Privy Council Appeal No. 17 *of* 1945 [1946] A.C. 508.
Bengal Appeal No. 15 *of* 1943

Srimati Bibhabati Devi - - - - - - - *Appellant*

v.

Kumar Ramendra Narayan Roy 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 30TH JULY, 1946

Present at the Hearing:
LORD THANKERTON
LORD DU PARCQ
SIR MADHAVAN NAIR
[*Delivered by* LORD THANKERTON]

This is an appeal by special leave from a decree of the High Court of Judicature at Fort William in Bengal, dated the 25th November, 1940, dismissing an appeal against a decree of the First Additional District Judge, Dacca, dated the 24th August, 1936.

The present suit was instituted in the Court of the First Subordinate Judge at Dacca on the 24th July, 1930, by the respondent Kumar Ramendra Narayan Roy (hereinafter referred to as the plaintiff) against the present appellant and others. In the plaint, as subsequently amended on the 15th April, 1931, the plaintiff sought (ka) a declaration that he is Kumar Ramendra Narayan Roy, the second son of the late Rajah Rajendra Narayan Roy of Bhowal and (ka 1), that his possession should be confirmed in respect of the one-third share of the properties described in the schedule, or, if from the evidence and under the circumstances plaintiff's possession thereof should not be established, then possession thereof should be given to him. He further asked for injunctions against obstruction to his possession. The present appellant filed a written statement denying, *inter alia*, the identity of the plaintiff with Kumar Ramendra Narayan Roy (hereinafter referred to as the Second Kumar), and alleging that the suit was barred by limitation. Issues were adjusted, and those now relevant are,

2. Is the suit barred by limitation?

4. Is the Second Kumar Ramendra Narayan Roy alive?

5. Is the present plaintiff the Second Kumar Ramendra Narayan Roy of Bhowal?

After a very long trial lasting for 608 days, the First Additional District Judge delivered an elaborate and careful judgment in favour of the plaintiff on the 24th August, 1936, and by his order of the same date he ordered and decreed " that it be declared that the plaintiff is the Kumar Ramendra Narayan Roy, the second son of the late Rajah Rajendra Narayan Roy, Zemindar of Bhowal, and that he be put in possession of an undivided one-third share in the properties in suit—the share now in the enjoyment of the first defendant (the present appellant)—jointly with the other defendants' possession over the rest." On an appeal by the present appellant, the appeal was heard by a Special Bench of the High Court, consisting of Costello, Biswas and Lodge JJ., and by decree dated the 25th November (Lodge J. dissenting) it was ordered and decreed " in

accordance with the opinion of the Majority of the Judges that the judgment and decree of the Court below be and the same are hereby affirmed and this appeal dismissed."

It will be convenient to restate the short account of the family history in the judgment of the trial Judge:—Rajah Rajendra Narayan Roy, the Zamindar of Bhowal, one of the largest landed proprietors of East Bengal, died on the 26th April, 1901. The title was personal, but the family was old, and though not entitled to fame, regarded as the premier Hindu Zamindar family of Dacca. The family-seat is at Jaidebpur, a village about 20 miles from Dacca, and situate in the Pargana of Bhowal, a large and fairly compact estate, spreading over the districts of Dacca and Mymensingh. The Rajah had a residence at Dacca, but he ordinarily lived in his family home, and was undoubtedly a local magnate of the highest position and influence. The rent-roll of the estate was Rs. 6,48,353 in 1931. It could not have been much less in the Rajah's time.

The Rajah died leaving him surviving, his widow, Rani Bilasmani, and three sons and three daughters. The sons were: Ranendra Narayan Roy, Ramendra Narayan Roy and Rabindra Narayan Roy. These, mentioned in order of seniority, were known as Bara Kumar, Mejo Kumar and Chhoto Kumar. The daughters were Indumayee, Jyotirmoyee, and Tarinmoyee. Indumayee was the eldest child, Jyotirmoyee the second, then had come the sons, and then the youngest child, Tarinmoyee Debi.

The Rajah had executed before his death a deed of trust and a will, and, though the exact terms of these are not known, their result, as agreed, was that the estate, upon his death, vested in the Rani, his widow, in trust for the three sons. She managed as trustee till her death which took place on the 21st January, 1907. Upon that event the three sons became the owners at law, as they had been in equity; and there is no question that the Second Kumar owned a third share in the estate, and would be owning it still, if he be alive, unless he has been prescribed against for the requisite period.

The three Kumars, after the death of their mother, as before, lived as an undivided Hindu family, joint in mess, property and worship. The eldest Kumar was married in 1901 to Sarajubala Debi, the second defendant in this suit. The Second Kumar was married in 1902 to Bibhabati Debi, the present appellant, and the third Kumar in 1904 to Ananda Kumari Debi, the fourth defendant in this suit. The family lived at Jaidebpur, and the three sisters, all married, lived as members of the family. Another member of the family was the grandmother, Rani Satyabhama, who had survived her son Rajah Rajendra. The Rajah had a sister, Kripamoyee, who survived him, and who was practically a member of the family, though she lived in a separate block with her husband. The first Kumar died in 1910; the Third Kumar died in 1913, and his widow, the fourth defendant, adopted in 1919 a son, Ram Narayan Roy, who is the third defendant. Indumayee and Kripamoyee died in 1920, and Satyabhama died in 1922.

A brief outline of the contentions of the parties is as follows:—there is no dispute that the Second Kumar and the appellant, with a large party went from Jaidebpur to Darjeeling in April, 1909, arriving at the latter place on the 20th April, and took up their residence at a house called "Step Aside," which had been rented for their stay; and, further, that at that time the Second Kumar had gummatous ulcers on or about both elbows and on his legs, being the tertiary stage of syphilis, which he had contracted at some date subsequent to 1905. It is also agreed that he was taken for dead on the 8th May, 1909. The appellant maintains that the Second Kumar died shortly before midnight and that the following morning his body was taken in a funeral procession and was cremated with the usual rites at the new sasan at Darjeeling. The plaintiff admits that there was a funeral procession and cremation on the morning of the 9th May, but maintains that the body so cremated was not that of the Second Kumar; his case is that the Second Kumar was taken for dead about dusk, between seven and eight o'clock, in the evening of the 8th May, that arrangements were at once made for cremation, that the body was taken in funeral procession to the old sasan, and placed in position for cremation, when a violent storm

of rain caused the party to take shelter, and that, on their return after the rain had abated, the body was no longer there; that thereafter another body was procured and taken to "Step Aside," and was the subject of the procession and cremation the following morning.

On the 10th May, the appellant, with the rest of the party, left Darjeeling for Jaidebpur, where she had her ordinary residence until April, 1911, when she left for Calcutta, to live there permanently with her mother and brother Satyendra in a rented house. She began to enjoy her widow's estate in the undivided one-third share of the Bhowal estate, which the Second Kumar had owned, and she recovered the proceeds, amounting to Rs. 30,000, of a life policy taken out by the Second Kumar, the necessary certificates of his death having been provided. Soon after her departure for Calcutta, the Court of Wards took charge of the appellant's share of the Bhowal estate, and an attempt by her to obtain its release having been unsuccessful, her share remained in charge of the Court of Wards up to the time of the decree in the present suit.

On the other hand, the plaintiff's case is that while the funeral party were sheltering from the storm, he was found to be still alive by four sanyasis (ascetics), who were nearby and had heard certain sounds from the sasan, and who released him and took him away, looked after him, and took him with them in their wanderings; that when he had recovered from an unconscious state, he had lost all memory of who he was, where he came from and of past events. He lived and garbed himself as a sanyasi would, smeared himself with ashes and grew long matted hair and a beard. Some eleven years later he recalled that he came from Dacca, but not who or what he was; that in December, 1920, or January, 1921, he reached Dacca, and took up a position on the Buckland Bund, a public walk on the margin of the river Buriganga, at Dacca, where people promenade, morning and evening, for pleasure or health. He could be found seated at the same spot, day and night, with a burning dhuni (ascetic's fire) before him. Then followed a period of gradual recognition or suspicion of him as the Second Kumar by certain people, which culminated in the removal of the ashes, and after greatly increased recognition of him as the Second Kumar by relatives and others, a declaration by him of his identity as the Second Kumar in the presence of many people on the 4th May, 1921, and that mainly on the insistence of his sister Jyotirmoyee, who accepted him as such and was one of his principal witnesses. It is unnecessary, for the present purpose, to say anything about the very large body of evidence, oral and documentary, as to recognition of the plaintiff as the Second Kumar, or as to his identity with the Second Kumar, mentally, culturally, or physically. It may be added that both the trial Judge and the Judges of the High Court had the advantage of a personal inspection of the plaintiff, which would not be available to this Board.

The appellant is at once faced with the concurrent judgments of two Courts on a pure question of fact, and the practice of this Board to decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from the practice. Their Lordships propose to review the decisions of the Board to ascertain the practice as it now stands, as there can be no doubt that the later decisions have somewhat modified the earlier form of the practice, and also in order to discuss the nature of the special circumstances which will justify a departure from the practice.

The earliest case to which reference may be made is *Mudhoo Soodun Sundial* v. *Suroop Chunder Sirkar Chowdry*, (1849) 4 Moore Ind. App. 431; Dr. Lushington, in delivering the judgment of the Board, said (at p. 433) "Both the Courts below have decided against the validity of the instrument; a fact which, considering the advantages the Judges in India generally possess, of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions, but does not, and ought not, to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case." A similar statement was made by Lord Kingsdown, who delivered the

judgment, in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo*, (1861) 9 Moore Ind. App. 66, at p. 87, and by Lord Cairns, in delivering the judgment in *Tareeny Churn Bonnerjee* v. *Maitland*, (1867) 11 Moore Ind. App. 317, at p. 338, in which he states that the Courts below were unanimous.

In November, 1886, in the judgment of the Board, consisting of Lord Fitzgerald, Lord Herschell and Sir Barnes Peacock, in *Allen* v. *Quebec Warehouse Company*, (1886) 12 App. Cas. 101, Lord Herschell, who delivered the judgment, said (at p. 104) " Their Lordships having arrived at the conclusion that there has been no error in point of law, the sole question that remains for determination has been whether the judgment of the Court below ought to be reversed on the ground that the judges have taken an erroneous view of the facts. Now, it has always been the view taken by this Committee, in advising Her Majesty, when the question for determination has been whether the concurrent judgment of the judges who have been unanimous below should be supported or reversed, that unless it be shewn with absolute clearness that some blunder or error is apparent in the way in which the learned judges below have dealt with the facts, this Committee would not advise Her Majesty that the judgment should be reversed. That principle has been laid down in many cases." After a reference to *Naragunty's* case and *Tareeny's* case, Lord Herschell proceeds, " Their Lordships entirely adhere to the views thus expressed, and therefore they do not consider that the question they have to determine is, what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong." In the cases so far cited, the Board examined the evidence, but a month later than the decision in *Allen's* case, a Board consisting of Lord Hobhouse, Sir Barnes Peacock and Sir Richard Couch, decided the case of *Thakur Harihar Buksh* v. *Thakur Uman Parshad*, (1886) 14 Ind. App. 7. Lord Hobhouse, in delivering the judgment, said " Therefore their Lordships have not considered it proper to go through the mass of oral evidence given in this case, because, if the Courts below concur in their conclusion upon such a matter as family custom, their Lordships are very reluctant to disturb the judgment of those Courts. If there had been any principle of evidence not properly applied; if there had been written documents referred to on which the appellant could shew that the Courts below had been led into error, their Lordships might re-examine the case; but in the absence of any such ground they decline to do so."

In 1894, in *Umrao Begam* v. *Irshad Husain*, (1894) 21 Ind. App. 163, Lord Hobhouse, who delivered the judgment, said (at p. 166) " This is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs. Their Lordships would be specially unwilling in such a case to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts. The counsel for the appellant frankly admitted that they laboured under this difficulty, and that they must find some ground of law or general principle for impugning the decree. To do this, they made some comments on the use made by the Courts below of Raza's oral statements; but these comments all resolved themselves into objections to the weight of evidence, and did not affect its admissibility." A similar opinion was expressed in *Kunwar Sanwal Singh* v. *Rani Satrupa Kunwar*, (1905) 33 Ind. App. 53, at p. 54. In *Rani Srimati* v. *Khajendra Narayan Singh*, (1904) 31 Ind. App. 127, at p. 131, Lord Lindley, in delivering the judgment, said, " The case is unquestionably one of great difficulty, but the appellants have failed to shew any miscarriage of justice, or the violation of any principle of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact."

That the practice equally applies where there is a dissent in the Appellate Court is made clear by two cases. In *Atta Kwamin* v. *Kobina Kufuor*, (1914) A.I.R., P.C., 261, Lord Kinnear, in delivering the judgment, said,

" Their Lordships have seen no sufficient reason for disturbing the judgment in this case. It raises some questions of considerable difficulty. But the difficulties are occasioned by the obscurity of the facts; and the learned judges below, from their familiarity with the customs and sentiment of the natives, have an advantage for dealing with the evidence which is wanting to this Committee. In such a case, it would not be consistent with an approved rule to reverse the concurrent judgments of two Courts, unless " it be shewn with absolute clearness ", to use the language of Lord Herschell, " that some blunder or error is apparent in the way in which the learned judges below have dealt with the facts." It is true that Lord Herschell's rule applies in terms to those cases only in which the judges have been unanimous; and one of the Judges of the Court of Appeal has dissented in the present case. But this ought not to detract from the weight which is due to the opinion of the majority on the matter of fact, since the dissent is not based on a different view of the evidence, which indeed the learned Judge has hardly considered, but upon grounds of law which their Lordships are unable to adopt ". And in *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury* (1921), 48 Ind. App. 114, Lord Dunedin, delivering the judgment (at p. 119) said, " These two learned judges form a majority of the appellate Court. That makes a concurrent finding, and it is not vitiated as such because, as here, the other judge in the appellate Court does not come to the same conclusion in fact though coming to the same result in law arising from another fact. Of course, to be concurrent findings binding on this Board, the fact or facts found must be such as are necessary for the foundation of the proposition in law to be subsequently applied to them." The concurrent finding there referred to by Lord Dunedin was that the existence of a marriage was disproved. Counsel for the appellant then argued that, assuming he could show a good acknowledgment of legitimacy, that conferred the status of legitimacy and made it irrelevant to enter into any enquiry as to the fact of marriage. On this Lord Dunedin says, " The case might be disposed of by holding, as the majority of the learned judges of the appellate Court did, that there was no proper acknowledgment of legitimacy. There is not, however, as to this a concurrent finding, for the learned trial judge thought otherwise, and it would be necessary to examine the evidence before coming to the above conclusion."

A very important statement as to this practice of the Board was made by Lord Dunedin, in delivering the judgment in *Robins* v. *National Trust Company* (1927), A.C. 515, at p. 517, " The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian legislation or Indian law, be it Hindu or Moslem, as such. Indeed, it is obvious that if such a rule is a good rule to be applied to the findings of the Courts in India, there could be no reason for suggesting that the findings of the Courts of our great self-governing Dominions should be entitled to less consideration. Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is this Board." Later, referring to the use of the phrase " miscarriage of justice " used in two earlier judgments of the Board, Lord Dunedin says, " There was a faint attempt made in the present case to argue that what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all important would amount to a miscarriage of justice. The expression means no such thing. It means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all. There is, however, also another way of preventing the application of the rule. If it can be shewn that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case there is no finding at all." Later (at p. 521), Lord Dunedin says, " Much was sought to be

made of the unfair way in which the appellant argued the trial judge had treated the evidence of a certain Dr. Shurly. Some of the criticisms he made do not particularly recommend themselves to their Lordships, but in the end he came to his result on a consideration of the whole evidence. That the Court of Appeal looked at the evidence in rather a different way matters not, for the rule is a rule as to concurrent findings, and not a rule as to concurrent reasons. Thus in *Ram Anugra Narain Singh* v. *Chowdry Hanuman Sahai* (1902), 30 Ind. App. 41, at 43, the judgment of the Board states: " The rule (as to concurrent findings) is none the less applicable because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence." The fact that the trial judge based his finding on the oral evidence, while the High Court based their similar finding on the documentary evidence does not take the case out of the rule as is settled by *Ram Anugra Singh's* case, just cited by Lord Dunedin, and *Bhagwan Singh* v. *Allahabad Bank* (1926), 53 Ind. App. 268.

At the request of their Lordships, Mr. Page, on behalf of the appellant, dealt with the cases in which the special circumstances were held to justify a departure from the practice of the Board, and which their Lordships will now consider. In *Guthrie* v. *Abool Mozuffer* (1871), 14 Moore Ind. App. 53, in which the High Court had merely stated that they saw no reason to differ from the finding of the Zillah Judge, and which related to an allegation of duress by the purchaser in obtaining a deed of sale, it was held by the Board that the findings of the Zillah Judge were incomplete, as there was no finding as to the payment of the consideration, that the inferences of the Zillah Judge from the facts before him could not be justified, and that his judgment treated the judgment of the Cazee as reversed, whereas it was confirmed on appeal. That case was very special, and can have no bearing on the present case. In *Hay* v. *Gordon* (1872), 18 Sutherland W. R. (Cal) 480, it was held by the Board that, under the provisions of the Statute of Limitations (Act XIV of 1859) there were not separate judgments, as the decision of the trial judge was not binding until confirmation by the High Court. This case is also of no assistance in the present case.

In *Venkateswara Iyan* v. *Shekhari Varma* (1881), 8 Ind. App. 143, at p. 150, Sir Arthur Hobhouse, who delivered the judgment, said, " It is true that upon this question there are concurrent decisions of the Courts below. But though the question may be called in its result one of fact, its decision turns upon the admissibility or value of many subordinate facts, and involves the construction of documents and other questions of law." Their Lordships are unable to hold, under the practice as now modified, that the question of the value of evidence, as apart from its admissibility, can constitute a reason for departure from the practice. In *Thakur Harihar Buksh* v. *Thakur Uman Parshad* (1886), 14 Ind. App. 7, Lord Hobhouse, whose judgment as to the alleged family custom has already been cited, proceeds (at p. 16) " Then the question comes back to the construction of the razinamah, and that is again divided into two branches. The Courts below have found that the razinamah ought to be construed to give an absolute interest, because it has been decided that it should be so construed, in fact that the matter is *res judicata*. Upon that point it is unnecessary for their Lordships to express any opinion; but they wish it to be understood that they do not express any agreement with the Court below on this point, and it must be taken that, not having heard the argument on the other side, their minds are completely open upon it. They rest their opinion upon the terms of the razinamah itself." Their Lordships then said that the razinamah did confer an absolute interest, and they agreed with the decision of the Courts below, though not for the same reasons. This was a question of law, which was essential to the decision.

In *Chitpal Singh* v. *Bhairon Bakhsh Singh* (1905), 28 All. 219, at p. 222, Lord Macnaghten, who delivered the judgment, said, " It was urged that the Court had drawn a wrong inference from documents before it, and that this error had led to a miscarriage of justice. After all, however, it turns out that the case is an ordinary case of the concurrence of two judgments on a mere question of fact, involving many considerations, on

some of which the two Courts are not agreed. But the mere fact that the two Courts do not agree on all the steps which lead to one and the same conclusion is no reason for disregarding the well known rule. The rule, however, is not an absolute rule; it presses upon the appellant with more or less weight, according to the circumstances of the case, and no doubt the fact that the Courts have differed on some important but subordinate questions is a matter to be taken into consideration in determing whether the evidence before the lower Courts should be reviewed in detail." Their Lordships are of opinion that, under the practice as subsequently modified, the latter part of that statement—as a general statement—is too wide. *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (1914), 41 Ind. App. 110, was a case of no evidence, and a decision that there is no evidence to support a finding is a decision of law. *Chaudri Satgur Prashad* v. *Kishore Lal* (1919), 46 Ind. App. 197, was a case of legal inference from documents and not of finding of fact. In *Tilakdhari Singh* v. *Kesho Prasad Singh,* A.I.R. (1925) P.C. 122, it was held that, though the concurrent findings proceeded upon the examination of titles and facts, the rule applied. Lord Shaw, who delivered the judgment, said, " There is no ground for the suggestion that the Judges of the Courts below failed in this duty or introduced illegitimate considerations into their view upon the titles and the facts. They having done that which was strictly their duty, their Lordships are of opinion that what remained was a question of fact." The appeal was dismissed upon the ground of incompetency, a ground which is not in accordance with the usual procedure of the Board, which simply dismisses the appeal.

In *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills Ltd., A.I.R.* (1929), P.C. 38, at p. 39, Lord Dunedin, who delivered the judgment, said, " The present appeal is brought by special leave. Their Lordships think it necessary to say that it must have been conveyed to their Lordships who granted the leave, that the case raised an important and general question. Speaking generally a patent case has to do with the construction and the infringement of one or more particular patents, and it cannot often be said that any general question is thereby raised. In such cases where there have been concurrent judgments of the Judge of first instance and the Court of Appeal, their Lordships would deprecate the idea that leave should be given to appeal to the King in Council." The practice in regard to patent cases, which is more fully explained in the ensuing part of the judgment, allows a departure from the practice, where the Trial Judge, being judge both of fact and law, has misdirected himself in law, and patent cases thus are subject to the general practice.

From this review of the decisions of the Board, their Lordships are of opinion that the following propositions may be derived as to the present practice of the Board and the nature of the special circumstances which will justify a departure from the practice:—

(1) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.

(2) That it applies to the concurrent findings of fact of two Courts, and not to concurrent findings of the judges who compose such Courts. Therefore a dissent by a member of the appellate Court does not obviate the practice.

(3) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.

(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7) That the Board will always be reluctant to depart from the practice in cases, which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the Courts of that country.

(8) That the practice relates to the findings of the Courts below, which are generally stated in the order of the Court, but may be stated as findings on the issues before the Court in the judgments, provided that they are directly related to the final decision of the Court.

In this appeal the concurrent finding of fact is as follows "it is declared that the plaintiff is the Kumar Ramendra Narayan Roy, the second son of the late Rajah Rajendra Narayan Roy, Zamindar of Bhowal." It was for the plaintiff to prove that he is the Second Kumar, and, in order to do so, he had to survive various tests, any one of which, if he failed to surmount it, would almost inevitably destroy his whole case. In these circumstances, in the opinion of their Lordships, the appellant was entitled to maintain, as regards any one of such tests, that there were such special reasons as would justify a departure from the practice of the Board. Perhaps the most striking of these tests was whether the Second Kumar in fact died at Darjeeling or survived. If he did die there, that fact would completely negative the plantiff's case. The seventh proposition above stated is applicable to the circumstances of the present case. With these preliminary observations, their Lordships will proceed to consider the contentions submitted by Mr. Page on behalf of the appellant. A number of these contentions related to subordinate matters of evidence, or that the Trial Judge had not sufficiently taken into account particular oral or documentary evidence, or that the Judges who formed the majority in the High Court had not formed their own conclusions on the evidence. These subordinate matters of evidence, even if they might be called important, do not afford any sufficient reason for departure in this case from the practice as above explained by their Lordships, and their Lordships are clearly of opinion that the criticisms of the Trial Judge and the Judges of the High Court are quite unjustified. Further, their Lordships are unable to find any defect in these judgments in considering the separate compartments into which the evidence conveniently falls, and carefully considering the inter-relation of such compartments and their reaction on each other. There remain three contentions with which their Lordships find it necessary to deal.

The first of these contentions relates to the admissibility of the evidence of four witnesses, conveniently referred to as the Maitra group, whom the learned Trial Judge accepted as unimpeachable witnesses, and whose evidence he accepted as virtually conclusive proof of the time of "death" as having taken place at dusk, between seven and eight o'clock. The time of death or apparent death at Darjeeling is crucial. If the death took place shortly before midnight, and not at dusk, that fact would be fatal to the plaintiff's case. The learned Judges of the majority in the High Court placed the same reliance on this evidence. The evidence of these four witnesses is described with sufficient accuracy by the Trial Judge as follows:—"The evidence of these gentlemen is that one day they were seated in the common room of the (Lewis Jubilee) Sanitarium before dinner—that would be about 8 p.m.—chatting, each does not recollect all the rest, but each recollects the day, and the fact they used to be in the common room before dinner. The recollect the day, not the date or anything, but the day when a certain thing happened. When they were so seated, and there were others too, a man came with the news that the Kumar of Bhowal was just dead, and he made a request for men to help

to carry the body for cremation. Principal Maitra has a distinct recollection of this request—the news broke in upon the talk they were having, and the thing has stuck in his memory." It should be added that the man who so came into the common room has not been identified, and is not a witness. It was, further, agreed that, according to the Hindu custom cremation would, when possible, follow immediately after the death.

Their Lordships are of opinion that the statement and request made by this man was a fact within the meaning of sections 3 and 59 of the Indian Evidence Act of 1872, and that it is proved by the direct evidence of witnesses who heard it, within the meaning of section 60; but it was not a relevant fact unless the learned Judge was entitled to make it a relevant fact by a presumption under the terms of section 114. As regards the statement that the Kumar had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumour, but, in the opinion of their Lordships, the learned Judge was entitled to hold, in relation to the fact of the request for help to carry the body for cremation, that it was likely that the request was authorised by those in charge at Step Aside, having regard to " the common course of natural events, human conduct and public and private business ", and therefore to presume the existence of such authority. Having made such presumption, the fact of such an authorised request thereby became a relevant fact, and the evidence of the Maitra group became admissible. Accordingly, this contention fails.

The remaining two contentions relate to the question of identity, the colour of the eyes and the indications of syphilis.

It is agreed that the eyes of the Second Kumar and the plaintiff are kata eyes, that is, of a shade lighter than the normal dark brown eyes of a Bengalee; it is also common ground that the eyes of the plaintiff are of a light brownish colour. The dispute is as to the colour of the eyes of the Second Kumar. Mr. Page's contention rested upon the view that the entry of their colour as " grey " in Dr. Caddy's report to the Insurance Company in 1905 in connection with the proposal of the Second Kumar for life insurance could only mean that they were grey as distinguished from brown, and that the report must be accepted as conclusive of the matter. But this contention must fail, for not only was there conflicting evidence on the point, having regard to the statement in the affidavit dated the 6th March, 1910, given to the insurance company by Kali Prasanna Vidyasagar, who had long been familiar with the Second Kumar, and therein stated that the latter's eyes were rather brownish, but the witness Girish Chandra Sen stated that Dr. Caddy had asked him to look for any identification marks, and that he told the doctor " grey eyes ", thereby meaning kata eyes. It follows that it was a question of value of evidence, and the learned Judge had before him evidence on which he was entitled to hold that the eyes of the Second Kumar were brownish, and therefore similar to the eyes of the plaintiff.

It is common ground that, when the Second Kumar went to Darjeeling he had gummatous ulcers on both arms about the elbows, and about both legs, representing the tertiary stage of syphilis, which he had contracted on some date subsequent to Dr. Caddy's examination of him in 1905. Further, it is not disputed that there was evidence on which the learned Judge was entitled to find that the plaintiff is " an old syphilitic individual ". It is enough to say that the plaintiff has one scar on the left arm and two on the right arm, in each case about the elbow; these clearly, on the evidence, are a small proportion of the number of ulcers from which the Second Kumar was suffering in 1909, but there was evidence on which the learned Judge was entitled to hold that these three scars were the remains of some of the Second Kumar's ulcers. There was no definite evidence as to the permanency, or otherwise, of scars left by gummatous ulcers. There does not seem to have been any evidence which would enable the learned Judge to identify any scars on the legs of the plaintiff as corresponding in position with the position of the Second Kumar's ulcers on his legs. Mr. Page sought to found on a passage in the evidence of the plaintiff's witness, Dr. K. K. Chatterji, in which he says, " If the ulcers of 1909, big ulcers on both arms and legs, are not treated or dressed

or washed, I would give three months to him. He would get septic and die. Even if he is washed with water, but not anti-septic, it will make no difference. If washed with anti-septics but no dressing or treatment, his chance of life would increase 5 per cent. roughly speaking. If washed, but not with anti-septic and covered up with cloth and not surgical dressing, the chance would be less." The plaintiff stated in his evidence that while with the Sanyasis, he had no treatment. But the doctor's evidence is a calculation of chances of recovery, which no doctor would maintain to be without exception, and it is not surprising that he later states that there is no normality in syphilis. The whole matter is one of the value of evidence, and this contention also fails.

Accordingly, their Lordships are of opinion that the appellant has failed to establish any valid ground for departure from the practice of the Board.

Finally, the appellant rests on article 144 and section 28 of the Indian Limitation Act of 1908. On the supposed death of the Second Kumar the appellant entered on her widow's estate in the undivided one-third share of the Bhowal estate, which belonged to her husband and she thereafter enjoyed it—after 1911, through the Court of Wards—for a period much exceeding the necessary twelve years, and the question is whether her possession was adverse to her husband, he being in fact alive. Possession must be adverse to a living person, and, as she was possessing under a mistake as to his death, it is difficult to see how she can claim that by her possession she was asserting a right adverse to one whom she regarded as dead. The position of a widow as regards limitation is stated in *Lajwanti* v. *Safa Chand* (1924), 51 Ind. App. 171, at p. 176, where Lord Dunedin, delivering the judgment, said, "It was then argued that the widows could only possess for themselves; that the last widow Devi would then acquire a personal title; and that the respondents and not the plaintiffs were the heirs of Devi. This is quite to misunderstand the nature of the widow's possession. The Hindu widow, as often pointed out, is not a life renter but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing as a widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as stridhan, but she makes them good to her husband's estate." Mr. Page, for the appellant, conceded that the appellant's possession could not be adverse to the reversioners, who would take as heirs of her husband, on the termination of her widow's estate. All that the appellant claimed to have prescribed was her interest in the estate as widow of the Second Kumar. It might well be argued that, according to the Hindu law, the wife is half of the husband, and that, on his death, she holds his estate as one-half of the husband, but their Lordships prefer to base their rejection of the appellant's contention on the broader ground that her possession was not adverse to a husband, whom she regarded as dead.

Their Lordships cannot part with this case without expressing their deep indebtedness to counsel for their valuable assistance in a case of such unusual magnitude and complication, and, in particular, their gratitude and admiration for the untiring skill and breadth of mind with which Mr. Page has conducted his case.

Their Lordships, accordingly, are of opinion that the appeal fails and should be dismissed, and that the decision of the High Court should be affirmed, and they will so advise His Majesty. In the very special circumstances of this case, there will be no order as to costs of the appeal.

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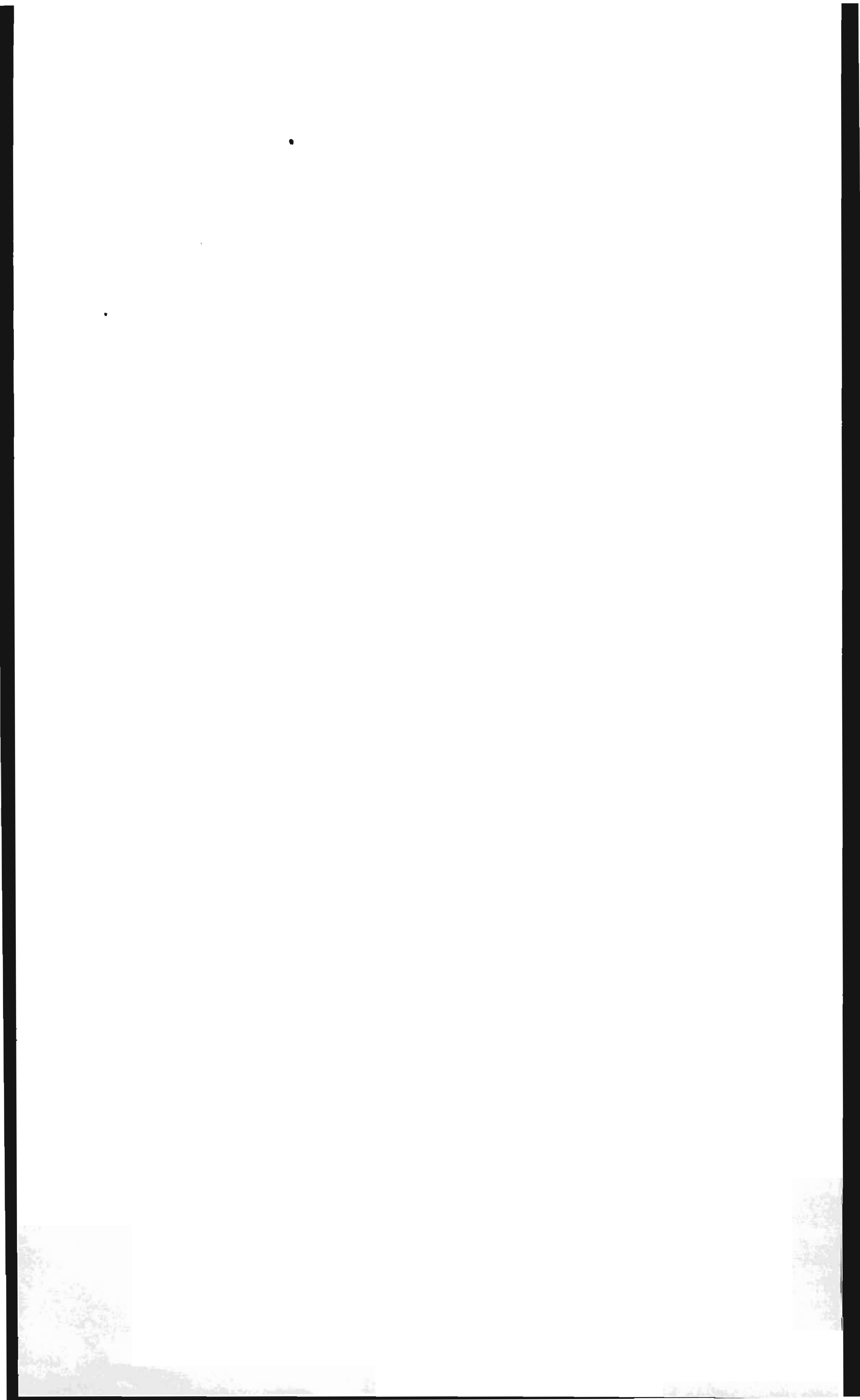

In the Privy Council

SRIMATI BIBHABATI DEVI

v.

KUMAR RAMENDRA NARAYAN ROY AND OTHERS

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