Privy Council Appeal No. 50 *of* 1931.
Allahabad Appeal No. 9 *of* 1929.

Kunwar Mahabir Singh - - - - - - *Appellant*

v.

Kunwar Rohini Ramanadhwaj Prasad Singh - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1933.

Present at the Hearing:

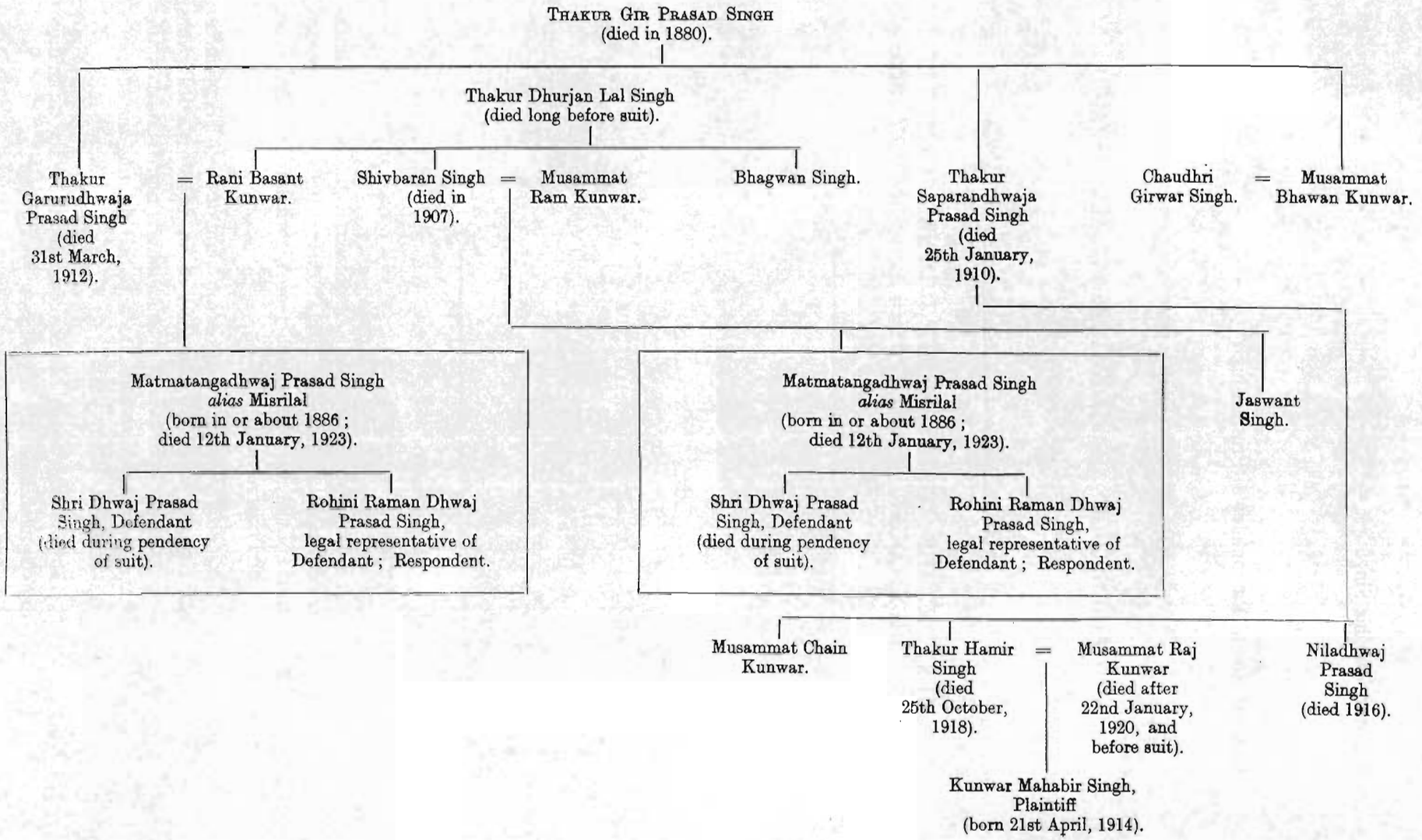
LORD THANKERTON.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[*Delivered by* LORD THANKERTON.]

This is an appeal from a decree of the High Court of Judicature at Allahabad dated the 12th February, 1929, which reversed a decree of the Subordinate Judge of Aligarh dated the 2nd June, 1925, and dismissed the suit.

The suit was instituted by the appellant on the 7th September, 1923, claiming absolute possession of an estate called Biswan. The present respondent is now defendant as representative of his brother, the original defendant, who died pending the suit, and is in possession of the estate.

The following table will conveniently show the alternative pedigrees maintained by the parties:—


Thakur Gir Prasad Singh
(died in 1880).
Thakur Dhurjan Lal Singh
(died long before suit).
Thakur Garurudhwaja Prasad Singh (died 31st March, 1912).
= Rani Basant Kunwar.
Shivbaran Singh (died in 1907).
= Musammat Ram Kunwar.
Bhagwan Singh.
Thakur Saparandhwaja Prasad Singh (died 25th January, 1910).
Chaudhri Girwar Singh.
= Musammat Bhawan Kunwar.
Matmatangadhwaj Prasad Singh alias Misrilal (born in or about 1886 ; died 12th January, 1923).
Shri Dhwaj Prasad Singh, Defendant (died during pendency of suit).
Rohini Raman Dhwaj Prasad Singh, legal representative of Defendant ; Respondent.
Matmatangadhwaj Prasad Singh alias Misrilal (born in or about 1886 ; died 12th January, 1923).
Shri Dhwaj Prasad Singh, Defendant (died during pendency of suit).
Rohini Raman Dhwaj Prasad Singh, legal representative of Defendant ; Respondent.
Jaswant Singh.
Musammat Chain Kunwar.
Thakur Hamir Singh (died 25th October, 1918).
= Musammat Raj Kunwar (died after 22nd January, 1920, and before suit).
Niladhwaj Prasad Singh (died 1916).
Kunwar Mahabir Singh, Plaintiff (born 21st April, 1914).

The main question at issue turns on the true parentage of Matmatangadhwaj Prasad Singh *alias* Misrilal (hereinafter called "M"). The appellant maintains that he was the son of Shivbaran Singh and Musammat Ram Kunwar, while the respondent maintains that his parents were Thakur Garurudhwaja Prasad Singh (hereinafter called "G") and Rani Basant Kunwar.

On the death of his father, Gir Prasad Singh, in 1880, G. took possession of the estate as owner and held it till his death in 1912. On the 30th June, 1886, his brother, Saparandhwaja Prasad Singh, brought a suit to recover half of the estate from him on the ground that it was a joint estate. The Subordinate Judge dismissed the suit on the 14th January, 1889, on the ground that the estate was impartible and descended by a custom of primogeniture. On the 7th February, 1893, the High Court reversed this decision, but their judgment was reversed by this Board on the 27th June, 1900, and the estate was finally held to be impartible.

On the death of G. in 1912, mutation was effected into the name of M. without objection, and M. held the estate without challenge until his death in 1923. His elder son's application for mutation was granted against objection taken by the present appellant, who was left to vindicate his claim by ordinary suit, and the present suit was instituted by him on the 7th September, 1923.

If M. was not the son of G., the appellant's father, Hamir Singh, was entitled to the estate on the death of G., and he died in October, 1918, without having claimed it; the appellant would then have been entitled to it, but he was under four years old at the time of his father's death.

The parties are agreed that M. was born within a year or two after July, 1886. The appellant's case is that he was the son of Shivbaran and his wife and was born at Jarki, and that at some indefinite time later, by an arrangement, he was taken by G. and his wife, Rani Basant Kunwar, who was Shivbaran's sister, and was thereafter treated in every way as their natural son. The respondent's case is that M. was the son of G. and was born of Rani Basant Kunwar at Agra, while she was resident there for a period of a few months for medical treatment.

Extensive evidence, both oral and documentary, was recorded at the trial, and it will be convenient to deal with the documentary evidence in the first place.

The first group of documents relates to three litigations, subsequent in date to the decision of the High Court in February, 1893, that the estate was partible and prior to the reversal of that decision by the Board in June, 1900. In the first suit (102 of 1893) M. was the plaintiff, and defendant No. 1, Madhuri Saran, a mortgagee, denied in his written statement dated the 23rd August, 1893, that M. was the son of G.; on the same day the suit was allowed to be withdrawn on the ground of defects

in the frame of the suit. Their Lordships agree with both the lower Courts that Madhuri's denial is not competent evidence of the fact, as there is no proof of special knowledge on his part. But, while one may speculate as to an ulterior motive for the withdrawal of the suit, their Lordships are of opinion that no such inference may legally be drawn from it. Accordingly this document is of no evidential value. The other two suits, Beni Ram's suit (147 of 1893) and M.'s suit (248 of 1896) to set aside Beni Ram's decree, are merely of value as to two facts which are not now in dispute, namely, that M. was also known as Misrilal, and that, during G.'s life, M. was consistently treated by him as his son, which is consistent with the case of both parties.

The second group of documents is connected with suits filed during the period from June, 1900, to the death of G. in 1912. Two suits (180 of 1900 and 43 of 1901) were filed by a mortgagee, Khundan Sing, in which G., M. and Saparandhwaja were impleaded as defendants and which were tried together. In his written statement in the first suit dated the 15th January, 1901, Saparandhwaja denied that M. was the son of G. Their Lordships agree with the comment of the High Court: "It is noteworthy that even Sapar Dhwaj, who ought to have known the true facts, did not expressly assert that Mat Matang Dhwaj (M.) was the son of Kunwar Sheo Baran Singh who was then alleged to be his maternal uncle. The point not being a material one was not made the subject matter of any issue at all. The Court took it for granted that Mat Matang Dhwaj (M.) was the son of Gadur Dhwaj (G.). We find this description both in the judgment and the decree. In the judgment there is even no reference to the denial by Sapar Dhwaj of the parentage of Mat Matang Dhwaj (M.), which was assumed to be correct." It should be added that neither G. nor M. defended the suits.

The next suit was one by Saparandhwaja against G. for maintenance (152 of 1903) in which he obtained a decree for maintenance at the rate of Rs. 200 *per mensem*. The next suit (100 of 1910) relates to a mortgage granted by Durjan Lal, father of Shivbaran, over the joint family property, to which the plaintiff, Musammat Gomti, had acquired right. Shivbaran had died in 1907 and the defendants in the suit were his brother, Bhagwan Singh, and Jaswant Singh and Misrilal, described as sons of Shivbaran. Decree was granted *ex parte* in the suit, and later, on the 26th March, 1912, the three defendants signed a *vakalatnama* for the purpose of getting the suit restored. On the 18th May, 1912, the suit was restored to its former number and the *ex parte* decree was set aside. From that time M. took no part in the proceedings and, although his name was in the decree granted, admittedly it could not affect him personally. In the *vakalatnama* he is described as "Kunwar Misrilal, *alias* Matmatangadhwaj Prasad Sing, son of Thakur Garuradhwaj

Prasad Singh," and he signs as " Kunwar Matmatangadhwaj Prasad Singh *alias* Misri Lal." Their Lordships agree with the High Court that Musammat Gomti's suit and the proceedings following thereon do not in any way amount to an admission by M. that he was the son of Shivbaran and not the son of G. It was during the course of these proceedings that M. had taken possession of the estate without objection on G.'s death. Reference may be made at this point to two powers of attorney granted by G. to M. in January, 1905, and February, 1907. These are consistent with the appellant's case, but their Lordships find no ground for the appellant's suggestion that they were executed in order to manufacture evidence as apparently the estate was taken over by the Court of Wards in 1907, as stated in Hamir Sing's plaint and the Subordinate Judge's judgment in suit No. 88 of 1913, and the exact date may well have been later than February. Accordingly these powers of attorney are not of material value.

The last group of documents, which relate to the period after G.'s death in March, 1912, are undoubtedly of vital importance. If the appellant's case is well-founded, his father, Hamir Sing, was entitled by survivance to the estate. He lived until 1918, and not only failed to claim the estate but acted in a way inconsistent with any such claim. The appellant endeavours to explain and excuse this by evidence of Hamir's poverty, ill-health and weak-mindedness.

On the 6th June, 1912, mutation of names was ordered in favour of M. as the heir of G., without any objection taken, a significant omission on the part of Hamir. On the 14th April, 1913, Hamir filed a suit (88 of 1913) against M. for the full maintenance of Rs. 200 which his father had obtained, the Court of Wards having offered him only Rs. 100 *per mensem*. The suit was dismissed by the Trial Judge and also by the High Court, and he thereafter drew the maintenance of Rs. 100 until his death. In the first place, a claim for maintenance is inconsistent with a claim for ownership of the estate. In the second place the plaint, which was verified by Hamir " according to his own knowledge," contains admissions which directly negative the appellant's case. M. is described as the son of G. and as the " gaddinashin " of the Biswan estate, and Hamir was at pains to insert a pedigree, showing M. as the son of G.

As regards Hamir's condition, their Lordships agree with the learned Judges of the High Court in their comments and criticism of the evidence and of the views expressed by the Subordinate Judge. It may be further noted that, apart from the two doctors, not one of the witnesses who spoke as to Hamir's health, and among whom was his sister, suggested that he was weak-minded or unable to understand and transact affairs. Their Lordships are unable to hold it proved that Hamir did not understand his verification of the plaint in April, 1913. A large number of

receipts by Hamir for his maintenance allowance were produced. These are of some general value as being inconsistent with Hamir's ownership of the estate, even while the Court of Wards was in charge. The estate was released in February, 1918, and the receipt dated the 20th October, 1918, expressly admits M. to be the son of G.; but Hamir died of influenza within five days thereafter, which may modify the value of this admission. It is, however, in line with the attitude from which Hamir never departed.

After his father's death the appellant, through his mother, Musammat Raj Kunwar, filed a suit for maintenance (369 of 1919) against M., which was compromised on the 22nd January, 1920, for an *ex gratia* allowance of Rs. 20 *per mensem* to the appellant as a member of M.'s family. Their Lordships agree with the learned Judges of the High Court in their comments on the value of the admission by the appellant's mother of M.'s title to the estate as the son of G.

To sum up the documentary evidence as a whole, the only evidence in favour of the appellant is (*a*) the denial by Saparandhwaja in 1901 that M. was the son of G., and (*b*) any favourable inference to be drawn from the proceedings in the Gomti suit of 1910. These at least show that doubts were then current to some extent as to the parentage of M., but that may be said to enhance the value of Hamir's conduct after the succession opened on G.'s death in 1912 and the admissions by the appellant's mother in 1919. In their Lordships' opinion, it would require very clear and convincing oral testimony to rebut the documentary evidence in the respondent's favour and, in particular, the admissions in the maintenance suits of 1913 and 1919.

Their Lordships find it unnecessary to deal with the oral evidence in detail, as they are in substantial agreement with the detailed criticism of that evidence by the learned Judges of the High Court and their criticism of the treatment of that evidence by the Subordinate Judge. In particular, their Lordships are of opinion that the learned Subordinate Judge has erred in two important respects, viz., in not attaching sufficient weight to the documentary proof of admissions in the maintenance suits of 1913 and 1919 and in placing the burden of proof on the respondent. One passage may be cited from the learned Judge's opinion, namely, "All the above witnesses (*i.e.*, the plaintiff's) were in some way or other in a position to have special knowledge as to whether defendant's father was a son of Shivbaran Singh or whether he was a son of Gariradhwaj Prasad Singh (G.). I see no reason to disbelieve them in spite of the fact that their evidence is certainly open to just criticism. From the very nature of the case, plaintiff could not have given better evidence. He could not be expected to have called any witnesses from Jarkhi to depose in his favour. The facts in question being within the special knowledge of Rani Basant Kunwar, the onus of proving them was on the defendant." The concluding sentence appears

to rest on an erroneous application of Section 106 of the Indian Evidence Act, which only applies to parties to the suit, of whom Rani Basant Kunwar was not one. Their Lordships apprehend from these observations that, if the learned Judge had given sufficient weight to the documentary evidence and had held the burden of proof to be on the plaintiff, he would have found difficulty in holding the oral evidence to be sufficient to discharge that burden.

It is right to refer to the absence of certain evidence, which the Subordinate Judge regarded as justifying inferences unfavourable to the respondent. As regards the horoscope and the books of account there seems little doubt that these existed, and that, if still available and produced, they would have been of importance as evidence. But the circumstances under which the Court would be entitled to draw inferences unfavourable to the respondent are provided for by section 114 (*g*) of the Evidence Act, and the Court must be satisfied that the evidence could be produced. The appellant has not attempted to prove that the account books are in existence and could be produced. It is most regrettable that the right of discovery is not fully taken advantage of in such a case as this, where documentary evidence, if it is still available, might afford valuable evidence. But the appellant's failure to exhaust this source cannot be used against the respondent. Similarly, in the case of the horoscope, Rani Basant Kunwar named the person in whose possession it might be, but the appellant made no attempt to pursue enquiries as to its existence. With regard to the birth register, it is sufficient to say that it was admitted before their Lordships that registration was not compulsory in Agra at the material period, and this point is of no value.

On the whole matter, their Lordships are of opinion that the appellant has failed to prove his case, and they will humbly advise His Majesty that the decree of the High Court dated the 12th February, 1929, should be affirmed and the appeal dismissed with costs.

In the Privy Council.

KUNWAR MAHABIR SINGH

v.

KUNWAR ROHINI RAMANADHWAJ PRASAD SINGH.

DELIVERED BY LORD THANKERTON.

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