Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Musammat Lal Kunwar v. *Chiranji Lal, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the 16th December*, 1909.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
LORD SHAW.
SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

This is an Appeal from a Judgment and Decree of the High Court of Judicature for the North-Western Provinces, Allahabad, dated the 23rd November, 1905, which reversed the Judgment and Decree of the Subordinate Judge of Aligarh, dated the 19th August, 1904, on a pure issue of fact.

That issue of fact is, whether one Brij Lal, deceased husband of Musammat Dhan Kunwar, now also deceased, adopted Chiranji Lal, the Plaintiff and Respondent, the son of one Ram Lal.

Tej Ram, the brother of Brij Lal, survived his brother Brij for about eight and a-half years, and died on the 21st June, 1898, leaving two

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widows him surviving, the senior of whom died on the 24th February, 1899, leaving her surviving Musammat Lal Kunwar, who is the Defendant in the suit and the Appellant in this Appeal.

The suit was instituted on the 22nd August, 1903, by the Plaintiff, *in formâ pauperis*, though his natural father is possessed of some means, against the Appellant, Musammat Lal Kunwar, and Musammat Dhan Kunwar, who died pending the Appeal, and the property in dispute is not inconsiderable.

The Plaintiff alleges that the brothers, Tej Ram and Brij Lal, were separated in ownership of this property, and, as the adopted son of Brij Lal, he claims to recover the whole of the property mentioned in the plaint, or in the alternative, if their ownership is joint, to recover one half of that property. Both Defendants contested the suit and pleaded, amongst other things, that the Plaintiff was not the adopted son of Brij Lal, and that the two brothers were members of a joint Hindu family.

Brij Lal, his brother Tej Ram, and Ram Lal, the father of the Plaintiff, are all Bohra Brahmins, which, it is alleged, merely means that they belong to the Bohra tribe, or brotherhood, whose members follow the business of money-lending,—an astute class, one would suppose, well accustomed to keep books and record events from which large pecuniary results might follow, and fully alive to the importance of preserving those records, and producing them when engaged in legal controversies in which they might be decisive.

These three Bohra Brahmins, with several other families of Bohra Brahmins, lived in the village of Jatari. The adoption is alleged to have taken place on the 18th April, 1889, some ten months before Brij Lal died. He was at that time undoubtedly childless, and much unsavoury

evidence was given as to the nature of the malady with which he was affected, and the reason why he despaired of having natural children. The Plaintiff was at that time between 4 or 5 years of age. He was married 5 years after his adoption, and must, at the time of the institution of the present suit, have been about 20 years of age. There were many important points on which he could have been examined, especially as to a certain extract from the Government Gazette of the North-Western Provinces, dated the 25th February, 1899, in which it is recorded that one Chiranji Lal, whose father's name is given as Ram Lal, and whose school was given as Muzaffarnagar Government High School, had passed in the third Division. The special significance of this entry is obvious from this that the first time the alleged adoption was put forward in any of the many suits and legal proceedings instituted by these several parties was on the 8th April, 1890, under circumstances to be hereafter mentioned. If that entry was framed on information supplied by the Plaintiff or his father, Ram Lal, it was most damning to his case, as he is in it described as the son of his natural father—not of his adoptive father. It was received in evidence without any evidence being given to identify the Chiranji Lal described in it as the Plaintiff; and, indeed, before their Lordships, it was urged by Counsel on his behalf that *non constat* but that the extract referred to a person other than the Plaintiff, but of the same name. The Plaintiff, however, was never produced as a witness to sustain his own case and so help to discharge the burden of proof that rested upon him. It is suggested that the presumption which would be drawn in this country to the detriment of a Plaintiff who, under similar circumstances, failed to enter the witness-box and face the ordeal

of cross-examination, ought not to be drawn in cases between natives tried in India, because of a species of advocacy tolerated by the Courts of Law in that country, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client in order that he himself may have the opportunity of cross-examining that client. The result is that, should the opponent refuse to be led into this trap, the parties (the principal witnesses, who possibly could throw light on all those tangled transactions which so perplex those who have to decide these cases) are never examined at all, and the litigation goes forward through tortuous windings to its unsatisfactory and uncertain end. This case is a good example of this practice, for not only was the Plaintiff not examined on his own behalf, but the Defendant, Musammat Dhan Kunwar, was not examined on her own behalf either. It is a vicious practice, unworthy of a high-toned or reputable system of advocacy. It must embarrass and perplex judicial investigation, and, it is to be feared too often enables fraud, falsehood or chicane to baffle justice. The circumstances under which Musammat Dhan Kunwar, who is a *pardanashin* woman and illiterate, was examined by the Subordinate Judge are instructive.

After the death of Brij Lal, on the 3rd February, 1890, his surviving brother, Tej Ram, applied to the Assistant Collector for a mutation of names for the village formerly enjoyed by Brij Lal, and also made an application to the District Judge of Aligarh for a certificate for the collection of debts on the ground that the property enjoyed by both was joint property. Musammat Dhan Kunwar resolved to oppose these applications, and on the 24th March, 1890, executed a power of attorney in favour of Ram Lal, authorizing him, amongst other things, to file an application for the

mutation of names in respect of "the ancestral property, the estate of my husband, in order to get my name entered in respect thereof"; and also to obtain from the District Judge a certificate in her favour for the collection of the debts due to her husband. There is no mention whatever of the Plaintiff or any right belonging to him, or any reference whatever to the alleged adoption in this lengthy document, but when the proceedings authorized by it are instituted, the petition of objection to the mutation of names purports to be presented by the widow of Brij Lal for herself, and as guardian of Chiranji Lal, her adopted son, of Mauza Jatari. The objection to the application for succession is similarly framed. In each the fact of adoption is stated, no date however being given. In addition to this, the widow Dhan Kunwar, on the 6th May, 1890, made a deposition in these proceedings in which she not only swore to the fact of the adoption, but described the ceremony at length. The question of adoption was an entirely irrelevant issue in both these proceedings. It was not, and could not have been, decided in either of them. It was foreign to the real questions in controversy. It was unnecessary and useless to raise it, unless indeed the real object was to make evidence in support of the adoption. From that point of view it might, though an unscrupulous, have been a sufficiently sagacious and effective step. Ram Lal in his deposition in the present case, dated the 21st July, 1904, swore that he acted as General Attorney for the widow for three or four years after his appointment; that he made the application of the 8th April, 1890, at the request of Dhan Kunwar; that it was at her instance that he mentioned the fact of the Plaintiff's adoption; and that she made the statement already referred to in his presence

before the Tahsildar. This evidence having been given, and the above-mentioned deposition of Dhan Kunwar having been received in evidence, the Subordinate Judge required the lady to be examined and took her evidence at the house of Babu Sheo Parshad. The part of the evidence dealing with the matter runs as follows :—

> I was examined before the Tahsildar of Khair. Ram Lal misled me and took me there. Tej Ram said to me that he would not have my name recorded. Then Ram Lal sent Sundar, *naim* (barber woman) to me, sending word to me that I should execute a power of attorney in his favour, and that then he would have my name recorded. Then he sent Musammat Sundar to me for the second time. He wanted me to state that I had adopted his son. I said that we had always been on inimical terms. I then went to the house of Ram Lal for the purpose of having my name recorded. Ram Lal took me to the tahsil Court. His wife also accompanied me.

And again :—

> I was never on friendly terms with Ram Lal. Chiranji, the Plaintiff, never came to my house. When I went to the tahsil I was accompanied by Chiranji Lal and his mother, and I stated what she said to me.

This lady was cross-examined by the Plaintiff's pleader, but not a question was put to her relative to the account books, which are referred to in her deposition of the 6th May, 1890, in these words :—

> No account books of Brij Lal are with me They must be in my sitting room. I have not gone to the sitting room since my husband's death. I am not literate. I lived in the house of Ram Lal for 6 or 7 days because my *jeth*, Tej Ram, quarrelled with me about this.

And no application appears to have been made to recall Ram Lal, or to examine the Plaintiff, then about 16 years of age, or his mother, if she were alive, to refute the serious charge thus made

against them, the charge, in effect, of entering into a conspiracy to procure the commission of perjury for the Plaintiff's gain. The history of the account-books is most remarkable. Ram Lal and many other witnesses describe in minute detail the recording of the fact of adoption, as well as of the receipts of presents in them. Ram Lal further stated at the trial that "the assets of Brij Lal, such as goods, papers and ornaments were with Musammat Dhan Kunwar," and that he employed a pleader for her in the mutation proceedings; but not a question was put to him as to why, at the time when he was managing the suit and putting forward the claim of his son for the first time, he did not search for, examine, or produce the books which, if there be a particle of truth in the whole story told by him and his witnesses, would have terminated the controversy then as now in his son's favour. Dhan Kunwar was not then hostile to his son's claim. On the contrary, it is alleged that it was at her request, and by her insistence, that it was put forward. Ram Lal is a hereditary money-lender like all his tribe. He must be well accustomed to keep books, and know the value of written documents. The pleader he then employed must, if the story now told had been detailed to him, have seen the capital importance of the production of these books. Yet he appears never to have asked Dhan Kunwar a single question concerning them. The admission above-mentioned of the lady that they were in her sitting room was extracted from her on cross-examination by the pleader for Tej Ram, her opponent, the man who is sworn by Ram Lal to have been present at the ceremony, and to have signed the entry in the book recording the adoption. No effort was shown to have been made by either side to procure the production

of these books; no search for them, or loss of them, was proved; no explanation given why they were not forthcoming.

Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book in which anything connected with this ceremony was entered, covers the Plaintiff's case with suspicion. It was according to the Plaintiff's witnesses a memorable event. Wealthy members of the Bohra brotherhood hurried from villages scores of miles away to grace the ceremony, as if this child of 5 years old, the youngest of three sons, were some young potentate coming into his kingdom. There was feasting and music, one witness stating, somewhat boastfully, that one might eat as often as one liked. According to Ram Lal himself, 125 members of the brotherhood and 100 or 150 others were collected together in this little village of Jatari; yet none of the inhabitants of the village were produced, on behalf of the Plaintiff. to prove that such a gathering ever took place, while, if the story of the numerous witnesses resident in the village and its vicinity, examined for the Defendants, be true, this host of people must like some invisible spirits of the night have assembled and dispersed unseen. The next matter which throws suspicion on the Plaintiff's case is this. On the 15th May, 1890, the Officiating District Judge of Aligarh had made an order granting a certificate of succession to Tej Ram, and refusing to decide the issue raised in that proceeding as to the adoption. On the 18th September, 1890, the Assistant Collector made, in the mutation proceedings, an order refusing to decide the same issue and ordered the name of Tej Ram to be entered in the village papers in the place of Brij

Lal. On the 19th September, 1891, an application was made to the Subordinate Judge of Aligarh, that Dhan Kunwar be appointed guardian of the Plaintiff in a suit brought by Ram Lal against Chiranji Lal and others, and an order was made that summonses for final disposal of it should be issued to the Defendants directing them to attend in person or by pleaders on the 23rd November, 1891, and also directing that they should put in a written statement by the 17th November, 1891. On the 29th September, ten days after, the summons was issued in the suit, then entitled Ram Lal, *Plaintiff* v. Musammat Dhan Kunwar, widow, and Chiranji Lal, minor, under the guardianship of his mother, Musammat Dhan Kunwar, residents of Jatari, *Defendants;* from which it appears that the suit was brought to recover a sum of Rs. 1,092-6-11, but in respect of what cause of action is not stated.

The further proceedings in the case are not printed in this record, but it would appear from an order dated the 15th October, 1898 (four months after Tej Ram's death), made by the Subordinate Judge of Aligarh in the original suit (158 of 1891) already mentioned, that a Decree for the sum sued for had been obtained against the Defendants, who are described as judgment debtors, Ram Lal being described as Decree holder; that some objection had been made by the judgment debtors; that it was such an objection, as in the opinion of the Judge should not be made by the judgment debtors, and gave rise to the suspicion that there was collusion between the objector and the judgment debtors. Who the objector was does not appear, but the same Subordinate Judge in his Judgment delivered on the 17th November, 1902, in a suit instituted by Dhan Kunwar against Lal

Kunwar, states that, after Tej Ram's death, Ram Lal obtained a Decree in this suit and applied to attach under it a certain door frame and door leaves of a house, alleging them to be the property of her son (the Plaintiff) in virtue of the alleged adoption. Dhan Kunwar was never asked a question about these proceedings when produced in the present trial. At the end of her cross-examination by the Plaintiff's pleader, the Plaintiff himself was invited by the Subordinate Judge to ask her any questions he might desire to ask, when he replied, "Sufficient questions have already been asked." The only account given of this litigation by Ram Lal himself is that he instituted the suit for profits due to himself, that he was a co-sharer in the property, and paid Rs. 3000 a year as revenue, but it is evident that, while Dhan Kunwar enjoyed the property of her late husband in virtue of her right as his widow, she ought to have paid the appropriate share of the revenue, and the Plaintiff incurred no personal responsibility for it. The introduction of his name was therefore quite unnecessary, and there is too much reason to suspect that the whole proceeding was simply an attempt to manufacture evidence.

Ram Lal, in his deposition made on the 7th September, 1899, stated that the Plaintiff was then being educated at Muzaffarnagar. Had the latter been produced as a witness and cross-examined on the contents of the Gazette of the 25th February, 1899, which was filed on behalf of Lal Kunwar in the litigation of 1899—and its existence thus well known to him—he might have possibly been able to explain who was his schoolfellow and namesake who had a father of the same name as his own.

And if he had been obliged to confess that the person mentioned in the Gazette was no

other than himself, it would have put an end to the suggestion that he passed amongst his friends, associates and neighbours as the adopted son of Brij Lal—heir to what was for him comparative affluence. Numbers of witnesses were produced on his behalf at the trial to prove that he was recognized amongst the brotherhood as the adopted son of Brij Lal, and several others were produced by the Defendant, to prove that he was not so recognized, but no evidence whatever was given to show that he was ever regarded in his own village, at Muttra, or where he lived and was at school, as the son of Brij Lal. In the 10 years which elapsed from 1889 till 1899, his name never appears in any document as the latter's adopted son, save only in the documents prepared under the supervision of his own father.

These are the broad facts of the case. At the hearing several depositions, made in previous suits, by witnesses examined in the present suit were admitted in evidence without the necessary foundation for their admission having been laid. The most vital points were not elucidated. The most suspicious circumstances were not probed. The most important and decisive documents were not produced. Much discussion was devoted before their Lordships, as well as in the Indian Courts, to petty discrepancies between the evidence of the different witnesses examined for the Plaintiff, for instance, as to which of three pundits alleged to have been present at the ceremony of adoption, presided, and which assisted; or as to whether the ceremony and the receipt of the presents were recorded in two books or only in one, and such like. In the High Court much comment was directed to the question of the relative credibility of a Bohra money-lender who had amassed many

tens of thousands of rupees in his business, and of a Bohra money-lender who in the same business had not been so fortunate, as if there were some fixed relation between the gains of usury and truth. Due weight, however, does not appear to have been given to the conduct of the Plaintiff; the improbability and inconsistency of the story told on his behalf; his absence from the witness chair; and the non-production of all books or documents. The conduct of the trial was, on the whole, eminently unsatisfactory. The Subordinate Judge decided, as a fact, on the evidence before him, that the Plaintiff had not been adopted. The High Court, on the same evidence, decided that he had been adopted. Their Lordships do not accept either of these conclusions. It appears to them that the sounder view lies between these two extremes. The burden of proving that the alleged adoption took place 20 years before the trial rested upon the Plaintiff. They are clearly of opinion that he has failed to discharge it.

Their Lordships will, therefore, humbly advise His Majesty that this Appeal should be allowed, the Decree of the High Court set aside with costs, and the Decree of the Subordinate Judge dismissing the action restored.

The Respondent will pay the costs of the Appeal.

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