Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ravalji Raisingji Naharsingji v. *Bai Dariaba, from the High Court of Judicature at Bombay; delivered 3rd August* 1898.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The question in this case is simply a question of fact. Is the Appellant the son of Bajirajba, by her late husband Naharsingji? Practically the question comes to this. Has the Appellant proved that Bajirajba gave birth to a son on the night of the 1st of December 1883?

The First Class Subordinate Judge of Ahmedabad decided in the Appellant's favour. The High Court of Bombay has reversed his decision.

Naharsingji was the son of Pratapsingji Thakor of Mehlol in the Panch Mehals who died on the 21st of July 1883. Naharsingji had married Bajirajba on the 25th of February in that year. She was a daughter of a leading man in Chachka a village in Chuda one of the Native States of Kathiawar. The marriage was celebrated at Mehlol and Bajirajba lived there with her husband until the beginning of October 1883 when she went back to Chachka her own village.

She went there according to her story for her confinement. The Respondent alleges that she went in order to attend her sister-in-law who was ill. About a week afterwards Naharsingji

himself left Mehlol and went to Ahmedabad for medical treatment. He returned to Mehlol on the 27th of November 1883 and died on the same day at 4 p.m. being then about 40 years of age. Before marrying Bajirajba Naharsingji had married four wives. One died a few months after her marriage. The other three all had issue though in no case did the issue survive infancy. It is suggested on the part of the Appellant that it was owing to the death of his children nine in all at Mehlol one after another in early infancy that Bajirajba was sent away to her own village to be confined there. At the death of Naharsingji only one of his wives besides Bajirajba was living Dariaba the Respondent who had been married about twenty years and had lost three children herself. Naharsingji's mother Sardarba who is now dead also survived him.

In the evening of the day on which Naharsingji died a report was sent to the Collector of the Panch Mehals by Chotalal the Kharbari of the estate in his own name and in that of Sardarba. The report announced Naharsingji's death and added, "The last marriage of the "deceased Naharsingji was with a bride of the "village of Chachka in the Kathiawar Province. "And as she was pregnant she was sent about "two months ago to her parents' house for "delivery. And she is now in about her ninth "month of pregnancy."

On the 2nd of December 1883 a telegram came from Chuda addressed to Naharsingji at Mehlol. It was sent by Balubha a brother of Bajirajba and stated that his sister Bajirajba had given birth to a son. On the same day three persons named Makanji Chandaji and Santok Bewa were despatched to Mehlol with the same tidings bringing with them as seems to be usual in such cases impressions on paper of the child's feet.

In ordinary course messengers between Mehlol and Chachka accomplish the journey in two days spending the night at Ahmedabad. It seems however to be only one day's journey between the two places if use is made of the railway which is available for part of the distance.

The messengers from Chachka reached Mehlol on the 4th of December. The news of the birth of the child was at once made public and though the house was in mourning the messengers seem to have received the customary rewards expected by bearers of glad tidings.

Santok Bewa left Mehlol in a day or two and returned to Chachka reaching that village on or about the 7th of December. He brought with him tidings of Naharsingji's death. According to the Appellant's case no earlier information of that event had been received at Chachka.

In consequence of the communications received from Chotalal of Naharsingji's death and Bajirajba's pregnancy the Mamlatdar of Godhra at once went to Mehlol and took charge of the Palace remaining there for about a week.

Having regard to the publicity of the news of the birth of the child and the appearance of the Mamlatdar on the scene it is impossible to believe that Sardarba and Dariaba were not fully informed of Bajirajba's alleged confinement at a very early date.

The next thing that occurred was that on the 11th of December an inquiry was held at Chachka about the alleged birth of the child. It was held by the direction of the Thakor of Chuda at the instance of the Political Agent for Kathiawar who was set in motion by the Mamlatdar of Godhra or the Acting Collector Mr. Spence. The gentleman employed to investigate the matter was the Kharbari of Chuda one Popatbhai by name. His impartiality has not been questioned. He seems to have performed the duty entrusted to

him with promptitude and great ability. He interrogated several witnesses on oath. He saw the child. He had the lady herself examined by two midwives whom he brought with him from Chuda under the care of a doctor. After an inquiry which lasted three days he made his report. His conclusion was that although there were some grounds for suspicion the child was really Bajirajba's child.

On the 21st of December after the inquiry was terminated Chotalal formally reported the birth to the acting Collector.

Early in January 1884 Bajirajba went to Mehlol taking the child with her. The child was publicly exhibited at Mehlol and installed on the gadi without any appearance of opposition on the part of Sardarba or Dariaba. Bajirajba at once applied to the Collector that the name of the child might be entered in the Government Records in the place of Naharsingji. The application was granted by the Collector on the 10th of January 1884 and forwarded to the Mamlatdar through Mr. Younghusband on the 23rd of January. Nothing further however was done in the matter. On the 2nd of February 1884 some dispute having apparently arisen between Sardarba and Chotalal as to the management of the property Sardarba sent a petition to the Collector. She seems to have wished to make it clear that any representations which had been made by Chotalal were made without her authority and she desired to be furnished with any replies made to Chotalal's representations. But she said nothing about Bajirajba or the child.

It appears from the judgment of the Subordinate Judge that about the same time two Grassias of Ratanpur Vajesing and Shivesing relatives of Sardarba presented a petition to the Collector claiming to be heirs of the estate on the ground that Bajirajba had never been pregnant and had borne no son.

In March 1884 the Assistant Collector Mr. Younghusband held a local inquiry. He took a deposition from Sardarba on the 17th of March in which she alleged that Bajirajba had never been pregnant and asserted that Naharsingji had been impotent for three years before his death—an assertion which both Courts found to be untrue when it was afterwards put forward as one of the main grounds of defence to the action. Mr. Younghusband had Bajirajba examined by an European midwife one Caroline Blein whose opinion admittedly was unfavourable. On these materials Mr. Younghusband reported that the child was supposititious. The Bombay Government however considered the opinion of the midwife and the report of Mr. Younghusband to be alike unsatisfactory.

In June 1884 the Collector received a letter from the Government desiring him to inform Bajirajba that they had secured the services of a lady doctor Miss Pechey and were prepared to accept her report as final. They intimated that if Bajirajba refused to submit to examination her refusal would be treated as an admission that boy was not her son and that in that case the the other widow would be allowed to adopt. Unfortunately this resolution was communicated to Bajirajba in a letter from the Collector expressed in terms so harsh and offensive that it is not suprising to find that Bajirajba's reply was that she had already submitted to two examinations and would on no account submit to be examined again.

Then an order was issued by the Collector directing that the Mamlatdar of Godhra should be appointed manager and that his name should be entered in place of Naharsingji or the infant Appellant until the title was finally settled by the Civil Courts. Both the widows applied for certificates but both applications were rejected and ultimately on the 19th of October 1886 this

suit was instituted by Bajirajba in the name of the infant Appellant.

The evidence adduced at the trial is voluminous. Much of it as might be expected is absolutely worthless. The learned Judge of First Instance has gone through it all minutely. His judgment in many respects is most useful though their Lordships are not prepared always to agree with him in his estimate of the relative importance of the different incidents and circumstances of the case.

The judgment of the High Court is not less painstaking. The learned Judges have evidently bestowed great care and attention on the case But they seem occasionally to lose sight of proved facts or facts which on a fair consideration of all the circumstances may be taken to be proved in an attempt to discover a theory which will account for everything. More than once in dealing with the evidence as regards a particular matter the result of their judgment on it seems to be influenced by a consideration of the question repeated several times in slightly different language "What theory fits best with "all the facts of the case?" The safer course perhaps would have been in the first place to determine what things are to be accepted as facts and what are to be rejected as unworthy of credit. Towards the conclusion of their judgment the following passage occurs which may be referred to as an example of the method pursued :—

"To sum up" they say "the only theory "which fits in with the various inconsistencies "of the case is that Chotalal with the connivance "of Sardarba and Dariaba formed the plan of "putting forward a son born to Bajiraj in order "to prevent the estate going into the hands of "Government on Naharsing's death without "issue. So a report was made to the Collector "and secret news was sent to Bajiraj. Then or "shortly afterwards the letter 131"—that was a

letter purporting to be sent by Naharsingji to Bajirajba's family in reference to her going to Chachka for her confinement—" was prepared " and sent to Chachka to account for a lady just " delivered of a child being unable to suckle it. " The idea that no news was sent to Chachka of " Naharsing's death on account of Bajiraj being " so near her delivery is contrary to the plea of " the Plaintiff (though evidently a false plea) " that such news was openly sent. The idea that " it was too bold a conspiracy for Bajiraj never " having shown or feigned marks of pregnancy " to pretend that she had been delivered and " appeal with such apparent straightforwardness " to Sardarba Dariaba and the Mehlol midwife is " met by the fact that if Chotalal and the people " at the Mehlol Darbar were parties to the " fraud (and their conduct shows that they must " have been so at first) that this apparent " straightforwardness is easily explained."

That no doubt is an ingenious theory. But it is one that no Counsel in the interest of his client would have ventured to suggest. Their Lordships are not surprised that the learned Counsel for Dariaba quietly put it aside. If Sardarba and Dariaba who must have known Bajirajba's condition when she went to Chachka welcomed the child as Bajirajba's genuine offspring and then after some dispute with Chotalal about the management of the property denounced the story of the confinement as an imposture and a fraud what would the natural inference be? Surely the inference would be that the change of attitude was due to interested motives solely. The learned Counsel for the Respondent thought the learned Judges of the High Court had gone too far. Their own view was much more plausible. Some allowance they said must be made for the position of ladies living in seclusion like Sardarba or Dariaba. Much might go on about the house without their knowing it;

even if they did know something of what was going on you could hardly expect them to make a determined stand against a well-laid scheme and a popular movement. Their Lordships feel the force of these observations. But they cannot suppose that Sardarba and Dariaba could have been ignorant that the boy was brought to the Palace and publicly exhibited and if they knew all the time that it was a spurious child it is certainly somewhat surprising to find that Sardarba made no complaint on that score when she first appealed to the Collector against Chotalal.

The learned Counsel for the Respondent did not of course abandon the theory of a conspiracy. Only they said that Sardarba and Dariaba were no parties to it. They agreed with the High Court in maintaining that the imposture originated with Chotalal and that he got Bajirajba and her relatives at Chachka to carry out his scheme. Now is that a possible theory? It must be remembered that Naharsingji's death was not expected at the time. He died quite suddenly at 4 o'clock one afternoon. On the evening of the same day Chotalal sent word to the Collector that Bajirajba was in the 9th month of her pregnancy, so that the fraud (if fraud there was) must have been concocted on the spur of the moment. Why should Chotalal have committed this crime? It is difficult to see any sufficient motive. He had been the Kharbari for some years. There was nothing to threaten his position. If the High Court are right in saying that Dariaba was a mere dummy he would be just as secure with her as mistress and just as likely to make a good thing out of his post as he would if he provided a spurious offspring for the second wife. Then again if it was a fraud why should he have tied himself down to the probable date of the child's birth? He could not be certain that the people at

Chachka would fall in with his scheme or if they did that they would have the means of carrying it out at once. One would have thought he would have left himself somewhat greater latitude in point of time. It was certainly not necessary to say that the lady was nine months gone with child. Then comes the difficulty of communicating with the people at Chachka. It is suggested that a secret messenger might have been sent off on the 28th of November to arrange matters for the fictitious confinement. Evidence there is none on the point. In argument it was contended that the medium of communication was a certain Priest a Brahmin of Mehlol who is said to have accompanied the messengers from Chachka and from that it is inferred that he must have left Mehlol immediately after Naharsingji's death. It is difficult to suppose that Bajirajba's brothers who are said to have been Chotalal's instruments in the fraud would have trusted a verbal message brought by a person with whom they do not seem to have been acquainted. It is difficult to understand how Chotalal at Mehlol could have controlled the machinery and directed the working of the plot at Chachka. With the head of the couspiracy at such a distance, with no ready means of communication between the conspirators, with so many persons, in different ranks of life, concerned in the scheme one would have thought that the fabric of fraud must have fallen to pieces and that its downfall must have been patent and unmistakeable. And then we come to a difficulty which seems to be almost insurmountable. How was the fraud carried out? Where did the supposititious child come from? Chachka is a small village; one would think that a child could not have been removed from its own home without leaving some trace of the removal especially if the child was a month old at the time as the Respondent alleges. The Respondent and her advisers had

ample time and apparently ample means to make all possible inquiries. The importance of tracing the child must have been present to their minds and yet there is no hint or suggestion in the whole of the voluminous record as to the place or family from which the child was procured.

On the whole their Lordships think it impossible to accept the theory put forward by the Counsel for the Respondent without some corroborative evidence of a trustworthy character.

Now there is much that is puzzling in the history of the case and on minor points there is abundance of contradiction. But from first to last the only distinct evidence in favour of the Respondent's contention is to be found in the record of Popatbhai's inquiry.

It so happened that the first witness Popatbhai examined was a woman called Pan who is a midwife and apparently the only midwife in Chachka. According to the Appellant's case Bajirajba was delivered by her but when Pan was examined she declared that the whole thing was an imposture and she asserted that the child she saw that night was a month old, an assertion disproved by Popatbhai who saw the child himself with his own eyes in the course of the enquiry. Pan has since been examined twice in the course of this suit. On each of those occasions she declared that her statement before Popatbhai was false. She was frightened she said. Popatbhai threatened her. That is certainly untrue. Then she declared that she had been bribed on the first occasion. The Subordinate Judge thought the bribery proved. But their Lordships are bound to say that there is no trustworthy evidence of any attempt to bribe her. It is certainly a singular thing that the parties to the conspiracy if there was a conspiracy should not have taken care to secure Pan's testimony in their favour. On the

other hand it is a very singular thing that Pan should have declared against the leading people in her own village. It is possible of course that she was bribed but there is no evidence of it. It is possible that when an inquiry was held suddenly at the instance of the Ruler of the State and she was the first witness summoned she may have said what she thought would be agreeable to the ruling powers. Other explanations were suggested but their Lordships cannot say that any one of the explanations offered was at all satisfactory. They can only say that although the testimony which Pan gave on the first occasion notwithstanding her subsequent contradiction does tell in the Respondent's favour yet Pan is evidently a person on whose unsupported testimony no reliance whatever can be placed. Pan's evidence before Popatbhai like the unexplained delay in communicating the intelligence of Naharsingji's death must always remain an unsolved difficulty. The learned Judges of the High Court dispose of these difficulties by eliminating all difficulties or by introducing difficulties greater still. Pan they say "blurted out the truth." If that is assumed there is no difficulty left. But Pan was not a person to whom truth was either precious or natural. The whole question in the suit is was the story Pan told Popatbhai the truth or not.

In coming to the conclusion that the child was really Bajirajba's child Popatbhai was a good deal influenced by the production of the letter already referred to which purported to be a letter from Naharsingji to Bajirajba's brother in reference to her approaching confinement. It bears Naharsingji's seal as well as Naharsingji's signature. The first two lines the last line and a half and the signature it is said were written by Naharsingji himself the body of the letter being written by a witness who was examined at the trial. The Judge of First Instance thought

the letter genuine. The High Court thought otherwise. Their principal reason for discrediting the letter was that Naharsingji's seal was attached to it. But that is a point on which Popatbhai and the Judge of First Instance were much better qualified to speak than the learned Judges of the High Court. Popatbhai makes no comment on the presence of the seal; obviously it did not strike him as anything peculiar. The learned Judge of First Instance observes that "it was said that it was not usual "to fix a seal to such private letters." "But" he adds "the file sent to me by the Collector "contains kankotris" or notes of invitation "bearing such seals." He thought the "letter "quite consistent with ordinary affairs of human "life among Hindoos." It appears to their Lordships that the authority of the Native Judge far outweighs the objections of the learned Judges of the High Court. It may be observed that Samatsing Bajirajba's brother who produced the letter before Popatbhai was examined at the trial but he was not asked a single question about the letter. Their Lordships see no reason to doubt that the letter was genuine.

The medical evidence may be dealt with very shortly. The two midwives who examined Bajirajba at the inquiry before Popatbhai deposed to their belief that Bajirajba had lately been confined. One was dead at the date of the trial; the other was called and confirmed her deposition. Miss Blein's report was not produced at the trial and it is admitted that though it was unfavourable it was not considered satisfactory by the Government. The fact that Bajirajba declined to submit to be examined by Miss Pechey is quite accounted for by the tone of the letter sent her by the Collector. In the course of the trial Bajirajba was examined by two lady doctors one nominated on behalf of the Respondent and the other on behalf of

the Appellant. They made their examination together. They agreed upon what were the signs of a woman having been confined. The lady who acted for the Respondent found no sign of parturition having taken place the lady who acted on behalf of the Appellant and whose competence is admitted by her colleague or opponent found signs which satisfied her that Bajirajba had borne a child.

There are some minor points which may be disposed of rapidly. There was a question as to whether the Kholo ceremony was performed in the case of Bajirajba. That is a ceremony which takes place when the first pregnancy in the case of a married woman is declared. It was admitted that the ceremony could not be performed with full display on account of the death of Naharsingji's father but the evidence seems to show that the Betho Kholo that is the Kholo ceremony without its full rites was duly performed and the Rakhdi or thread tied on Bajirajba's wrist. Sardarba when examined before Mr. Younghusband did not in terms deny that the Rakhdi was on her wrist. She only said she did not know it.

Discrepancies were pointed out in the evidence of the persons other than Pan who deposed to being present at the child's birth but those discrepancies are not in their Lordships' opinion so serious as to discredit the evidence of the birth.

Their Lordships are of opinion that the learned Judge of First Instance came to a right conclusion on the evidence before him and they will therefore humbly advise Her Majesty that the judgment of the High Court ought to be reversed and the judgment of the Subordinate Judge restored.

The Respondent will pay the costs both here and below.