

Sri Sri Sri Nandamani Ananga Bhima Deo Kesari Gajapathi - *Appellant*

v.

Sri Suseela Mala Patta Mahadevi - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 1ST NOVEMBER, 1932.

Present at the Hearing :

LORD BLANESBURGH.

LORD ATKIN.

LORD RUSSELL OF KILLOWEN.

SIR JOHN WALLIS.

SIR DINSHAH MULLA.

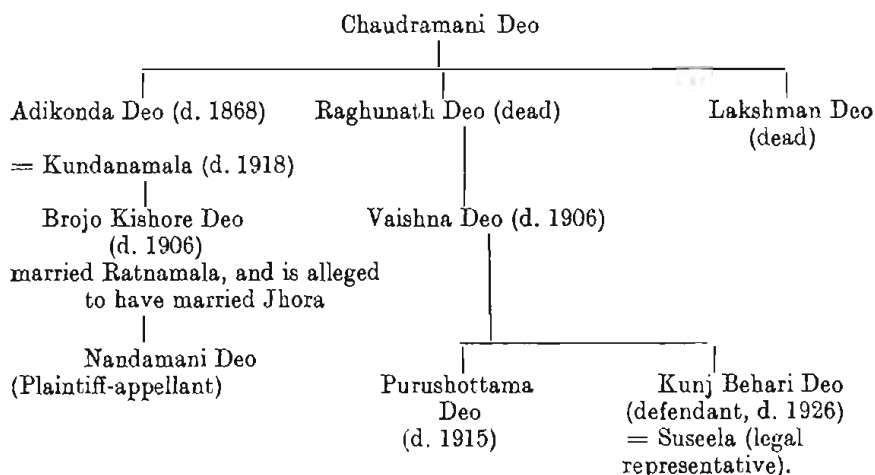
[*Delivered by* SIR DINSHAH MULLA.]

This is an appeal from the decree of the High Court of Judicature at Madras dated the 30th March, 1928, which reversed a decree of the Court of the Additional Subordinate Judge of Berhampore dated the 20th December, 1922.

The suit out of which the present appeal arises was instituted by Nandamani Ananga Bhima Deo, the appellant, to recover from the respondent the zemindari of Chinnakimedi situated in the Ganjam District. The plaintiff claimed to be the son of Brojo Kishore Deo, who was at one time a zemindar of Chinnakimedi, by his wife Jhora. The defendant denied that Jhora was married to Brojo Kishore Deo, or that the plaintiff was the son of Brojo Kishore Deo. The trial judge decided for the plaintiff. On appeal, the High Court at Madras differed from the trial judge, and dismissed the suit. From that decree of the High Court the present appeal has been brought to His Majesty in Council. The sole question on the appeal is whether it has been established that a valid marriage took place between Brojo Kishore Deo and Jhora.

The zemindari of Chinnakimedi is an ancient impartible estate, and it descends by the rule of primogeniture to a single heir. The residence of the zemindars is Pudamari where they have their fort and palace. There is another zemindari adjoining it known as Peddakimedi. Both the zemindaries were held at one time by the same person until 1776 when one of the sons of the then zemindar took possession of Peddakimedi and another of Chinnakimedi, and the two estates have since then been held and enjoyed separately.

In 1868, the holder of the Chinnakimedi zemindar was Adikonda Deo, who was a member of a joint Hindu family subject to the Mitakshara law. The following pedigree shows the relationship of the parties to the present litigation :—



Before his death in 1868, Adikonda Deo gave to his widow, Kundanamala, a written authority to adopt a son to him. On the death of Adikonda, his brother, Raghunatha Deo, took possession of the zemindari. In 1870, Kundanamala, acting on the authority, adopted Brojo Kishore Deo as a son to her husband. Brojo Kishore Deo was one of the two sons of Lakshimanarayana Deo, who was then the zemindar of Peddakimedi. The other son was Krupamaya Deo, who succeeded to the zemindari of Peddakimedi on the death of Lakshimanarayana Deo. Shortly after his adoption, Brojo Kishore Deo instituted a suit to recover the zemindari of Chinnakimedi from Raghunatha Deo, and the suit was decided in his favour upon the advice of the Board in 1876. Brojo Kishore Deo was then a minor, and the estate was managed by the Court of Wards. The Court of Wards appointed a guardian of his person, and he was sent for his education to the Raja Kumar Institute at Parlakimedi. Brojo Kishore Deo completed the age of 21 years in June, 1890, and the estate was handed over to him by the Court of Wards in that month. It is the plaintiff's case that Brojo Kishore Deo was married to Jhora in 1888 in the palace at Pudamari, that Jhora lived after the marriage in the palace, and that Brojo Kishore Deo had four children by her, all of whom were born in the palace. Of these four children the eldest was a daughter born in 1889 or 1890, and the youngest was the plaintiff who was born on the 4th

September, 1901. Two other sons, who were both born before the plaintiff, died in infancy.

On the 9th May, 1890, Brojo Kishore Deo married Ratnamala, who is still alive, and she was admittedly the Patta Mahadevi, that is, the senior Ranee or queen. Kundanamala was her aunt, and she brought about the marriage. This marriage took place at Dharmapuri. Brojo Kishore Deo had no children by Ratnamala.

It would appear from the books of account of the estate kept by the Court of Wards that about Rs. 15,000 was spent on the occasion of the marriage of Ratnamala. There is no entry in those books to show that any money was spent by the Court of Wards on any marriage with Jhora.

Ratnamala resided in a spacious building attached to the palace and communicating with it. Jhora resided in a building equally spacious adjoining that of Ratnamala, and also communicating with the palace.

Shortly after Brojo Kishore Deo obtained possession of the estate, he granted a village called Chodameri as jaghir to Jhora. In 1893, he made a similar grant to her of another village called Narasingagodo. On the 5th July, 1894, he executed a *kocheri potro*, whereby he confirmed the grant of Chodameri, and substituted Gongapur for Narasingagodo at the request of Jhora. By this time he had also granted three villages as jaghir to Ratnamala. The income of the two villages granted to Jhora was about the same as that of the three villages granted to Ratnamala.

The first birthday anniversary of the plaintiff fell on the 4th September, 1902. On that day Brojo Kishore Deo held a festival on a large scale which was attended by *sonthos* (saints), mahants, pandas, pandits, pleaders and many others. Brahmans were fed, prayers were said in temples, and offerings of food were made in all the temples in the zemindari. At the close of the ceremony, Brojo Kishore Deo took the plaintiff to the temple attached to the palace. A report of the festival appeared in a Ganjam newspaper called Prajabonbhu. As to this festival, Madanamohana Singh Deo, the zemindar of Dharakote, and a witness for the defendant, said: "I cannot give any instance where a concubine's son's *varsha vrithi* (birthday anniversary) was performed on a noticeable scale. The *varsha vrithi* of a legitimate son of a zemindar is performed on a grand scale."

On the 23rd July, 1906, Brojo Kishore Deo purchased a village for Rs. 53,000 in the name of the plaintiff.

On the 14th August, 1906, Brojo Kishore Deo is alleged to have executed a document authorising Ratnamala to adopt a son to him. In that document it was stated that Brojo Kishore Deo had not until then been blessed with a son. On the 31st August, 1906, Brojo Kishore Deo executed another document called *dattata will-namah*, which will be adverted to later.

Brojo Kishore Deo died on the 3rd September, 1906, leaving him surviving Ratnamala, Jhora, his son the plaintiff, and

his daughter. The plaintiff was then of the age of about five years.

It was not disputed that Brojo Kishore Deo and Jhora lived together in the palace at Pudamari from 1890 to 1906 when Brojo Kishore Deo died, and that the first birthday anniversary of the plaintiff was celebrated on a scale quite unusual in the case of an illegitimate son. Nor was it disputed that Brojo Kishore Deo treated Jhora as his wife and the plaintiff as his son. The only question is whether Brojo Kishore Deo and Jhora lived together all these years on the footing of marriage or of concubinage.

On the 7th September, 1906, Vaishna Deo made an application to the Collector of Ganjam to have his name registered as zemindar. In the application he stated that Brojo Kishore Deo had left no legitimate male issue, that he had left only an illegitimate son, and that he as his undivided cousin was entitled to succeed to the estate.

Vaishna Deo died within a fortnight after his application, and on his death his son Purushottama Deo applied to the Collector to have his name entered as proprietor of the zemindari. At this stage Ratnamala appeared on the scene, and on the 5th December, 1906, she presented the authority to adopt alleged to have been given to her by Brojo Kishore Deo for registration under the Indian Registration Act. This was followed by an agreement on the 27th January, 1907, between Purushottama Deo and Ratnamala, whereby in consideration of Purushottama Deo granting two villages to Ratnamala she agreed not to adopt a son without his consent. On the same day, another document was executed between Purushottama Deo and Krupamaya Deo, the natural brother of Brojo Kishore Deo, who had then succeeded to the zemindari of Peddakimedi. By that document Purushottama Deo agreed to pay Rs. 70,000 to Krupamaya Deo for bringing about the above settlement between him and Ratnamala, and Krupamaya Deo on his part agreed not to give any of his sons in adoption to Ratnamala. On the 30th January, 1907, Ratnamala withdrew the authority to adopt from the office of the Sub-Registrar. On the 2nd April, 1907, the name of Purushottama Deo was entered by the Collector of Ganjam as proprietor of the estate.

Meantime, in December, 1907, Kundanamala, the widow of Adikonda Deo, purported to make a second adoption to her husband under the terms of the authority under which she had adopted Brojo Kishore Deo, by adopting a boy, Madana Mohana. The latter subsequently brought a suit against Purushottama Deo to recover the zemindari, but the suit was dismissed on the ground that the power to adopt had come to an end. This decision was eventually confirmed upon the advice of the Board in 1918. In the plaint in that suit it was stated that Brojo Kishore Deo had died without leaving any legitimate issue.

Purushottama Deo died on the 24th October, 1915, while the suit against him was pending, and he was succeeded in the possession of the zemindari by his brother Kunja Behari Deo, the defendant in the present litigation.

On the 5th November, 1915, Ratnamala adopted Jaganatha Bheema Deo, a son of Krupamaya Deo, purporting to do so under the terms of the authority of the 14th August, 1906. In so doing both Ratnamala and Krupamaya Deo were acting in contravention of the terms of the agreement with Purushottama Deo mentioned above. In 1916, the adopted son brought a suit against the present defendant to recover possession of the estate. The suit was dismissed on the ground that the document giving authority was not registered as required by law, and the decision was upheld upon the advice of the Board in 1921.

Meanwhile, the plaintiff-appellant attained majority on the 4th September, 1919, and to raise funds for the prosecution of the present suit he sold the lands that had been purchased in his name by Brojo Kishore Deo. On the 23rd August, 1920, he brought this suit for the recovery from Kunja Behari Deo of the Chinnakimedi zemindari. By his plaint he alleged that Brojo Kishore Deo had two wives, Ratnamala who was the Patta Mahadevi, and Jhora who was the junior wife, and that he was the son of Brojo Kishore Deo by Jhora. He also claimed that Brojo Kishore Deo had, by the *dattata will-namah* mentioned above, recognised him as his successor to the estate.

The defence was that the plaintiff's mother was not the wife, but a "Jhora," that is, a concubine, of Brojo Kishore Deo; that Brojo Kishore Deo was a Kshatriya and the plaintiff's mother was a low caste woman, and that a valid marriage between them was impossible; and that even if Brojo Kishore Deo and the plaintiff's mother had gone through a form of marriage, the marriage was not valid as the requisite ceremonies had not been performed. The paternity and age of the appellant were not admitted, and the genuineness of the *dattata will-namah* was denied.

A large mass of evidence, both oral and documentary, was adduced by both the sides before the Subordinate Judge. The plaintiff's mother died in 1922 before she could be examined as a witness. Ratnamala is still alive, but she was not called as a witness by either side. It is a striking circumstance that though the plaintiff appeared in the witness-box, the defendant, who was much older than the plaintiff, and who must have known a great deal of the relation between Brojo Kishore Deo and the plaintiff's mother, did not go into the witness-box. The defendant died in 1926 during the pendency of the appeal in the High Court, and his widow, Suseela Mala, was brought on record as his legal representative.

The plaintiff called evidence to show that his mother was the daughter of Chintamani Singh, a Kshatriya resident of Damanabhumi, and the sister of Kasinath Singh, who was admittedly a Kshatriya, and that her name was Jhora, and not Moti as alleged by the defendant. The principal witnesses who deposed to these facts were Artabandhu Singh, her paternal uncle, Kasinath Singh, her brother, and Raja Kumar Pratapchandra, a distant relation of hers. The Subordinate Judge, it would appear, was considerably impressed with the evidence of Raja Kumar Pratapchandra, and of him he recorded the following opinion :—“ I must say that there are no grounds for disbelieving this witness, an old gentleman and a retired deputy collector of the family of old Ghumsur zemindars of this district.” These witnesses also deposed to the negotiations for marriage. Evidence was also led to show that Kundanamala approved of the match ; that the usual Pattamuddi ceremony, a ceremony which precedes marriage, was performed at Damanabhumi ; and that after a few days she was taken to Pudamari where the marriage with Brojo Kishore Deo was celebrated. It was not disputed that the ceremonies deposed to by the witnesses who spoke to the marriage were ceremonies that are usually performed at an ordinary marriage in the Brahma form.

The evidence on the part of the defendant was directed to show that the plaintiff's mother was not the daughter of Chintamani Singh, nor the sister of Kasinath Singh, but that she belonged to the barber caste and came from Pabamanabhapur. Several witnesses were also examined who deposed that she was a servant girl in the employ of a concubine of the plaintiff's natural father at Peddakimedi, and that it was at that place that Brojo Kishore Deo first met her and became intimate with her. These witnesses also deposed that the eldest daughter of Brojo Kishore Deo was born, not at Pudamari, but at Peddakimedi, and that Brojo Kishore Deo did not take the plaintiff's mother to Pudamari until after his marriage with Ratnamala. They also stated that the name of the plaintiff's mother was not Jhora, but Moti ; that Jhora was a title conferred by a zemindar upon a favoured concubine ; and that Brojo Kishore Deo conferred that title upon the plaintiff's mother two or three years after she remained at Pudamari, and that it was since then that she came to be called Jhora.

The Subordinate Judge found that the plaintiff's mother was the daughter of Chintamani Singh and the sister of Kasinath Singh, that she was a Kshatriya by caste, and that Jhora, and not Moti, was her personal name. He also found that she was lawfully married to Brojo Kishore Deo, and that the plaintiff was the offspring of that marriage. As to the *dattata* will-*namah* he held that it was genuine. In the result he passed a decree in favour of the plaintiff.

On appeal, the High Court reversed the decree of the Subordinate Judge, and dismissed the plaintiff's suit. The appeal was

heard by Kumaraswami Sastri and Reilly, JJ., who delivered separate but concurring judgments. The learned judges examined the evidence of Kasinath Singh, Artabandhu Singh and Raja Kumar Pratapchandra, and concurred in the findings of the Subordinate Judge as to the name, parentage and caste of the plaintiff's mother, and as to the place from which she came. But strange to say, while the learned judges accepted the evidence of these witnesses on this, which was an essential part of the plaintiff's case, they rejected their evidence as to the treaty for marriage. Kumaraswami Sastri J. considered that it was improbable that there were any negotiations for the marriage. Reilly J., on the other hand, was of opinion that there were some negotiations, but that they were negotiations not for a marriage but for giving the plaintiff's mother in concubinage to Brojo Kishore Deo. As to this their Lordships may at once say that there is nothing in the facts of the case to suggest such a view, and that it is so highly improbable that it cannot be accepted. The learned judges also discredited the testimony of witnesses of marriage. This they did, not on the ground of any inherent defects in their evidence, but on the supposed improbabilities of the case. In the result they held that the alleged marriage was not proved.

The first question for their Lordships' consideration is, whether there are any facts to justify the rejection of the testimony of the witnesses who deposed to the treaty for marriage and the marriage ceremony. The learned judges considered that there were three such facts.

Of these facts the first was that neither the natural father of Brojo Kishore Deo nor any of his relations were consulted by Kundanamala in the matter of the selection of the bride and that none of them was present at the marriage. As to this it is sufficient to say that it was admitted by the defendant's own witnesses, Satyababi Byano and Mohana Ghandayat, that none of them was consulted in the matter of the selection even of Ratnamala, and that none of them attended the marriage of Brojo Kishore Deo with her.

Another circumstance which weighed with the High Court was that Kundanamala was not present at the alleged marriage with Jhora. This was admitted by the witnesses for the plaintiff, but they offered an explanation which was accepted by the Subordinate Judge. They said that after the arrangements for the marriage had been completed at Pudamari, Kundanamala changed her mind, and insisted on the marriage being celebrated at Molabhonja; that Brojo Kishore Deo would not agree to it, and Kundanamala was annoyed and left Pudamari. The learned judges of the High Court considered that this was an improbable story. Their Lordships, however, see no reason to differ from the trial judge.

Lastly, the learned judges thought that the Court of Wards was not cognisant of the marriage, and considered that a very

significant circumstance. They said that if the Court of Wards had been aware of Brojo Kishore Deo's marriage with Jhora, it would not have sanctioned a second marriage with Ratnamala while he was still a minor, nor would it have sanctioned the expenditure of such a large sum of money as Rs. 15,000 on the occasion of such a marriage.

Their Lordships are unable to accede to this view. The powers of the Court of Wards in Madras are regulated by Act I of 1902. Under section 23 of the Act, "the Court may make such orders and arrangements, as to it may seem fit, in respect of the marriage—(a) of any ward whose person is for the time being under its superintendence." Section 34, clause (a), prohibits a ward from transferring any property which is under the superintendence of the Court, and from entering into any contract involving him in pecuniary liability either personally or in respect of such property. "But," the section goes on to say, "nothing in this clause or section 23 shall be deemed to affect the capacity of a ward to enter into a contract of marriage; provided that he shall not incur in connection therewith any pecuniary liability except such as, having regard to the personal law to which he is subject, and to his rank and circumstances, the Court may, in writing, declare to be reasonable." Brojo Kishore Deo married Ratnamala in May, 1890. He completed the age of twenty-one years in June following, when the estate was handed over to him. He was quite competent under the Hindu law to contract a marriage, and the Court of Wards had no power to prevent it. No doubt, the Court of Wards had power, under section 23 of the Act, to refuse to sanction the expenditure, but had it refused to do so, the marriage would have been postponed for two or three months at the most until Brojo Kishore Deo got possession of the estate, while the benefit to the estate would have been no more than the interest on Rs. 15,000 for that period. It is most unlikely, in the circumstances, that the Court of Wards would have withheld payment of Rs. 15,000 even if it had known that Brojo Kishore Deo was already married.

Their Lordships are, therefore, of opinion that there is nothing in any of the circumstances mentioned above that could justify the rejection of the evidence of the witnesses either as to the negotiations for marriage or the marriage itself.

Their Lordships will now turn to another part of the case. It raises the question as to the signification of the terms "Jhora," "Phool Mahadevi," and "Mahadevi," used in describing the plaintiff's mother in the documents marked X, II to VI, A, B, W, and XV. As to this, the defendant's case was that "Jhora," besides being a proper name, signifies among the Oriyah zemindars the favoured concubine of a zemindar; that "Phool Mahadevi" is another word for "Jhora" in the sense of a concubine; that it was in that sense that those terms were used in the documents; and that, therefore, the plaintiff's mother was the concubine, and not the wife of Brojo Kishore Deo. On the other

hand, the plaintiff insisted that neither "Jhora" nor "Phool Mahadevi" signifies a concubine, and that both these terms are synonyms for "Sanna Mahadevi," that is, a junior wife.

The term "Mahadevi" does not present any difficulty. It is clear from the evidence of the defendant's own witnesses, the Manager of the Court of Wards and the Zemindar of Dharakote, that "Mahadevi" signifies a married woman, and that it cannot be used in conjunction with "Jhora" in the sense of a concubine.

The expression "Phool Mahadevi" does not appear in any Oriyah dictionary. The zemindar of Dharakote stated that he had never heard that word. The Manager of the Court of Wards said that he had heard it only once. The rest of the defendant's evidence in this connection is not reliable. In fact, the defendant himself in one of the grounds of appeal to the High Court stated that "Phool Mahadevi" was an "unfamiliar designation" invented to conceal the fact that the plaintiff's mother was a concubine. Their Lordships are, therefore, unable to agree with the High Court that "Phool Mahadevi" signifies a concubine.

"Jhora," according to Oriyah dictionaries, means a bunch of flowers. There is one dictionary, however, in which the word is also stated to mean "Sanno Mahadevi"; *jeopori* (popularly called) Jhora Deyi. But there is no dictionary in which "Jhora" is stated to mean a concubine. The Subordinate Judge thought that "Jhora," in a secondary sense, is the equivalent of "Sanna Mahadevi," that is, a junior wife. The High Court differed from him, and considered that it means a concubine. Their Lordships are not satisfied that "Jhora" signifies a concubine. Assuming that it does, they are of opinion, for the reasons stated later, that it has not been proved that it is used in that sense in the documents mentioned above. These documents must now be considered.

Exhibit X.—As to this document both the Subordinate Judge and Kumaraswami Sastri J. held that it was marked only for identification, and that it was not proved. Reilly J., however, considered that it was proved. Their Lordships have no doubt that the document has not been proved.

Exhibits II to VI.—These purport to be accounts of the household and other expenses of Brojo Kishore Deo. They contain several items mostly of a few annas "on account of Jhora's house." These accounts were put in in lump by the defendant's pleader in the course of the cross-examination of one of the witnesses for the plaintiff after he had identified the handwriting of Chav Patnik by whom it was stated they were written. Chav Patnik was then in the service of the defendant, but was not examined as a witness. No evidence was led to show to whom "Jhora" in those entries referred or in what sense that word was used, nor were the items put to any witness for the plaintiff in cross-examination. No inference, therefore, adverse to the plaintiff, can be drawn from those accounts.

Exhibits B, A, XV and W.—Exhibit B is the *kocheri potro* dated the 5th July, 1894, in respect of the jaghir granted by Brojo Kishore Deo to the plaintiff's mother. In that document the plaintiff's mother is described as "Sri Phool Mahadevi Sreemoti Debi Jhora." Exhibit A is the *dattata will-namah* dated the 31st August, 1906, also executed by Brojo Kishore Deo. In that document, she is described as "Sri Maharajah's Phool Mahadevi Sreemoti Debi Jhora." She is also described in similar terms in Exhibit XV which was a lease granted by her of part of her jaghir lands, and in Exhibit W which was a mortgage in her favour. Both these documents were executed after the death of Brojo Kishore Deo. Their Lordships think that there is nothing in any of these documents to show that "Jhora" is used in the secondary sense of a concubine. "Phool Mahadevi," as already stated, does not signify a concubine. These documents, therefore, do not support the defendant's case. On the contrary, they show that the plaintiff's mother was a married woman, for admittedly the term "Mahadevi" could not be used except in connection with a married woman.

It will be convenient to consider here another point which was relied upon by the learned judges of the High Court, and strongly urged on behalf of the defendant. It was this that no claim was put forward by the plaintiff's mother on behalf of the plaintiff for about thirteen years, and that she acquiesced in adverse claims made against the estate from time to time, and that these facts raised a strong presumption that the plaintiff's mother knew that she was not the wife of Brojo Kishore Deo and that the plaintiff was his illegitimate son. As to the plea of acquiescence their Lordships may observe that a minor is not bound by any acquiescence on the part of his guardian, though it may be a piece of evidence against him. How far it militates against him is a question dependent upon the facts of each case.

Brojo Kishore died on the 3rd September, 1906. Within four days after his death Vaishna Deo applied to the Collector to have his name registered as proprietor of the zemindari. He died within a few days after his application, and it was followed by a similar application by Purushottama Deo. Shortly afterwards Purushottama called together the leading men of Pudamari, and adjured them to support his claim to the estate. About the same time some of his servants, under his instructions, locked up almost all the doors of Jhora's house. In this state of things she turned for advice to Krupamaya Deo, the natural brother of Brojo Kishore Deo. She showed him the *dattata will-namah*. But Krupamaya Deo had his own ends to serve. He assured her that he would look after the plaintiff's interest, and advised her not to show the document to the Collector. What part he played after the death of Brojo Kishore Deo and how he extracted Rs. 70,000 from Purushottama Deo, has already been stated. He was, as observed by one of the learned judges, "playing a double game—assuring the plaintiff's mother for help and at the same time betraying her

interest." Jhora, however, confided implicitly in him, and it is not improbable that, following his advice, she made no mention of the document to the Collector when he saw her, and remained inactive.

It would appear that Purushottama Deo allowed Jhora to enjoy without interruption the rents and profits of the two villages granted to her as jaghir by Brojo Kishore Deo for some years. In 1913, however, he denied her right to them, and Jhora had to institute a suit against him to establish her right to them. She lost in the first court on the ground that the document on which she sued was not registered. She appealed, and the suit was compromised, she retaining one village and giving up her claim to the other.

Paragraph 4 of the plaint in that suit is in these terms : " The plaintiff is the Jhora wife of the late Sri Brojo Kishore Deo, Zemindar of Chinnakimedi. The late Brojo Kishore Deo accepted her in the *gandharva* form and treated her as such with all rights and ceremonies due to her since 1888." Purushottama Deo filed a written statement. In paragraph 1 he stated : " The allegations in paragraph 4 of the plaint are not true. Plaintiff was a mere concubine of the late Sri Brojo Deo, and as such enjoyed no special rights or ceremonies." As to the allegations in that plaint, the learned judges of the High Court considered that they pointed to the fact that the plaintiff's mother was not a lawfully married wife of Brojo Kishore Deo. Reilly J. said : " It is quite clear that in describing herself as a ' Jhora ' wife in that plaint she did not mean that she was a legally married wife." In that case the plaintiff's mother was cross-examined by counsel for Purushottama Deo at some length as to her marriage with Brojo Kishore Deo. Thrice in her evidence she spoke of Brojo Kishore Deo as her husband. In her cross-examination she said :—

" Prior to my marriage I was not living in Digupudi. I was in my father's house. . . . My marriage took place in this village (*i.e.*, Pudamari). It was before Brojo Kishore obtained the taluq that I married him. I married him two years before he obtained the taluq. I married the late Rajah when he was a minor, that is to say, before he became a Rajah. . . . At the time of my marriage Brojo Kishore Deo was residing in Parlakimedi. He came here for my marriage. How do I know whether or not he obtained the permission of the Collector ? The Court of Wards alone spent for my marriage. At that time the manager was looking after the taluq. I have no idea for how many days my marriage took place. It took place in the same manner as it would take place in the case of all families. Vidya Bhusan, Gadadhara Purohit, and Neelakanta Purohit were present. These three persons performed the marriage rites."

In her re-examination she said :—

" The woman married before *pattabhishekam* (coronation) is called Jhora. The woman married after *pattabhishekam* is called Patta Mahadevi."

Their Lordships think that it is impossible in the face of this evidence to say that what the plaintiff's mother meant by " Jhora wife " was that she was a concubine of Brojo Kishore

Deo. The evidence clearly shows that so far as she was concerned, she understood that she was the lawfully married wife of Brojo Kishore Deo, that her marriage with him took place in the ordinary form, and that she was his "Jhora wife" because her marriage took place before the *Pattabhishekam* ceremony. It cannot, therefore, be said that the delay in bringing the present suit was due to any consciousness on her part that she was not married to Brojo Kishore Deo. It must have been due to other causes. What those causes were cannot now be definitely ascertained, for she died before she could be examined as a witness. But the circumstances of the case suggest several sufficient reasons. In the first place, she was, as their Lordships have already said, the victim of Krupamaya Deo's machinations. Then there was the difficulty of financing an expensive litigation up to the final tribunal of appeal, for the plaintiff had to sell the lands before he could sue. Lastly, she ran the risk, if she brought such a suit as the present, of being turned out of the palace with her infant children.

The last contention on behalf of the defendant was based on three documents which, it was contended, showed that the plaintiff was the illegitimate son of Brojo Kishore Deo.

The first of these documents is the authority to adopt dated the 14th August, 1906, alleged to have been given by Brojo Kishore Deo to Ratnamala. In that document it has been stated that Brojo Kishore Deo had not till then been blessed with a son, suggesting that the plaintiff was not of legitimate birth. Both the Courts in India held that the document was not proved. Their Lordships see no reason to differ from that finding.

The second document is the deed of sale dated the 23rd July, 1906, in respect of lands purchased by Brojo Kishore Deo in the name of the plaintiff "represented by his mother and guardian Srimathi Devi Jhora Garu." The learned judges of the High Court considered that the purchase was made by Brojo Kishore Deo as a provision for the plaintiff, which he would not have done had the plaintiff been of legitimate birth. But the transaction was *prima facie* benami, and there is no evidence to show that it was intended as a provision for the plaintiff. Benami purchases in the names even of legitimate sons are not uncommon in India. Their Lordships do not think that this document in itself supports an inference of illegitimacy.

The last document is the *dattata will-namah* dated the 31st August, 1906. It was executed by Brojo Kishore Deo three days before his death. It is headed by a statement that it had been executed by him and Ratnamala, but the document was not executed by her. The following is a translation of the document as given in the judgment of Kumaraswami Sastri J., and accepted by both the sides :—

"*Dattata will-namah* executed on the 31st day of August 1906, corresponding to the 16th day of Simho of Onko 37, by the following two persons, namely, Sri Beeradhi Beero Pratapa Sri Brojo Kishore Ananga Bhima Deo Kesari Sri Sri Maharajah and Sri Sri Ratnamala Patta Mahadevi.

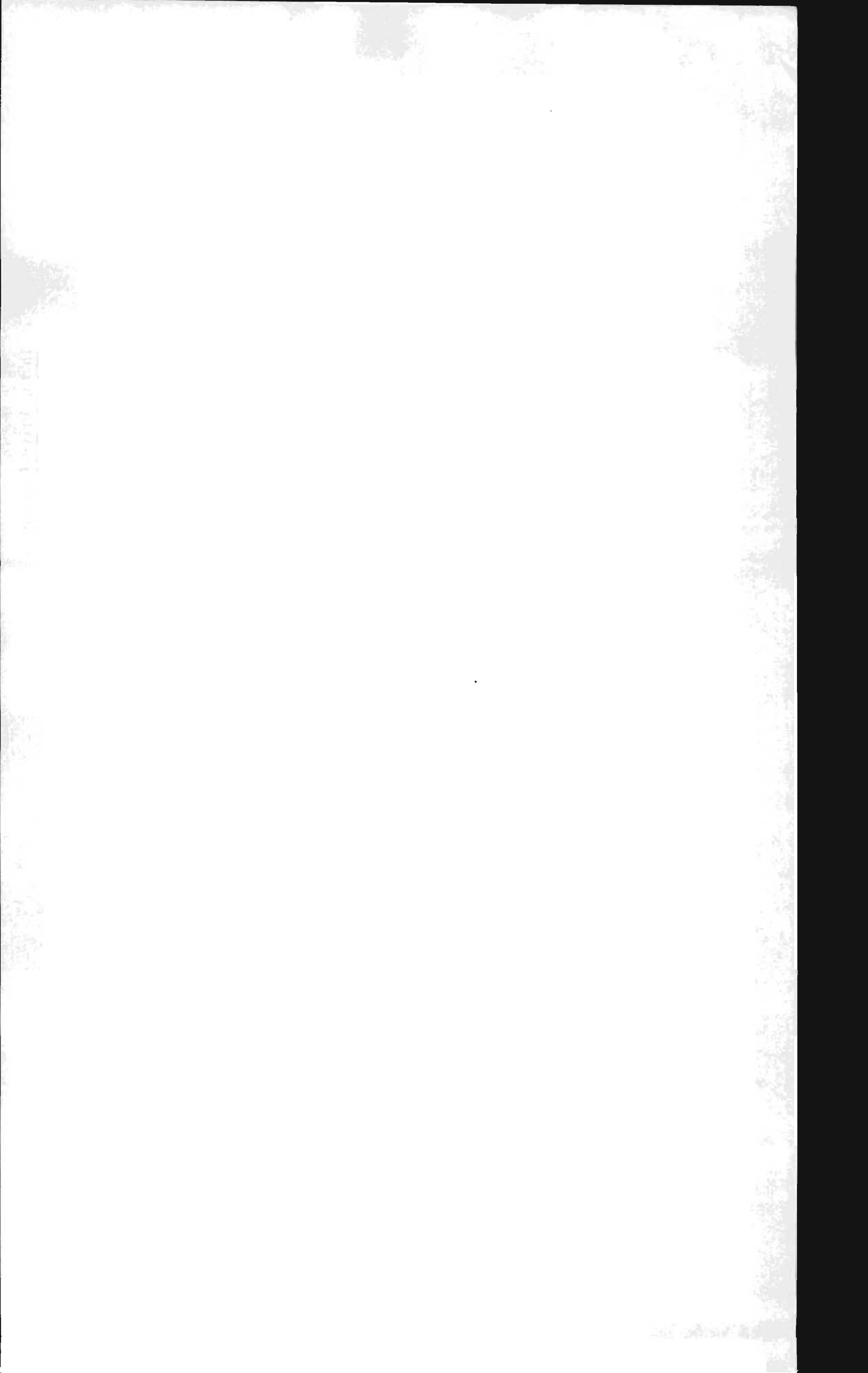
I, Sri Sri Sri Brojo Kishore Maharaja, have been suffering from bodily illness for about the last 7 months. I have taken medicine from several people. Till this day I have not found any relief. We have no issue (born) jointly to both of us (out of our union) to succeed to our Taluk. Be it now known to all hereby that we, Sri Sri Sri Brojo Kishore Deo Maharajah and Sri Sri Ratnamala Patta Mahadevi, we two have lawfully consented to adopt Sri Nandamani Deo who is about 5 years of age and who was born in the family in the middle of our Antahpuram (harem) to my, (i.e.), Sri Maharajah's Phool Mahadevi, Srimoti Debi Jhora, and to me, Sri Sircar, and to his looking after the work of Rajyadhipo of this Taluk after my (i.e.), Sri Sircar's death and have executed this. We have brought up the aforesaid Sri Nandamani Deo as our own son. In our Kshatriya caste, if there is no son born to our Patta Mahadevi, there is no objection whatever to the son born to the Phool Mahadevi performing Uttaradhikari duties (duties of an heir). As in our Ganga Vamsam (family) *beejo* (seed) alone is important, we cannot at all adopt a boy validly from another family. For the above mentioned reasons, no one can raise any objection in respect of this Dattata Will. If by the grace of God I recover from this illness and a son is born to my Sri Patta Mahadevi from my *aurasa* (body) the above mentioned Dattata Will will stand cancelled."

As to this document the plaintiff's case was that it was in substance a recognition by Brojo Kishore Deo of his right to succeed to the estate. The defendant by his written statement denied that it was genuine, and he maintained that position throughout. The trial judge found that it was genuine. The defendant challenged the finding on appeal. The learned judges of the High Court agreed with the trial judge that it was genuine, but they held that the document far from supporting the plaintiff's case showed unmistakable signs of his illegitimacy. In his judgment Kumaraswami Sastri J. said "The fact that he wanted to adopt and to get Ratnamala to consent to the adoption shows to my mind clearly that the Rajah did not think that the plaintiff was a legitimate *aurasa* son who would in the ordinary course of events succeed to the estate by virtue of his sonship." To the same effect is the judgment of Reilly J. The learned judge said: "But the strongest evidence that Brojo Kishore regarded the plaintiff as an illegitimate son is provided by Exhibit A, which the plaintiff has produced as a document signed by Brojo Kishore."

This document was executed by Brojo Kishore Deo while he was on his death-bed. It is confused and impossible to construe as having any legal effect. It may mean either that Brojo Kishore Deo was persuading Ratnamala to be reconciled with the plaintiff's mother and to treat the plaintiff as her own son, or he was importuning her to take in adoption his illegitimate son by a concubine. The learned judges of the High Court understood it in the latter sense. The plaintiff who relied upon it, did not so understand it, nor did the defendant who insisted throughout that it was fabricated. Their Lordships find it difficult to believe that Brojo Kishore Deo should have on his death-bed contemplated an adoption of a son of a concubine. Their Lordships are, therefore, unable to agree with the High Court, that the document is evidence of the illegitimacy of the plaintiff.

In the result, their Lordships are of opinion that the marriage of Jhora with Brojo Kishore Deo is established, that Jhora was his junior wife, and that the plaintiff as his legitimate son is entitled to succeed to the estate.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court dated the 30th March, 1928, should be set aside, and the decree of the Subordinate Judge dated the 20th December, 1922, restored. The respondent must pay the costs of the appellant in the High Court and before this Board.



In the Privy Council.

SRI SRI SRI NANDAMANI ANANGA BHIMA
DEO KESARI GAJAPATHI

v.

SRI SUSEELA MALA PATTA MAHADEVI.

DELIVERED BY SIR DINSHAH MULLA.

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