Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheosagar Singh and others v. *Sitaram Singh, from the High Court of Judicature at Fort William in Bengal; delivered 6th March* 1897.

Present:

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

[*Delivered by Lord Macnaghten.*]

The question in this appeal is whether the infant Respondent Sitaram Singh is or is not the son of one Anar Koer who died in November or December 1884.

Upon the answer to this question the title of the Appellants to a moiety of certain shares in Mouzah Nadoura depends.

Anar Koer was the wife of Adit Singh the guardian on the Record and alleged father of Sitaram and she was the only child and heiress of Mahiput Singh.

Mahiput Singh and a cousin of his one Jawahir Singh had purchased the shares in question on their joint account and had registered them in their joint names. Mahiput who survived Jawahir died in August 1882. On his death the Plaintiffs who were sons of Jawahir applied for registration on the ground that the family was joint and that the succession belonged to them. The Deputy Collector on a summary application decided in their favour. Anar Koer then brought a regular suit to recover her father's moiety. In that suit it was held that the family was not joint and this

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decision was confirmed on appeal. But the registration in the Collector's books was not altered and possession of the whole property has remained with the Plaintiffs ever since.

In the present suit which was commenced in 1888 the Plaintiffs asked to have it declared that Sitaram was not the son of Anar Koer or the grandson by the daughter of Mahiput and that Anar Koer did not leave any child behind. The Subordinate Judge of Gya made a declaration to that effect. The High Court (Petheram C. J. and Beverley J.) reversed this decision and dismissed the suit. From that reversal the present appeal is brought.

There had been a previous litigation begun in 1885 between the same parties in which the very same issue was raised. The additional Subordinate Judge of Gya by whom the case was tried—a different person from the Subordinate Judge in the present suit—attached little or no weight to the oral evidence on the part of the Plaintiffs. Holding that the burden of proof lay on the Plaintiffs and that they had not discharged it he dismissed the suit. On appeal the learned Judges of the High Court (Mitter and Agnew JJ.) affirmed the decree. They did not however deal with the real question at issue between the parties. They held that the suit could not be maintained in the absence of certain persons in the same interest as the Plaintiffs. And apart from that objection they were of opinion that under the particular circumstances of the suit before them the Court ought not in the exercise of its discretion to make a declaratory decree. Whether the view of the learned Judges on these points was right or wrong the judgment proceeds expressly on the footing that it was "not necessary to come "to a decision" on the question of Sitaram's parentage. And so the appeal was dismissed.

The Plaintiffs then bought up the interests of the persons not represented in the first suit and commenced fresh proceedings. It was objected that the Plaintiffs were precluded from bringing a second suit by the decision in the suit of 1885. In a preliminary judgment the Subordinate Judge disposed of that point without any hesitation. On the 7th of February 1890 he delivered judgment on the main question. He carefully reviewed the evidence and all the circumstances of the case. He was not so much impressed by the oral testimony on the part of the Plaintiffs as he was by the way in which the Defendant's case had been conducted and by the absence of evidence which if the defence were an honest one would he thought certainly have been forthcoming. He held that the Plaintiffs had made out "a sufficient *primâ facie* case" and that the Defendant had altogether failed to meet it.

It is not necessary for their Lordships to do more than express their concurrence with the Subordinate Judge in his view of the question as it was presented to him because to that extent the learned Judges of the High Court adopt the reasoning and conclusion of the Court below.

"We have" they say "gone through the "evidence in this case very carefully and if the "oral evidence taken there" (that is in the Subordinate Court) "had stood alone it appears to "us that it would have been very difficult for "us to interfere with the decision because the "reasoning of the Subordinate Judge upon the "evidence as it appeared there appears to be "quite sound and the reasons given for the "conclusion he came to that Anar Koer at the "time when this person Sitaram was said to have "been born was a woman of such an age as to "be past the age of child-bearing appears to be "well founded."

The way in which the learned Judges of the High Court disposed of a decision which upon the evidence adduced at the trial they themselves thought well founded was perhaps rather summary. It seems that at the trial the parties had put in evidence the judgment and the decree and such of the depositions in the first suit as they considered material. But the learned Judges on appeal were not satisfied with so meagre an instalment of past history. They held it "necessary in the interests of justice" that they should see the whole of the paper book in the suit of 1885 and deal with it as part of the record before them. Reading the two records they found that the witnesses on the part of the Plaintiffs in the two suits were not the same and they assumed rather hastily that the Plaintiffs were making "a totally different case" from that which they had made originally. Taking the evidence in the first suit by itself they pronounced an opinion that if that suit had come before them on appeal it would have been impossible for them to have reversed the judgment of the Subordinate Judge who had dismissed the Plaintiffs' suit "thinking" they said "that upon the whole this person Sitaram "had been proved to be the child of Anar Koer." The same issue, they added, had been tried by two Subordinate Judges; the question was which of the two was right. Under the circumstances they preferred the earlier decision—a decision nearer the time of Anar Koer's death—to the result of a second trial after an enquiry which had they thought "disclosed to the Plaintiffs "exactly what the Defendant's case was."

Their Lordships cannot think this mode of dealing with the matter at all satisfactory. The reason why the Plaintiffs' called a different set of witnesses on the second trial is perhaps not far to seek. In the first case the Subordinate

Judge had put aside the evidence of the Plaintiffs' witnesses on the ground that they were all either biased by relationship in favour of the Plaintiffs or prejudiced against Adit Singh by former disputes. The Plaintiffs can hardly be blamed for not choosing to rely a second time upon witnesses thus discredited. Nor is it correct to say that in the second suit the Plaintiffs set up "a totally different case." In both suits their case was the same. They averred that Anar Koer died without issue. But when the time of Sitaram's birth was fixed the question was brought within a narrower compass. It was enough for the Plaintiffs then to prove if they could that at that time Anar Koer was past child bearing. The case they made originally was established beyond question if they could shew that at the time when the alleged offspring of Anar Koer was born it was impossible for Anar Koer in the course of nature to become a mother.

It is quite true that on the first trial the Plaintiffs did not make it part of their case that Anar Koer was past child-bearing in the latter years of her life. Apparently they had no reason to anticipate that so recent a date would be fixed for the birth of the rival heir who has never yet been produced in Court. They seem to have expected an older claimant. When the defence was opened and Adit Singh who was the first witness for the Defendant pledged himself to the date of Sitaram's birth the importance of the question became apparent and thenceforth every witness for the Defendant who did not state on examination-in-chief that he was ignorant of Anar Koer's age was cross-examined closely on the subject. No one however could tell how old Anar Koer was at her marriage or how old she was at Mahiput's death. One and all they

professed to know nothing whatever about her age. Moreover it is to be observed that two of the Plaintiffs' witnesses on cross-examination stated that Anar Koer had reached an age which makes child-bearing impossible or at least very improbable. One said she was 55 at the date of Mahiput's death. Another who gave his age as 48 said she was older than he was. So that the first statement as to Anar Koer's age came from the camp of the Plaintiffs' before the exact position of the Defendant was declared. And if on the first enquiry the Plaintiffs gained information useful to them by having the date of Sitaram's birth fixed the Defendant's advisers were made aware of the case they would have to meet in the event of a second trial. And it was an easy case for them to meet if their story was true. However instead of producing evidence as to Anar Koer's age at Mahiput's death or as to the birth of a child of her womb Adit Singh contented himself with the repetition of his former evidence and the allegation that Anar Koer was only his second wife. He had been married before he said to a woman with whom he had lived in wedlock for more than 20 years and he married Anar Koer after her death. So much he remembered and swore to positively. But he could remember nothing more about the first wife. He could not even recall her name and the Subordinate Judge who saw him under cross-examination came to the conclusion that that part of his story at any rate was a fiction.

It may perhaps be doubted whether the learned Judges of the High Court were right in assuming on the mere perusal of the evidence in the first suit to decide a case which was not before them and on which they could not have heard any argument. However that may be it is obvious that by the course which they took they gave the effect of a judgment conclusive

between the parties to a decision which was superseded on appeal and which in the opinion of the only tribunal competent to rehear the case ought never to have been pronounced. Indeed unless the matter of the decision of the Subordinate Judge in the first suit be treated as *res judicata* it can have little or no bearing on the question at issue. Granted that the first decision of the Lower Court was right it by no means follows that the second must be wrong.

It was argued or contended with much persistence before their Lordships that the decision in the first suit might support a plea of *res judicata*. That contention did not commend itself to their Lordships. It met with rather more favour in the High Court though it did not quite find acceptance there. The learned Judge who delivered the Judgment of the Court expressed himself as follows:—

"Certain points were taken here with reference "to this matter being *res judicata*. In the view "we take of it we do not think it necessary for "us to decide that question and I think it better "that we should be understood as not expressing "any opinion upon the point one way or "another."

Their Lordships are unable to understand what advantage there can be in treating such a point as open to argument and thus throwing doubt upon the meaning of an enactment which in this part of it at least seems to be expressed in tolerably clear language. To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been "heard and finally decided." If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the Lower Court was superseded

by the Judgment of the Court of Appeal. And the only thing finally decided by the Court of Appeal was that in a suit constituted as the suit of 1885 was no decision ought to have been pronounced on the merits.

Before their Lordships certain judgments in proceedings in execution were appealed to as sufficient to raise or eke out the plea of *res judicata*. But in each case on turning to the judgment it appears that the Court expressly guarded itself against being supposed to decide the question of Sitaram's parentage.

Their Lordships agree with the High Court in thinking that the Subordinate Judge came to a right conclusion upon the evidence and the circumstances of the case before him. They do not however think that there was anything in the evidence in the first suit or in the judgment of the additional Subordinate Judge or in what the learned Judges term "the history of the case" to suggest any doubt as to the propriety of the decision which they overruled.

Their Lordships will therefore humbly advise Her Majesty that the decision of the High Court should be reversed and the appeal from the decision of the Subordinate Judge of Gya dismissed with costs. The Respondent will pay the costs of this Appeal.