying out of the partition decree, it being understood that while the buildings are not to be taken as themselves joint family property, the method proposed by the Subordinate Judge is not to be adopted, unless indeed the parties agree thereto hereafter. The observations quoted by Mitter J. from Ram Charan Mitter's Tagore Lectures on Partition emphasise an important principle, but as there is not even a plan of the homestead and buildings before the Board, it would not be safe or right to direct that the buildings should be divided into the same shares as the land. Perhaps the most ordinary method when one co-sharer has put up buildings on the land is to allot to him for his share a portion of the land which contains his building. When this cannot be done or would not be fair it may nevertheless be unreasonable and

unnecessary to treat such co-sharer exactly as the others. The scheme of partition should not be taken out of the hands of the commissioner of partition in advance but should be left in the first instance to his discretion in the usual course.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court be set aside and the decree of the Subordinate Judge restored save for the direction therein contained as to the manner of partition and for the reference to the modi shop which should be deleted. The respondents must pay to the appellant his costs of this appeal and two-thirds of his costs in the High Court.

(40353—3A) Wt. 8136—2 180 2/37 P. St. G. 33

In the Privy Council.

NUTBEHARI DAS

v.

NANILAL DAS AND OTHERS

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