

*Privy Council Appeal No. 29 of 1915.*

*Bengal Appeal No. 29 of 1912.*

**Mussummat Gunjeshwar Kunwar - - - Appellant,**

v

**Durga Prashad Singh and Others - - - Respondents,**

FROM

**THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY, 1917.

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*Present at the Hearing :*

LORD DUNEDIN.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR WALTER PHILLIMORE, BART.

[*Delivered by* SIR JOHN EDGE.]

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This is an appeal from a decree, dated the 7th May, 1912, of the High Court at Calcutta which reversed a decree, dated the 31st March, 1908, of the Officiating Subordinate Judge of Bankipur and dismissed the suit. The plaintiff who is the appellant here is a minor and is suing by her next friend. The defendants are Durga Prashad Singh, an uncle of the plaintiff, Mussummat Harbans Kunwar, her mother, and three assignees of the defendant Durga Prashad Singh.

The suit was brought on the 21st July, 1906, to obtain a declaration that a compromise which was entered into between Durga Prashad Singh, who is the first defendant in this suit, and Mussummat Harbans Kunwar, and a decree dated the 30th August, 1904, which was made in pursuance of that compromise, are not binding upon the plaintiff; a declaration that the plaintiff's father, Bishambhar Prashad Singh, was at the time of his death separate from his brother, the defendant, Durga Prashad Singh; a declaration that the defendant, Mussummat Harbans Kunwar, by reason of her conduct in entering into the said compromise, had ceased to be entitled to any rights in the

estate of her deceased husband, Bishambhar Prashad Singh, and that the plaintiff was entitled to the present possession of that estate; a declaration of the plaintiff's reversionary right in case she should not be held entitled to the possession of the property in dispute during her mother's lifetime; and for other relief. The Subordinate Judge gave the plaintiff a declaration that the compromise and the decree of the 30th August, 1904, which was made on the basis of that compromise, were not binding upon her and, on the ground that the plaintiff was not entitled to get possession of the property during the lifetime of her mother, dismissed the suit so far as the claims for possession and mesne profits were concerned. The High Court in Appeal by its decree dismissed the suit. From that decree of the High Court this appeal has been brought.

The plaintiff and the defendant Durga Prashad Singh are descended from Lal Behari Singh, who died on the 24th October, 1885, leaving him surviving two sons, then minors, Bishambhar Prashad Singh, the plaintiff's father, and the defendant, Durga Prashad Singh, his mother, Mussummat Gulab Kunwar, and his widow, Mussummat Mohun Kunwar. The family of Lal Behari Singh was a joint Hindu family, governed by the law of the Mitakshara. Bishambhar Prashad Singh died on the 2nd August, 1902, leaving surviving him only one child, the plaintiff, and Mussummat Harbans Kunwar, his widow. The compromise referred to was made in a suit which Durga Prashad Singh had brought on the 7th May, 1904, against Mussummat Harbans Kunwar, her daughter the plaintiff, then and still a minor, and other persons. In his plaint in that suit Durga Prashad Singh alleged that his brother Bishambhar Prashad Singh had been born blind and was excluded from inheritance to his father's estate by reason of his congenital blindness; that all the proceedings in a suit against Bishambhar Prashad Singh for partition which Durga Prashad Singh's father-in-law, Mahabir Prashad Singh, had, on the 25th January, 1900, brought, assuming to act as his guardian and next friend, were illegal; and that no partition had taken place.

If Bishambhar Prashad Singh was not disqualified from sharing in the family properties, he was entitled on separation to a moiety of the property of the joint Hindu family, and if in fact he did, in such circumstances, separate from his brother Durga Prashad Singh, Mussummat Harbans Kunwar was on his death entitled to a Hindu widow's interest in his moiety, and on her death the plaintiff would inherit to her father. By the compromise which is in question in this suit Mussummat Harbans Kunwar for herself and her daughter, the plaintiff, abandoned all claim to the property of Bishambhar Prashad Singh, admitted that Bishambhar Prashad Singh had been born blind, and was consequently excluded by Hindu law from all right of inheritance; that he and his brother Durga Prashad Singh had not separated; and that Durga Prashad Singh was entitled to the whole family property by survivorship. By the

compromise Durga Prashad Singh gave to Mussummat Harbans Kunwar six villages, representing about one-fourth of the family property for her life, with remainder to the plaintiff, and undertook to pay certain debts.

It has been admitted on both sides that Bishambhar Prashad Singh was in fact blind at the time of his death. The Subordinate Judge found that Bishambhar Prashad Singh was not born blind. He also found that Mussummat Harbans Kunwar, who is a Purda Nashin lady, was not given a sufficient opportunity of obtaining independent advice as to the terms of the compromise before entering into it. The High Court in the appeal did not expressly find that Bishambhar Prashad Singh had or had not been born blind, but came to the conclusion that Durga Prashad Singh had reasonable grounds for believing that there existed materials for a *bonâ fide* litigation and compromise, and that the question was not whether Durga Prashad Singh was right in his claim that Bishambhar Prashad Singh had been excluded from a right to share in the family property by reason of his having been born blind, but was whether Durga Prashad Singh honestly believed that Bishambhar Prashad Singh had been born blind.

The main questions upon the determination of which the decision of this appeal must, in their Lordships' opinion, depend are, firstly, is a man who is a member of a joint Hindu family, which is governed by the law of the Mitakshara, and who becomes permanently blind after he is born, excluded by Hindu law from sharing in the family property by reason of a permanent and incurable blindness which was not congenital; secondly, was Bishambhar Prashad Singh, who was the father of the plaintiff, born blind; and, thirdly, did Bishambhar Prashad Singh and his brother, the defendant, Durga Prashad Singh, separate and remain separate. The first of these questions is a question of law, the second and third are questions of fact.

It will be convenient to deal at once with the first question, that of law. In his written statement the defendant, Durga Prashad Singh, alleged that Lal Bahari Singh died—

“leaving him surviving two sons, namely, the plaintiff's father, Babu Bishambhar Prashad Singh, and this defendant, and Mohun Kunwar, widow, and Gulab Kunwar, mother; but the plaintiff's father never succeeded him, nor could he succeed him, according to law, as he was congenitally blind.”

The first ground of Durga Prashad Singh's memorandum of appeal to the High Court was:—

“1st. For that, upon the entire evidence on the record, the Court below ought to have held that Bishambhar Prashad Singh was congenitally blind, and he had no right to succeed to his paternal estate; the reasons assigned by the said Court for holding otherwise are erroneous and unsound.”

The 17th ground of that memorandum of appeal was as follows:—

For that even assuming, without admitting, that Bishambar

was not born blind, but became blind after birth, as alleged by the plaintiff, the Court below ought to have held that, according to the Mitakshara law of the Benares School, he was excluded from participation of a share, inasmuch as the blindness occurred before the alleged partition."

It does not appear that the 17th ground of that memorandum of appeal was relied upon in the High Court, but as the point has been raised and pressed before this Board in this appeal, their Lordships will now deal with it.

The question as to whether blindness which is not congenital excludes by Hindu law a member of a joint Hindu family from sharing in the family property does not appear to have been decided by this Board. The text of Manu on this subject, as translated, is as follows: "Eunuchs and outcasts, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage."

In 1874 the High Court at Calcutta, in *Mohesh Chunder Roy and others v. Chunder Mohun Roy and others* (14 Bengal Law Reports, 273), a case in which the law of the Daya Bagha applied, decided that the blindness which, under the Hindu law as recognised in Bengal, excludes an afflicted person from inheritance, refers to congenital blindness, and not to loss of sight which supervened after birth. In that case the High Court Judges had before them the text of Manu which is above quoted.

In 1876 the High Court at Bombay in *Murarji Gokuldas and others v. Parvatibai* (I.L.R., 1 Bomb., 177) decided that according to the Hindu law, as prevailing in the Bombay Presidency, blindness, to cause exclusion from inheritance, must be congenital. In the latter case, Sir Michael Westropp, C.J., in a learned and exhaustive judgment, after considering the texts and authoritative commentaries bearing on the subject, including the text of Manu and the Mitakshara, said that:—

"Upon the best consideration we [he and Sargent, J.] have been able to give to this question, we are of opinion that there is a considerable preponderance of authority in favour of the conclusion that blindness, to cause exclusion from inheritance, must be congenital."

The Sanskrit word in the Mitakshara on this subject has been translated as "a blind man." The description "a blind man," if that be the correct translation, is somewhat indefinite, and their Lordships consider that, if that be the correct translation, it is not to be assumed that the author of the Mitakshara could have intended by the use of an ambiguous description to extend the prohibition of Manu and to exclude from a share in the heritage persons who become blind after they were born.

As was observed by Jackson, J. in *Mohesh Chunder Roy v. Chunder Mohun Roy*, to which reference has been made above: "A rule of Hindu law, which is relied upon as preventing the natural course of inheritance, ought to be clear and

unnistakable." Rajkumar Sarvadhikari, in his "Hindu Law of Inheritance," p. 956. says:—

"Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu law, excludes a person from inheritance."

The above is, their Lordships hold, the true rule.

The oral evidence on the question as to whether Bishambhar Prashad Singh was born blind is very conflicting, but on the whole their Lordships would be prepared to find on the oral evidence, if it stood alone, that Bishambhar Prashad Singh's blindness was not congenital. There are, however, facts proved by records and other documentary evidence which can lead to no other conclusion than that Bishambhar Prashad Singh was not blind when he was born, and was treated by the family and by others as a person entitled to share in the family property.

Lal Bahari Singh, who was the father of Bishambhar Prashad Singh and Durga Prashad Singh, died on the 24th October, 1885, when they were minors, Bishambhar Prashad Singh being then about 9 years old and Durga Prashad Singh being then about 1½ years of age. On the 7th December, 1885, their grandmother, Mussunmat Gulab Kunwar, and their mother, Mussunmat Mohun Kunwar, presented a joint petition to the District Judge of Gaya in which they stated that Bishambhar Prashad Singh and Durga Prashad Singh, the minor sons of Lal Bahari Singh deceased, were "as heirs of their deceased father the owners in possession of all the properties, the approximate value of which is given below," and they prayed that a certificate of guardianship under Act XL of 1858 might be granted to them "for the protection of the person and the administration of the properties of the minors." On that petition the District Judge on the 12th February, 1886, appointed Gulab Kunwar and Mohun Kunwar to administer the estate of the minors during their minorities and they were appointed guardians. The names of the minors were entered in the land register as the names of owners, and Gulab Kunwar and Mohun Kunwar continued to manage the estate on behalf of and for the joint benefit of the minors until Mohun Kunwar died late in the year 1897.

After the death of Mohun Kunwar, Mussunmat Gulab Kunwar acted as sole guardian until Bishambhar Prashad Singh came of age.

On the 17th June, 1897, Bishambhar Prashad Singh presented a petition to the District Judge of Gaya, in which he stated that he had attained the age of majority, and was willing to look after his own business without the guardianship of Gulab Kunwar and Mohun Kunwar. Notice was thereupon given by the District Judge to the guardians to produce the certificate of guardianship, and to show what objection they

might have. On the 4th September, 1897, they filed their objection, and in it stated that they had no objection to Bishambhar Prashad Singh being declared major, and that they had given up the management in respect of his share and he was looking after his affairs; but they objected that the management of the affairs of Durga Prashad Singh should remain with them as he was still a minor, and they stated that they "have and can have no objection to whatever proceedings may be taken by the Court with regard to the share of Babu Bishambhar Prashad Singh." The District Judge declared Bishambhar Prashad Singh of age. On the 29th September, 1898, Bishambhar Prashad Singh presented a petition to the District Judge of Gaya, in which he stated :—

"1. That Mussumats Gulab Kunwar and Mohun Kuuwar were appointed guardians of your petitioner and his brother Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh, by an order of the Court, dated the 12th February, 1886.

"2. That Mussummat Mohun Kunwar died in Assin 1305 = 1897.

"3. That the two brothers are joint.

"4. That your petitioner attained his age of 21st year in March 1897, and that he was declared major by the order of this Court.

"5. That under the law no certificate of guardianship is necessary in a joint family, and the property or share of Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh not being defined, no guardian of his property should be appointed or retained, nor could the certificate of guardianship of the properties of the two brothers have any effect after the attainment of majority by any of them.

"6. That consequently now as your petitioner represents the whole estate of your petitioner and his brother, there is no necessity of retaining the said Mussummat Gulab Kunwar as the guardian of the minor Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh, nor can she under the law continue to be his guardian.

"Your petitioner therefore prays that under Section 39, Clause (1), Act VIII of 1890, your Honour will be graciously pleased to declare that the guardianship of Mussummat Gulab Kunwar has terminated, and cancel the certificate of guardianship dated the 12th February, 1886, aforesaid, or pass such other order and grant such relief as may to your Honour seem just and fit."

In reference to that petition the District Judge made the following orders :—

"2nd December, 1898. Return of service of notice on Mussummat Gulab Kunwar filed. House service made. Identifier not come. One week given."

"9th December, 1898. Affidavit of identifier filed."

"10th December, 1898. The grandmother is the sole surviving guardian, and she is said to be an old woman of about 80, and files no objection. They all live together, so there is no question of the personal benefit of the minor. The elder brother as karta of the family has the inherent right to guardianship, and the previous order of guardianship to the grandmother has become infructuous since he attained his majority. It will therefore be revoked."

After the order of guardianship had been revoked, Bishambhar Prashad Singh managed the family properties for himself and for his brother Durga Prashad Singh, and on their joint

behalf brought suits and obtained decrees. He gave way to bad habits, became extravagant and contracted debts. On the 25th January, 1900, Mahabir Prashad Singh, who was the father-in-law of Durga Prashad Singh, then a minor, as the next friend of Durga Prashad Singh, brought a suit for partition against Bishambhar Prashad Singh, in the Court of the Subordinate Judge of Gaya, and in the plaint stated—

“that according to the Mitakshara school of law, the plaintiff [Durga Prashad Singh] and the defendant [Bishambhar Prashad Singh] are the proprietors in equal shares of all the joint properties specified and detailed in Schedule No. 1 of this plaint.”

It was also alleged in this plaint—

“that the defendant [Bishambhar Prashad Singh] is blind from birth and is wholly incapable of managing the joint properties, and owing to his being blind and an extravagant man the properties are being wholly ruined.”

And it was further alleged in the plaint in that suit—

“that if the properties of the said joint family are allowed to remain in the hands of the defendant [Bishambhar Prashad Singh], he will ruin all the joint properties before your petitioner [Durga Prashad Singh] attains majority, and your petitioner will be put to difficulty and subjected to unnecessary expenses in seeking redress after his attaining majority. Hence the plaintiff [Durga Prashad Singh] has no other remedy than to get the properties partitioned. Therefore the plaintiff's necessity to bring this suit.”

Mahabir Prashad Singh has not been called as a witness in this suit, nor has his absence been satisfactorily accounted for. On behalf of Durga Prashad Singh it has been suggested that his father-in-law, Mahabir Prashad Singh, was acting in collusion with and in the interests of Bishambhar Prashad Singh—an insinuation which appears to their Lordships to be wholly groundless.

The statement in the plaint that Bishambhar Prashad Singh was blind from birth was irrelevant, and, further, it was inconsistent with the claim that the family property should be partitioned between the brothers.

There was and could have been no defence to that suit for partition. Durga Prashad Singh, on whose behalf the suit was brought, was entitled to have his share partitioned off. The suit was compromised and by consent and with the sanction of the Subordinate Judge as to the compromise a decree for partition was made.

In accordance with that decree for partition the immovable property was partitioned, and the shares of the brothers were divided by metes and bounds, the name of each brother was entered in the Land Register in respect of his separated share, and such of the movable property as was capable of being divided was divided between them, and complete separation between them was effected.

It has been said that Mussummat Gulab Kunwar and Mussummat Mohun Kunwar did not know that under the Hindu law a person who was born blind was thereby disentitled

to share in family property. It is inconceivable that ladies in their position could have been in ignorance of that well-known rule of the Hindu law, and if the evidence which was given on behalf of Durga Prashad in this suit was true those ladies had several male relations and friends who were aware that Bishambhar Prashad Singh was born blind and who must have known what the state of Hindu law was. It has also been said that the action of Gulab Kunwar and of Mohun Kunwar is explainable on the supposition that they did not wish to deprive Bishambhar Singh of a share in the family property. That is an explanation which their Lordships cannot accept.

If Bishambhar Prashad Singh had been in fact born blind his mother, Mohun Kunwar, and his grandmother, Gulab Kunwar, must have known from the time of his birth that he suffered from congenital blindness. It must have been a fact of which neither of them, nor the plaintiff nor any near relation of the family could have been in ignorance; but the first time when it was alleged that Bishambhar Prashad Singh had no right to share in the family property was when Mussummat Harbans Kunwar, after the death of Bishambhar Prashad Singh, applied to the District Judge of Patna for a certificate under Act VII of 1889.

To that application Mussummat Gulab Kunwar, on behalf of Durga Prashad Singh, on the 10th December, 1902, filed an objection, in which she stated—

“3. That the aforesaid Bishambhar Prashad Singh was born blind and died as such. 4. That the aforesaid Bishambhar Prashad Singh had no right to any properties which were ancestral to the family under law, and that the petition is therefore liable to be rejected.”

Their Lordships have without any doubt come to the conclusion that Bishambhar Prashad Singh was not born blind, and that Durga Prashad Singh could not possibly have been in ignorance or in doubt as to that fact, and had, when he induced Mussummat Harbans Kunwar to enter into the compromise on behalf of the plaintiff which is in question in this suit, no honest and *bonâ fide* belief in the claim which he was making. That compromise, and the decree which was made in pursuance of it, could not be allowed to affect in any way the right of the minor, and she was entitled to the declaration which the Subordinate Judge made in her favour. In order to avoid any possible misconception arising as to the meaning of the decree of the Subordinate Judge, the following words—“whose action in connection therewith may be construed as one done for the transfer of the property left by her husband”—must be omitted from that decree. With that omission the decree of the Subordinate Judge should be affirmed, and the decree of the High Court in the respondents' appeal should be set aside with costs. As regards the appellant's appeal to the High Court with reference to the question of possession, the appeal against the High Court's decree was not argued before their Lordships, and under these circumstances the decree of the High Court will

stand. The respondents Durga Prashad Singh, Ritu Singh, Lachmi Narayan Rajput and Tori Mahton must pay the costs of the appeal to His Majesty in Council and of their appeal to the High Court. Upon the appellant's cross-appeal to the High Court, the High Court made no order as regards the costs, and this decree stands.

Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council.

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MUSSUMMAT GUNJESHWAR KUNWAR

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