

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Narendra Nath Pahari v. Ram Gobind Pahari and Others, from the High Court of Judicature at Fort William in Bengal; delivered 30th November 1901.

Present at the Hearing :

LORD MACNAGHTEN.

LORD SHAND.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

[*Delivered by Lord Lindley.*]

This is an Appeal against a decree of the High Court of Calcutta, dated the 15th of February 1898, which reversed a decree of the Zillah Judge of Midnapore, dated the 26th of February 1896. The Appellant claims to be entitled as the son of his deceased father Upendra Nath Pahari to have letters of administration to his estate granted to Tillottama his widow and the Appellant's mother as his guardian during his minority.

The marriage of Upendra and Tillottama is proved. She was married when quite a child but she went to her husband's house and lived with him in July 1886 shortly before he died. How long before is not clear; some witnesses say five or six days, others say 10 or 12 days. He died on the 15th of July 1886 from the effects of a carbuncle in his back from which he had been suffering for some time. The Appellant says he is a son of Tillottama and was born on

the 18th April 1887 which is less than 280 days from the day of Upendra's death.

By Section 112 of the Indian Evidence Act it is enacted as follows :—

“ The fact that any person was born during the
 “ continuance of a valid marriage between his
 “ mother and any man, or within two hundred
 “ and eighty days after its dissolution, the mother
 “ remaining unmarried, shall be conclusive proof
 “ that he is the legitimate son of that man,
 “ unless it can be shown that the parties to the
 “ marriage had no access to each other at any
 “ time when he could have been begotten.”

The marriage of the deceased with Tillottama is not in dispute, and she has remained single, so that the only questions are :—1st. Is the Appellant the child of Tillottama? 2nd. Was he born within 280 days after her husband's death? 3rd. Is it proved that he and she had no access to each other at any time when the Appellant could have been begotten?

The evidence adduced by the Appellant that he was born within 280 days after the death of the deceased and that Tillottama was his mother is direct and positive. Tillottama herself, her grandmother and several other women including three midwives, all swore to the birth as alleged. These women swear they were present at the birth. They gave their testimony some ten years after the event and there are some discrepancies in their evidence and some of the details given by each of them are apparently inaccurate. Mistakes as to collateral matters may honestly be made, especially after the lapse of so long a period as ten years. But unless the testimony of these witnesses is wholly rejected as wilfully false it is impossible not to believe what they say as to the fact of the birth. The learned Judge who saw them accepted their statements

on this point as true, and their Lordships see no sufficient reason for differing from him.

The case does not turn entirely on the direct and positive evidence of these women. The history of the case and the conduct of the parties seem to their Lordships more consistent with the truth of the Appellant's story than with any other explanation of what has actually occurred.

There is strong evidence that Tillottama showed signs of pregnancy after her husband's death; she said she knew she was pregnant before his death. This is probably untrue; but her pregnancy shortly afterwards seems established. Her confinement was expected by her relations; and the religious rites customary after the birth of a child were performed after the alleged birth of the Appellant, although it seems that some relatives usually invited on such occasions were not present. It is important to observe that no one accuses Tillottama of unchastity; the Respondents do not suggest that if she had a child Upendra was not its father; their contention is that she has never had any child at all; and that the Appellant is the child of some other woman and is fraudulently claiming to be the child of Tillottama. The attempt to prove that the Appellant is the son of someone else hopelessly failed; but it is not incumbent on the Respondents to disprove the Appellant's case and their failure to support their own theory does not prove the truth of his. The fact however remains that there is no evidence that any woman except Tillottama was the mother of the Appellant.

A great point was made of the fact that in the course of an inquiry into the Appellant's birth made five or six months after it Tillottama's father was asked by a magistrate if he had any objection to have her examined by an English lady doctor and that he did object without the

consent of the lady's mother-in-law and mother-in-law's brother. The High Court attached great importance to this circumstance, much more in their Lordship's opinion than it deserves. There was no demand by the Respondents for any such examination, and no refusal by Tillottama. An examination was merely suggested by the magistrate and the matter dropped without being further pressed. This was quite in accordance with the feelings of Hindus and these same feelings quite account for the absence of all expert evidence on the subject.

Some other remarkable circumstances require notice. The deceased was said to have left a will dated 14th July 1886 the day before his death stating that he had been dangerously ill of a carbuncle on his back for the last 15 days. By this alleged will he appointed his wife Tillottama his executrix and in substance gave his property to her and directed her to adopt a son and if he died without a child then she was to be at liberty to make a second and if need be a third adoption. By the alleged will the testator made various provisions (in favour of several persons) which he directed his wife and adopted son to carry out. The last clause of the document ran thus:—

“ It should be known that, if through God's
 “ favour I recover from this illness, and in future
 “ any son should be born of my loins, then the
 “ provisions of this will will all stand cancelled ;
 “ otherwise, on my death, all the provisions of
 “ this will will entirely stand good in favour of
 “ my wife Chowdhrani Tilottama Debi, as long
 “ as she is alive.”

This document was propounded by the father and guardian of the widow on the 7th August 1886 she was then a minor about 15 years old. The application was for letters of administration with the will annexed and was opposed by the

mother and the nearest male relations of the deceased. The mother of the deceased admitted the authenticity of the will and claimed to be herself entitled to letters of administration with the will annexed. The male relations asserted that the will was a forgery. On the 11th March 1887 judgment was given against the propounder of the will and against the mother of the deceased on the ground that its authenticity had not been established. Several persons interested in upholding the will gave evidence in support of it; and they have given evidence for the Appellant in this litigation; and their evidence is open to unfavourable comment as pointed out by the High Court. But the Appellant is not responsible for this attempt to set up this will.

The Judge suggested that as the widow was so young and the relatives were at variance the Court of Wards might take charge of the estate until the widow who had a life interest in it attained her majority and could obtain letters of administration herself. This decision was given about a month before the Appellant was born and before therefore it could be known whether Tillottama, assuming her to be near her confinement, would give birth to a son or to a daughter.

The birth of the Appellant rendered it unnecessary to continue litigation about the will. But an application was made to the Court of Wards to take charge of the estate of the deceased, and on the 3rd September 1887 an order was made by that Court in the following terms:—

“ Under Section 27 Act IX., (B C.) of 1879,
 “ the Court of Wards hereby declares Narendra
 “ Nath Pahari, son of the late Babu Upendra
 “ Nath Pahari of Moheshpore, in Thana Contai, in
 “ Midnapore, to be minor under Section 6 (b) of
 “ the Act.

“ Under Section 35, the Court of Wards also
“ declares that it has determined to take under its
“ charge the person and property of the minor
“ above-named, and it directs that possession be
“ taken of such person and property on behalf of
“ the Court.”

Here there is a clear and distinct claim made on behalf of the Appellant to the estates of the deceased as his son and an order to take possession of them as the property of the Appellant.

The Court of Wards appears to have managed the estate on behalf of the Appellant until 1894 when the estate was placed under the charge of Tillottama as the mother and guardian of the Appellant.

In July 1895 Tillottama applied for a grant of letters of administration to herself as the mother and guardian of the Appellant, and then and not before the Respondents alleged that she never had had a child and that another woman was the mother of the Appellant.

The Appellant is still a minor and Tillottama as his mother and guardian is still managing the property: that ever since 1887 the right of the Appellant to these lands as her son has been judicially recognised and nobody has disputed it until the present controversy arose. Their Lordships regard these facts as strongly corroborating the truth of the Appellant's story.

But there remains the third question viz. non access of the deceased and his wife. The burden of proving this is on the Respondents. All they have to rely upon is the fact that the deceased died from the effects of a carbuncle from which he had been suffering for perhaps a fortnight. No witness has been called to say that the deceased could not have had connection with his wife at any time when she was living with him, and in the absence of such evidence

their Lordships cannot say that non access has been proved. There is no legal presumption to warrant them in so deciding.

Their Lordships feel with the High Court that there are many parts of the evidence which are unsatisfactory and open to grave suspicion. But although this is true their Lordships having carefully considered the evidence as a whole have come to the conclusion that the balance of the evidence warranted the decision of the District Judge and that his decision ought not to have been disturbed. They will therefore humbly advise His Majesty to discharge the Decree of the High Court of the 15th February 1898 and in lieu thereof to make an order dismissing the Appeal to that Court with costs and ordering the re-payment of any money paid thereunder. The Respondents must pay the costs of this Appeal.

