

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kalka Parshad and others v. Mathura Parshad and others, from the Court of the Judicial Commissioner of Oudh; delivered the 27th July 1908.*

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Present at the Hearing :

LORD ROBERTSON.

LORD ATKINSON.

LORD COLLINS.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

The suit out of which this Appeal arises was instituted by the Appellants, who are the three sons of one Sheo Sahai, deceased, claiming through their father as heirs of one Gur Sahai, deceased, to recover possession of the immoveable property in the plaint described, of which Gur Sahai died possessed about 40 years ago.

Gur Sahai was succeeded in the possession and enjoyment of the property by his widow, Musammat Parbati, who died on the 22nd March 1896. Sheo Sahai died on the 22nd September 1899.

The principal Defendant, the Respondent Mathura Pershad, is the nephew of Gur Sahai, his sister's son. He took possession of the property on the death of Musammat Parbati, still retains it, and succeeded in obtaining a mutation of names in his own favour.

Only two questions were discussed on the hearing of the Appeal, and it is only necessary for its decision that their Lordships should deal with these. They are :—

1. Is it open to the Plaintiffs, owing to what took place at the first hearing before the Court of the Judicial Commissioner, to attempt to establish that they are, according to Hindu Law, the heirs of Gur Sahai ?
2. If it be open to them to do so, is the evidence, legally and properly admissible, given before the Subordinate Judge, who tried the case in the first instance, sufficient to establish the fact of their alleged heirship ?

The course the proceedings took before the Court of the Judicial Commissioner is somewhat peculiar. The Plaintiffs had, at the hearing, examined several witnesses and given in evidence several pedigrees which, in the opinion of the Subordinate Judge, proved that Gur Sahai and Sheo Sahai were descended from one common ancestor, Partab Mal, son of Chajmal Das, were only seven degrees removed from that ancestor, and that the Plaintiffs were, through Sheo Sahai, heirs of Gur Sahai. Mathura Parshad filed a pedigree which showed that Gur Sahai was not descended from Partab Mal at all, but from another son of Chajmal Das, a younger brother of Partab Mal, named Shiam Das, that Gur Sahai stood in the 15th degree from the common ancestor, Chajmal Das, and Sheo Sahai in the 16th degree; and he contended that, under the Hindu law, heirships did not extend beyond the 14th degree, and that therefore he (Mathura Parshad), though only a sister's son, was to be preferred as heir to such remote relations.

No evidence whatever was given to prove the latter pedigree. Indeed it was abandoned by the Respondents on this Appeal. Yet the Court of the Judicial Commissioner, finding that it showed that five other persons stood in the same degree of relationship to Chajmal Das as did Sheo Sahai, held that the Hindu law permitted them, notwithstanding this, to succeed as heirs to Gur Sahai, and gave a decree for possession of one-fifth (not one-sixth as it should have been) of the land, the recovery of which was sought, as the share of Sheo Sahai therein.

Thereupon the Defendants Nos. 1 and 2 applied under section 623 of the Civil Procedure Code for a review of this judgment, setting forth amongst other things:—

1. That the Court had held that the pedigrees set up by the Plaintiffs were not proved, and that they were therefore not exclusively entitled to the property in suit.
2. That the question whether persons in the 16th degree could be preferred to Mathura Parshad, the nephew, was not allowed by the Court to be fully argued.

On this application the Court of the Judicial Commissioner decided that the Hindu law forbade, what they had previously decided it permitted, namely, the succession of a person sixteenth in descent from a common ancestor, on the ground that he could scarcely be said to be a relation at all, and that therefore the nephew Mathura Farshad should be considered as nearer heir to Gur Sahai than Sheo Sahai. They accordingly dismissed the Plaintiffs' suit with costs. It is to be observed, however, that the Court, in deciding on this application, made no reference to the first point which they had decided, viz., that the pedigree set up by the Plaintiffs was not proved.

In the first judgment of the Court they state that the finding of the Subordinate Judge that both Gur Sahai and Sheo Sahai were seventh in descent from Partab Mal, had been challenged by the Defendants' advocate, who contended that the Plaintiffs had failed to prove the pedigree on which they relied, and that all the documentary evidence on which the Lower Court based its finding was inadmissible. They then proceeded to devote four pages of their judgment to a minute and critical examination of the evidence, written and oral, adduced by the Plaintiffs, giving their reasons for holding that the documents were inadmissible, and the witnesses unworthy of belief, and they wind up this examination with the passage on which the Respondents rely as sufficient to shut out the Plaintiffs from attempting to sustain the decision of the Subordinate Judge. It runs as follows :—

“The oral evidence to prove the pedigree in the  
 “plaint is thus, in my opinion, of as little value as  
 “the documentary evidence on which the Plaintiffs  
 “relied, and at the hearing of the Appeal practically  
 “no attempt was made to support the finding of the  
 “Subordinate Judge. The only contention was that,  
 “accepting the pedigree filed by the Appellant,  
 “Mathura Parshad, the Plaintiffs are heirs of Gur  
 “Sahai, as according to it they are *Samanodakas* ;  
 “and therefore in the absence of other nearer heirs  
 “exclude the Defendant, who is the son of Gur  
 “Sahai's sister.”

It is inconceivable why the evidence given before the Subordinate Judge should be thus elaborately reviewed, if the Plaintiffs' advocate had formally admitted he could not support that Judge's finding. It is almost as strange that this advocate should confine himself to a contention based on a pedigree proved by nobody, and binding on nobody but the person who filed it, and which, at the best, could only secure to his clients one-sixth of what they sought to

recover. It is not less peculiar that the contention which is stated to have been the only contention put forward by the Plaintiffs, is the very contention which was conducted in such a fashion that a review was successfully applied for. Having regard to these several matters, it appears to their Lordships impossible to hold that the Plaintiffs are by the statement contained in this paragraph estopped from endeavouring to sustain, on this Appeal, the finding of the Subordinate Judge on this point. The second question, therefore, alone remains for decision.

The Plaintiffs gave in evidence at the trial three pedigrees, amongst others, namely (1) a pedigree purporting to have been written by one Maharaj Bahadur in 1872; (2) a pedigree purporting to have been filed by Sheo Sahai in 1892 or 1894 in a civil suit concerning lands other than and different from the lands sued for in this action, in which Sheo Sahai was Plaintiff and Kesho and others Defendants; (3) a pedigree filed in a suit brought for the recovery of the possession of certain lands in which Shankar Sahai (the son of the second Defendant) was Plaintiff, and Fazal Husain and others were Defendants. The Subordinate Judge, though he held—quite rightly, in their Lordships' opinion—that the controversy out of which this Appeal has arisen is but a stage in the dispute which arose on the death of Musammat Parbati in 1896, admitted each of these pedigrees in evidence, and the Plaintiffs relied strongly upon them. They are not ancient family records handed down from generation to generation and added to, as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them. Taking them

in the reverse order, the last is inadmissible, having been made *post litem motam*. The second is endorsed: "(Signed) Sheo Sahai, Plaintiff, by the pen of Sunder Lal, Special Agent," and is on the evidence of Sunder Lal clearly admissible as a declaration made by a deceased member of a family touching the family reputation or or tradition on the subject of its descent. It was held by the Court of the Judicial Commissioner not to be admissible on the same ground as the third pedigree because, in a statement made by Musammat Parbati in the absence of Sunder Lal, in a suit instituted by him against her in the year 1891 for cutting down trees in a certain grove in the village of Rampur Ansu, which he alleged was a halting-place, she had said:—"I have no kinship with him, nor am I on "visiting and dining terms with him as a "fellow-caste man. He has no concern with "my proprietary interest (*hakkiat*). . . . The "Plaintiff's [Sunder Lal's] father, and his co-"sharers have wasted their shares in the "*hakkiat*." But it is clear that the controversy to which this statement refers was not a controversy as to the heirship to Gur Sahai, but referred to an entirely different matter. In order to make the statement inadmissible on this ground, the same thing must be in controversy before and after the statement is made—*Freeman v. Phillips*, 4 M. & S. 486, 494, 497; *Shrewsbury Peerage*, 7 H.L.C. 1, 22; *Duke of Devonshire v. Neill* 2, Ir.L.R. 132. In their Lordships' opinion, having regard to the evidence of Sunder Lal and of the other witnesses examined for the Plaintiffs, this pedigree was clearly admissible.

The first pedigree purports to be signed by Maharaj Bahadur, a son of Sheo Narain, a deceased member of the Plaintiffs' family, who was however not examined as a witness. According to the evidence of Kalka Parshad,

it was in the handwriting of the former and was obtained by him from Sheo Narain in the years 1894-1896 (the precise date is not fixed) as a statement of the family descent, for the purpose of being given in evidence in certain criminal proceedings instituted under section 323 of the Indian Penal Code in the case of *In re Baiju and others v. Sundar Lal and Durga Parshad*. It was thus adopted by Sheo Narain, is not shown to have been made *post litem motam*, and is therefore, in their Lordships' opinion, admissible.

These pedigrees disclose that Gur Sahai and Sheo Sahai are descended from a common ancestor, Partab Mal, one of the sons of Chajmal Das, the first through his son Har Parshad, the second through his son Ram Ghulam, each being six degrees removed from Partab Mal. Six of the many witnesses examined on behalf of the Plaintiffs, members of the family, prove descent from this common ancestor. Three of these, namely, Kalka Parshad, Mohabbat Rai, and Sunder Lal, prove pedigrees, substantially identical with that signed by Sheo Sahai filed in 1892 or 1894, and others, such as Hazari Lal, prove important portions of it; while Lalta Parshad, one of the Defendants' witnesses, deposed as follows :—

“ Sheo Sahai also belongs to the family of Gur Sahai. I have heard that he is also remote by six degrees. In my opinion both [*i.e.*, Madho Ram and Sheo Sahai] are equally related, *i.e.*, in the same degree.”

And Sri Kishen, another witness for the Defendants, a priest of the family of Sita Ram deposed :—

“ Sheo Sahai and Sheo Narain descend from Ram Ghulam, Gur Sahai descends from Har Parshad ; Ram Ghulam, Har Parshad, and Shiam Das are sons of Partab Mal.”

This evidence precisely accords with the above-mentioned pedigrees numbered 1 and 2, proves, in fact, some of the most important steps in them, and is, therefore, the strongest corroboration of them.

Further corroboration of these pedigrees is to be found in the mode in which a certain Mohalla Sarai has been enjoyed. The family reputation is that this Sarai was founded by Sundar Das (one of the brothers of Partab Mal), who died childless. If the pedigrees of 1872 and 1894 be correct, then half, or an 8-annas share in this Sarai, should be found in the enjoyment of the descendants of Partab Mal, and the remaining 8-annas share in the enjoyment of the descendants of Shiam Das, the only brother of Partab Mal who had descendants. That, according to the evidence of Raghunath Parshad and Kalka Parshad, is precisely what is found. Two-annas shares were enjoyed by Sheo Sahai, Sheo Narain, and Gur Sahai respectively; a 2-annas share by Sheo Dyal and Ram Dyal (who died childless) jointly, and the remaining 8 annas by Sita Ram, Gur Parshad, Ram Narain, Shankar Sahai, and other descendants of Shiam Das. The Subordinate Judge points out that had Sheo Sahai and Sheo Narain been descended, as was contended for by the Defendants, from Shiam Das and not from Partab Mal, the whole 8-annas share of Partab Mal must, in the events which have happened, have come to Musammat Parbati. Sita Ram, one of the Defendants, gives in detail the distribution of an 8-annas share in the Sarai coming into the hands of his branch of the family, and states that the Sarai is joint property. No evidence is given to contradict that of Raghunath Parshad and Kalka Parshad as to the persons amongst whom the share of Partab Mal in the Sarai is distributed.



It was argued by Mr. Ross, on behalf of the Defendants, that the fair conclusion to be drawn from the evidence was that Maharaj Bahadur was either not born in 1872, or was then of such tender years that he could not have drawn up the first pedigree, as deposed to by Kalka Parshad. No doubt there is much force in this argument, but, even if it prevailed, there remains the second pedigree, that of 1892, corroborated as it has been in the manner pointed out.

Their Lordships think that it is impossible to put aside all this evidence, as was done by the Court of the Judicial Commissioner. They are, therefore, of opinion that the conclusion at which the Subordinate Judge arrived is that to which the evidence properly admissible, on the whole, most reasonably leads, and that the decision of the former tribunal was erroneous and that its Decrees should therefore be reversed with costs, and this Appeal allowed. They will humbly advise His Majesty accordingly. The Respondents must pay the costs of the Appeal.

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