Privy Council Appeal No. 35 *of* 1940

Allahabad Appeal No. 3 *of* 1936

Gopal Das and another - - - - - - - *Appellants*

v.

Sri Thakurji and others - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED 22ND JANUARY, 1943

Present at the Hearing:

LORD ROMER

SIR GEORGE RANKIN

SIR MADHAVAN NAIR

[*Delivered by* SIR GEORGE RANKIN]

This is an appeal by the plaintiffs from a decree of the High Court at Allahabad dated 3rd October, 1935, affirming a decree of 7th November, 1930, by which the Subordinate Judge at Benares dismissed the suit.

The plaintiffs claim as reversioners of one Parshotam Das who died in 1883, a Hindu governed by the Benares school of law.

HARISH CHANDRA (d. 16th August, 1856).
= MANKI BAHU (d. 1st June, 1893).

Hiran Bibi = Jagannath Das.	Mukandi Bibi = Raghunath Das.	Punno Bibi (Defendant No. 2) = Mannu Lal.	Adopted in 1860 Parshotam Das (d. December, 1883) = Bindeshri Bahu (d. 27th August, 1916).
Krishna Das *alias* Chhuttu Lal (Defendant No. 4).	Baijnath Das (Defendant No. 3).		

Mohan Bibi (Defendant No. 5) = Baldeo Das (d.).	Sohan Bibi (Defendant No. 6) = Mukandi Lal.
Gopal Das (Plaintiff No. 1).	Baldeo Das (Plaintiff No. 2).

Harish Chandra, whose name stands at the head of the pedigree table, died in 1856 leaving a widow, whose name was Manki, three daughters (one born posthumously), but no son. In 1860 the widow adopted Parshotam Das, then about five years old. When he died in 1883 he left a widow Bindeshri and two daughters Mohan and Sohan. Manki Bahu his adoptive mother survived him and died in 1893. His daughter Sohan was married to Mukandi Lal and the plaintiffs Gopal Das and Baldeo Das are her sons. Thus when Parshotam Das died Bindeshri

inherited his property. When she died in 1916 her daughters succeeded, but in 1926 they executed a deed of relinquishment in favour of the plaintiffs who thus make title as reversioners of Parshotam Das to any estate which he may have possessed at his death.

The defendants to the suit, in addition to Mohan Bibi and Sohan Bibi, who are only joined *pro forma,* are a certain idol and its managers. The plaint lays claim to all the property left by Parshotam Das and sets forth the particulars thereof in eight schedules or lists. List 8 may be neglected since it merely mentions certain articles as in the plaintiffs' own possession. Lists 6 and 7 mention properties claimed as accretions to the estate of Parshotam Das but this claim is now abandoned. Lists 4 and 5 comprise moveables as to which it is clear and is now admitted that the plaintiffs are barred by limitation. In the result the property now in dispute may be shortly described as consisting: *firstly,* of the proprietary interest in a village called Sheodasa in the Benares district together with certain incidental rights as mortgagees of inferior interests therein (lists 1 and 2): *secondly,* of a house in the city of Benares which used to be the family dwelling house of Harish Chandra and is called the *bari haveli,* together with an orchard adjacent thereto (list 3). Another house, called the *chhoti haveli,* is also entered in list 3 as having belonged to Parshotam Das, but this is not a subject of dispute as it has never been in the possession of the defendant idol or its managers and is not claimed by them. These properties at Sheodasa and Benares belonged originally to Harish Chandra and the plaintiffs' claim is that Parshotam Das inherited them from him. The defendant idol has two lines of defence to the claim. First, that pleaded in paragraph 15 of the written statement: " It is denied that the property in dispute or any part thereof was left by Babu Parshotam Das." Secondly, that by a compromise dated 17th May, 1896, and made by Bindeshri in a litigation between her and Harish Chandra's daughters, in consideration of her getting the *chhoti haveli* and Rs.20,000 Government promissory notes all claim to the Sheodasa property, the *bari haveli* and the orchard was given up by Bindeshri on behalf of her husband's estate and so as to bind his reversioners. This compromise was referred to in the plaint, which attacked it as having no validity against the plaintiffs.

From petitions made by Manki Bahu to the Agent of the Governor General in the years 1860 and 1871, she is seen to have claimed from the first that the adoption of Parshotam Das was the subject of special stipulation to the effect that she should retain all her rights in her late husband's property and even that its disposition after her death should be within her control. Such stipulations may be assumed to have been invalid as against a minor but Parshotam Das could when he came of age assent to any stipulation made by her or make any new bargain with her.

On the 9th December, 1871, Manki Bahu executed a will which was signed by Parshotam Das, then about 16 years of age, in token that he accepted it. It was registered by her on the 22nd of that month. The importance of its provisions does not arise from their ever having taken effect on her death, but partly from its recitals and partly from the reference to them made in a receipt of 1881 hereinafter mentioned and in a later will of 1893 made by the same testatrix; partly also from the light it throws upon Manki's claims and conduct. In this will of 1871 Manki Bahu expresses some disappointment with Parshotam Das, and proceeds to declare what is to happen to her husband's estate after her death. She treats it in effect as if it were her own absolute property. She wanted Government to undertake its guardianship and to appoint a manager, who with Parshotam Das and one other were to form a committee. In a paragraph numbered 3 she recited " I have made a temple of Thakurji in my own dwelling house," mentioning the *bari haveli* and its boundaries and adding " the orchard which is adjacent to the said *kothi* towards the north will also remain in the name of Thakurji." She fixed various sums for the expenses of the worship.

In the fourth paragraph she proceeded:—

> " I give to Babu Parshotam Das, the adopted son two promissory notes for Rs.12,000 out of the notes for Rs.63,200 detailed in this will together with a *pucca* house adjoining my kothi towards the north. After my death he should live and eat in it with his wife and children. He and his children will have power to enjoy the principal and interest of the said notes. Except this he and his descendants and heirs shall have no right to or claim for any estate and movable and immovable properties after my death."

She also gave to each of her three daughters promissory notes for Rs.8,000 and provided that they should have no right or claim to anything more. The interest on the remaining Government promissory notes for Rs.27,200 she directed to be expended in giving various small monthly sums to relatives and servants, on the worship of the thakur, on repairs, etc. As to the village of Sheodasa, she provides:—

" The profits of Mauza Sheodasa . . . which amount to Rs.13,000.14.0, will always be exclusively spent on account of the worship of Thakurji and Shivaji, and the food for Brahmans and other such acts."

The will concludes with a statement that she could alter or cancel its provisions in her lifetime and that so long as she lived she would remain in possession of the entire estate of her husband as before.

After the execution of this will an inscription in stone was put over the gate of the *bari haveli*. It bears date 19th October, 1878, and is in the form of a declaration by Manki Bahu, referring to her will, to the effect that the dwelling house and grove have been dedicated as a temple of Sri Thakurji. It states also that the deity has been entered as proprietor of village Sheodasa, the profits from which are to meet the expenses of worship, food,. deity offerings, etc.

Exhibit KK, which was endorsed by the trial Judge as " admitted against plaintiff " is a certified copy of a registered instrument which purports to be a receipt dated 29th March, 1881, signed by Parshotam Das. The Registrar's endorsements are to the effect that it was presented for registration on the same day by Parshotam Das, who admitted execution and signed his name as the person presenting it and again as the person who had executed it. Two persons signed as witnesses to the execution of the document and two as witnesses to the registration. The body of the document is as follows:—

> " I, Babu Parsottam Das, adopted son of Musammat Manki Bahu, widow of Babu Harish Chand deceased, resident of mohalla Bula Nala in the city of Benares, do declare as follows:—
>
> After the death of her husband, Babu Harish Chand, Musammat Manki Bahu adopted me, the executant, according to the wishes of the said Babu, her deceased husband. After performing the ceremonies relating to my adoption, she, under a will, dated the 2nd and registered on the 23rd December, 1871, made an arrangement in respect of the whole of her property (' imlak ') with my consent. So far as I am concerned, the said will provides that Rs.12,000 in notes and a house adjoining the ' kothi ' on the north, have been given away to me, the executant and adopted son, and that, besides the said property, I, the adopted son, or my descendants or heirs shall have no right or claim to the ' imlak ', *i.e.*, the movable and immovable properties comprised in the will. Accordingly, in fulfilment of the conditions laid down in the said will, I the executant, along with my wife, have, with effect from the date of the execution of the will, been in separate possession of the ' pucca haveli ' adjoining the ' kothi ' on the north, and receiving always from Bahu Saheba and bringing to our use the interest on the sum of Rs.12,000 in notes. Now I, the executant, stand in need of celebrating the marriage of my daughter. I have, therefore, taken from Bahu Saheba and brought to my use and enjoyment a sum of Rs.1,000 in cash out of the notes for Rs.12,000 entered in the will as payable to me. Now, there remain notes of Rs.11,000. I shall always take the interest on the said sum, and whenever I shall in any way stand in need of money I shall take the said notes or cash from Bahu Saheba. I have, therefore, executed these few presents by way of a receipt acknowledging payment of Rs.1,000 in cash, out of Rs.12,000 payable to me, so that they may serve as evidence and be of use when needed.

This document was written in the Civil Court, city Benares, on the 29th March, 1881, corresponding to Chait Badi Amavas, Sambat 1937, by the pen of Girja Prasad, resident of mohalla Piri Kalan in the city of Benares.

I executed this receipt for Rs.1,000. It is correct.

(Sd.) Parsotam Das, in autograph, in Hindi.

WITNESSES:—

(Sd.) Sheo Prasad Misir, at present residing in Bula Nala, in autograph, in Hindi.

(Sd.) Gopal Singh, resident of Peri Khurd, by the pen of Parsotam Das."

On this document it is maintained by the defence that Parshotam Das when some 25 years of age is seen to be accepting the *chhoti haveli* and Government promissory notes to the value of Rs.12,000 as the property which he was to get by his adoption, and to be giving up any claim to the properties now in dispute. In the revenue records of 1883 the *khewat* of mouza Sheodasa stands in the name of the defendant idol with Manki Bahu's name as manager. It seems clear that neither Parshotam Das nor Bindeshri ever collected any rents from the village.

A registered document dated 9th December, 1883, purports to be a copy of the will of Parshotam Das by which he left all his property to his wife Bindeshri saying that she was to be *malik* of the whole of his estate and that "no one other than her will have a power or right to be the owner of the property." The trial Court accepted this will as proved but the High Court on appeal did not. Parshotam Das died very soon after the date which this document bears—in December, 1883.

In 1893, shortly before her death, Manki Bahu made a second will by which she referred to her first will of 1871, and said that under it she had been managing the whole of her property but that certain changes had taken place. By this second will she claimed to be owner of Sheodasa and of Government promissory notes to the amount of Rs.44,000. Of the latter, Rs.12,000 were given absolutely to Bindeshri and Rs.24,000 were divided unequally between her three daughters. She directed that the income from Sheodasa should be applied, with other income, to the maintenance of the worship of the defendant idol and the *chhetra* or charity attached to it for feeding the poor. Apart from the Government promissory notes for Rs.12,000 Bindeshri was not to have any power of transfer.

Manki Bahu died on 1st June, 1893, a very little more than twelve years after 29th March, 1881, the date of the receipt exhibit KK. Her death was followed by a suit of 1895 brought by her daughter Punno against Bindeshri which ended in the compromise of 27th May, 1896, already mentioned. The compromise was itself attacked in a suit brought in 1906 by Sohan Bibi, the mother of the present plaintiffs, against her mother Bindeshri, her sister Mohan Bibi, and her husband's three sisters. This, properly considered, was a representative suit brought on behalf of the whole body of reversioners presumptive and contingent—*Mata Prasad* v. *Nageshar Sahai* (1925) L.R. 52 I.A. 398 but the idol was not made a party. The suit was carried on appeal to the Board and was ultimately dismissed by Order in Council dated 14th May, 1914. The High Court in the present case held that this decision was not *res judicata* so as to conclude the present appellants' claim, and the contrary is not contended by learned counsel for the respondent idol. On this view, however, it is difficult to see why the High Court thought themselves obliged to dismiss the plaintiffs' appeal—a result inconsistent with their findings but arrived at apparently out of deference to the previous decision of the Board. The High Court also held that fraud had been practised upon Sohan Bibi in connection with that appeal to His Majesty.

The first matter for consideration upon this appeal is in their Lordships' view the registered receipt of 1881 given by Parshotam Das. The trial Judge admitted it as proved and marked it Exhibit KK. He refers to it several times in his judgment:

> " The arrangements made under the said will (*i.e.* of 1871) were ratified by him in a registered receipt dated the 29th March, 1881, in which he clearly states that the will was made by Manki with his consent, that he had been given a house and promissory notes for Rs.12,000 only, that in fulfilment of the conditions laid down in the will he along with his wife had been in separate possession of the house and receiving the interest on the sum of Rs.12,000 and had no claim to any other property."

The learned Judge points out also that on the face of the compromise of 1896 this receipt was declared to have been admitted and accepted together with the two wills of Manki Bahu. Their Lordships do not find in the record nor have they been referred to any objection taken at the trial to the admission in evidence of the receipt. No discussion or decision thereupon appears to be recorded. In the High Court it was entirely disregarded. The learned Judges say:—

> " In order to substantiate the plea of adverse possession, reliance has been placed on a certified copy of a receipt alleged to have been executed by Parshotam Das on the 29th March, 1881. The plaintiffs did not admit the execution of this receipt by Parshotam and here again no foundation was laid by the defendants for the admission of secondary evidence. Further there was no evidence to prove the execution of the receipt by Parshotam Das."

On giving to this very important question the full consideration which it deserves their Lordships do not think that the High Court's rejection of the document can be sustained. The endorsement "admitted against the plaintiffs" is in the form generally employed by the trial Judge under O.13 r. 4 for documents tendered by the defendants just as the plaintiffs' documents are marked " admitted against the defendants." The endorsement means that the document is admitted in evidence as proved. Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial. In the present instance it does not appear that the objection was taken at the proper time or that it would have been of any avail had it been taken. The plaintiffs claim as reversioners of Parshotam Das and any statement proved to have been made by him is evidence against them as an admission. The registrar's endorsements show (see sub-section 2 of section 60 of the Registration Act, 1877) that in 1881 a person claiming to be this Parshotam Das, and to have become son of Harish Chandra by adoption made by his widow Manki Bahu, presented the receipt for registration and admitted execution. He was identified by two persons—one Sheo Prasad and the other Girja Prasad, who was the scribe of the document and was known to the Registrar. What remains to be shown is that the person admitting execution before the Registrar was this Parshotam Das and no impostor. The question is one of fact except in so far as there was as matter of law a presumption that the registration proceedings were regular and honestly carried out. *Gangamoyi Debi* v. *Troiluckhya Nath Chowdhry* (1906), L.R. 33, I.A. 60, 65; *Ehtisham Ali* v. *Jamna Prasad* (1921), L.R. 48, I.A. 365, 372. It seems clear that any objection to the sufficiency of the proof upon this point would have been idle, the circumstances being such that the evidence of due registration is itself some evidence of execution as against the plaintiffs. Wills and documents which are required by law to be attested raise other questions but this receipt was not in that class. The receipt was referred to in, and was part of the basis of, the agreement of compromise of 27th May, 1896, mentioned in the plaint and produced by the plaintiffs (exhibit 14). Whatever criticism the plaintiffs may have

upon Bindeshri's acts, their mother Sohan Bibi as presumptive reversioner had in her suit of 1906 failed to resist this receipt being held proved. In that case Girja Prasad, the scribe of the document, and one of the two persons who identified Parshotam Das before the Registrar in 1881 was called; as appears from the judgment of the trial Court dated 26th July, 1909 (exhibit E), holding the document to be proved, and by the record of the appeal brought before the Board in that suit. The High Court's judgment in that case (6th April, 1911) is one of the plaintiffs' documents in the present case (exhibit 9), and clearly treats the receipt as proved: indeed, it would seem to indicate that the matter was not in contest. Apart altogether from the Order in Council of 14th May, 1914, which upheld the compromise, there is more than enough in the circumstances of the case to entitle the trial Judge to treat the receipt as a document whose execution had been admitted by Parshotam Das in 1881.

The only other ground for the High Court's rejection of it appears to be that " no foundation was laid by the defendants for the admission of secondary evidence." It was contended by Sir Thomas Strangman for the respondents that the receipt comes within paragraph 2 of section 74 of the Indian Evidence Act and was a " public document "; hence under section 65 (*e*) no such foundation is required as in cases coming within clauses (*a*), (*b*) and (*c*) of that section. Their Lordships cannot accept this argument since the original receipt of 1881 is not " a public record of a private document." The original has to be returned to the party—see sub-section 2 of section 61 of the Registration Act, 1908. A similar argument would appear at one time to have had some acceptance in India but it involves a misconstruction of the Evidence Act and Registration Act and later decisions have abandoned it. The line of cases may be found in the textbooks (*cf.* Rustomji's Law of Registration, 3rd ed., 1939, p. 353), but it will suffice for their Lordships to refer to *Padman* v. *Hanwanta* (1915), 19 C.W.N. 929, a case about a registered will. It was said in the judgment of the Board delivered by Mr. Ameer Ali:—

> " It was urged in the course of the argument that a registered copy of the will of 1898 was admitted in evidence without sufficient foundation being laid for its admission. No objection however appears to have been taken in the first Court against the copy obtained from the Registrar's office being put in evidence. Had such objection been made at the time, the District Judge, who tried the case at first instance, would probably have seen that the deficiency was supplied."

It would not appear that in the present case the defendants were in any difficulty upon this point. From exhibit E the judgment of the District Judge on 29th July, 1909, in Sohan Bibi's suit of 1906, it appears that the original receipt when last heard of was held to be in the possession of Mukandi Lal the present plaintiffs' father on behalf of their mother Sohan Bibi. No reason appears for supposing that it is in the possession of the defendant idol or its managers and a notice to produce served upon the plaintiffs would have been a mere formality.

The receipt of 29th March, 1881, must in their Lordships' view be taken as proved. When once it is admitted to the record their Lordships think that, apart altogether from its direct effect to negative or terminate any right or claim of Parshotam Das to the *bari haveli*, the orchard, or Sheodasa, the receipt taken with the other evidence makes reasonably plain the fact that from that time Manki Bahu and the defendant idol claiming through her were in exclusive possession of these properties adversely to Parshotam Das and his estate for over twelve years. This conclusion in no way turns upon the questions whether Manki Bahu's will of 1871 took effect as a will upon her death in 1893 or whether the will of 1893 revoked it. The recital in the first will as to the establishment of the idol, the fact that she was by both wills claiming to dispose of the properties after her death as though they were her own, that she made a particular provision for Parshotam Das to satisfy his claims as an adopted son, that the defendant idol was entered in the revenue papers of 1883 as owner of Sheodasa—these are facts amounting to a sustained

course of conduct on the part of Manki Bahu throughout the remainder of her life. In rejecting the receipt the learned Judges of the High Court rejected the main clue to the meaning of the evidence. Thus they say that if Manki Bahu remained in possession of the properties in dispute " her possession must in the absence of proof to the contrary be deemed to be on behalf of Parshotam." Also that there is no evidence to show who remained in actual possession of the property between 1871 and 1883 and between 1883 and 1893. With all due respect to the learned Judges, their Lordships cannot accept this view of the effect of the evidence. It is a view which is only rendered possible by the rejection of the receipt—a course by which the learned Judges disabled themselves from appreciating the acts and conduct of the parties. Their Lordships' think it proved that after 1881 Manki throughout her life was in adverse possession of the properties in suit, standing strictly by the arrangement with Parshotam Das which the receipt represents; both Parshotam Das and his widow Bindeshri being dependent on her bounty for anything more. In their Lordships' view, Bindeshri when by the compromise of 27th May, 1896, she gave up all claim to the properties now in dispute, abandoned nothing which she had any good claim to retain on behalf of her late husband's estate. It is not shown that they were properties to which he was entitled at his death, but on any view time had begun to run against him in his lifetime by reason of Manki Bahu's adverse possession. His title if any came to an end in twelve years—that is, before Manki Bahu's death, notwithstanding that his property devolved upon his widow in 1883. The principle of section 9 of the Limitation Act, 1908, applies, and not article 141. *Asghar Reza v. Mehdi Hossein* (1893), I.L.R. 20, Cal. 560; *Mohendra Nath* v. *Shamsunnessa* (1914), 19 C.W.N., 1280. In these circumstances it is not necessary to consider whether the compromise of 1896 can be treated as invalid because Bindeshri claimed to be entitled under her husband's will to an absolute estate in his property, and not merely to the estate of a Hindu widow; or on any other ground.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of the respondents Nos. 1 to 7.

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In the Privy Council

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