

Privy Council Appeal No. 32 of 1914.

Allahabad Appeal No. 6 of 1913.

Sri Kishan Lal - - - - - *Appellant,*

v.

Mussamat Kashmiro and Others - - - *Respondents,*

FROM

**THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN
PROVINCES, ALLAHABAD.**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 28TH MARCH, 1916.

Present at the Hearing :

VISCOUNT HALDANE.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

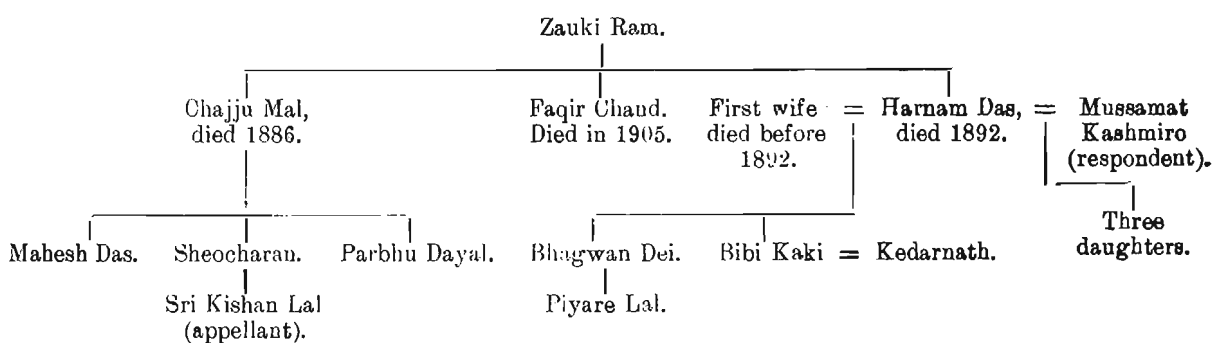
[*Delivered by* SIR JOHN EDGE.]

This is an appeal from a decree, dated the 13th December, 1912, of the High Court at Allahabad, which reversed the decree, dated the 11th November, 1910, of the Additional Judge of Meerut. The appellant, Sri Kishan Lal, is the plaintiff in the suit in which this appeal has arisen.

The suit was brought on the 8th September, 1909, by Sri Kishan Lal, a minor, through his certificated guardian, on a mortgage of immovable property, dated the 6th September, 1897, to recover one-fourth of the mortgage money alleged to be then due, together with interest and costs, by sale of the mortgaged property. The mortgage in question had been made by one Haji Muhammad Yahya Khan, in favour of one Faqir Chand, as the manager of Lala Harnam Das's estate. Haji Muhammad Yahya Khan died before this suit was instituted. His descendants and personal representatives are some of the defendants to the suit; they deny the plaintiff's title, and allege that the mortgage of 1897 was satisfied as to part of the mortgage money by payment to Mussamat Kashmiro, and as to the balance by the grant of another and subsequent mortgage in favour of Mussamat Kashmiro. Others of the defendants

are persons who allege that they purchased in 1903 portions of the mortgaged property from Haji Muhammad Yahya Khan, and paid the consideration money to Faqir Chand. The remaining defendant is Mussamat Kashmiro, who denies the plaintiff's title, and alleges that the money which was advanced in 1897 as the consideration for the mortgage was money which belonged to her for a Hindu widow's estate, and was advanced by Faqir Chand as and being the manager of her estate. On the other hand, the plaintiff's case is that the estate which was managed by Faqir Chand, and of which the mortgage money formed part, was the ancestral property of a joint Hindu family, and that one-fourth share of the family property has devolved upon him. Hence he claims in this suit to recover one-fourth of the money which he alleges is due.

The following genealogical table will show how the plaintiff was related to Lala Harnam Das, who was the husband of Mussamat Kashmiro, and the relationship which existed between Faqir Chand, Lala Harnam Das, Piyare Lal, and other persons, to whom it will be necessary to refer. The common ancestor was Lala Zauki Ram.



Having regard to the facts of this case, it is peculiarly necessary to see how the plaintiff alleges title in himself to sue upon the mortgage of 1897. In his plaint, which was filed on the 8th September, 1909, the plaintiff alleges, so far as is material, as follows:—

“1. The plaintiff is the mortgagee of the lands owned by the defendants.

“2. The particulars of the mortgage are as follows:—

“(a.) Date of mortgage.—Dated and registered on the 6th September, 1897.

“(b.) Names of the mortgagor and the mortgagee.—Haji Muhammad Yahya Khan, mortgagor, and Munshi Faqir Chand, mortgagee.

“(c.) Amount of mortgage money.—15,000 rupees.

“(d.) Rate of interest.—Interest at the rate of 12 annas per cent. per mensem and compound interest to be charged annually.

“(e.) Property mortgaged.—Zamindari in the villages of Dhautala and Uldhan, a detail of which is given in the reliefs.

“(f.?) The amount claimed.—10,500 rupees.

“3. After the death of Lala Harnam Das a dispute took place among his survivors, in which Babu Sheocharan Lal, deceased, father of the plaintiff, alleged himself to be the owner of the whole on the

ground of adoption. Under the agreement, dated the 28th November, 1892, the said dispute was referred to Lala Sri Ram and Mohan Lal, arbitrators, and Lala Daya Ram, umpire for arbitration.

“ 4. Under the arbitration award, dated the 10th and registered on the 17th January, 1893, it was declared that defendant No. 9 (Mussamat Kashmiro) would remain the owner of an 8-anna share of the property by virtue of life interest; that Munshi Faqir Chand would remain the owner of a 4-anna share, and that Parbhu Dayal, Mahesh Das, and Sheocharan Lal would remain the owners of the (remaining) 4-anna share. But under the said award the property and the business of all the aforesaid shareholders were allowed to remain joint during the lifetime of Munshi Faqir Chand, and for the management of the whole of the property and the business Munshi Faqir was appointed manager, and his name was recorded in the revenue papers in respect of all the property, and the whole of the business was carried on in his name.

“ 5. The share of Lala Mahesh Das and Parbhu Dayal was received by Lala Sheocharan Lal, father of the plaintiff.

“ 6. Munshi Faqir Chand, as manager of the aforesaid property, has advanced the aforesaid loan to the aforesaid mortgagor out of the estate under the aforesaid bond.”

* * * * *

“ 16. The plaintiff was a member of the joint family with his father, Sheocharan Lal; he is the owner of the whole of the property and the capital by right of survivorship.”

Mussamat Kashmiro, in her written statement, amongst other things, alleged that, after the death of Zauki Ram, the ancestral property left by him was partitioned in or about 1863 amongst his three sons, Lala Harnam Das, Chajju Mal, and Faqir Chand, and thereafter the three brothers lived separate, and were separate in food and in business; and that her husband, Lala Harnam Das, through his ability and business made great additions to his share of the partitioned property, and with the profits of money dealings acquired a great deal of property. She also alleged that Faqir Chand, as her manager and agent, advanced the mortgage money of 1897 out of the property which had come to her as the widow of Lala Harnam Das.

In her written statement Mussamat Kashmiro denied all knowledge of any mutual dispute. She stated that the arbitration proceeding was not taken in good faith, but was taken to defeat the rights of the real heirs of Harnam Das; that the agreement of reference was signed without her authority by Piyare Lal; that she was under the influence of her brother-in-law, Faqir Chand, who deceived her, misrepresented to her the nature and the effect of the agreement of reference, and induced her by his misrepresentations and threats to acknowledge the agreement of reference before the sub-registrar, and that she had no legal adviser. According to her, the written contents of the award were never read out to her, and Faqir Chand during his lifetime had made her believe that she was the sole proprietor of the property which had been left by her husband. She alleged that since her husband's death, on the 15th October,

1892, she had been in proprietary possession of the money-lending business without the participation of anyone else, and that she had appointed Faqir Chand as the manager of her business.

In order rightly to understand some of the points which arose in this case, it is necessary that the following considerations should be borne in mind. At the time, 1863, when it is alleged that the three sons of Zauki Ram separated, the joint family property was, so far as appears, of the value of about 9,000 rupees. From 1863 until he died in 1892, Lala Harnam Das carried on in his own name a money-lending business, in which he accumulated property of the value of about 300,000 rupees. When Lala Harnam Das died he left surviving him his second wife, Mussamat Kashmiro, three daughters whom he had by her, and two daughters by his first wife, one of whom, Mussamat Kaki, was childless, and the other of whom, Mussamat Bhagwan Dei had a son, Piyare Lal, who has been a prominent witness in this suit. Lala Harnam Das left surviving him his brother Faqir Chand, who was a Tahsildar, and the eldest male relation of Lala Harnam Das when he died. Chajju Mal, another brother of Lala Harnam Das, had died in 1886, but he had left surviving him three sons, Mahesh Chand, Parbhu Dayal, and Sheocharan Lal, a Munsif, who were living when Lala Harnam Das died. Mussamat Kashmiro was a purdahnashin lady, she was illiterate, and it has not been shown that she was a woman of any business capacity. She was a woman who, in matters of business, would have to rely for advice and guidance upon others. If on the death of Lala Zauki Ram the three brothers did not separate, but continued to live as a joint Hindu family, it may be assumed that the property which Lala Harnam Das had accumulated was, when he died, joint property. If, on the other hand, the three brothers separated in 1863, it is to be assumed on the evidence that the property which Lala Harnam Das accumulated was his separate property. If there was no separation, the members of the joint family who on the death of Lala Harnam Das were entitled to the property which had been accumulated by Lala Harnam Das, were Faqir Chand, whose interest represented one-half, roughly speaking 150,000 rupees on a partition, and Mahesh Das, Parbhu Dayal, and Sheocharan, whose interest between them represented the other moiety, or, roughly speaking 50,000 rupees each on a partition. Mussamat Kashmiro would in that event have been entitled to nothing except maintenance. If the three brothers had separated and Lala Harnam Das had adopted his nephew Sheocharan as his son, Sheocharan would, on the death of Lala Harnam Das, have been entitled to the whole of the property, worth about 300,000 rupees, which Lala Harnam Das had accumulated, and Mussamat Kashmiro would have been entitled to maintenance only. If the three brothers had separated, and Lala Harnam Das had not adopted Sheocharan as his son, Mussamat Kashmiro would have been entitled for a Hindu widow's estate to the whole of the property

which Lala Harnam died possessed of, and that property would, on her death, go to Lala Harnam Das's daughters.

Lala Harnam Das died on the 15th October, 1892, and thereupon it was arranged between Faqir Chand and his nephew Sheocharan, that Sheocharan should be put forward as the adopted son of Lala Harnam Das, Faqir Chand, however, insisting that he should be appointed manager of the estate. On the 20th October, 1892, Faqir Chand, having had prepared an application to the Revenue Court for mutation of names in favour of Sheocharan as the adopted son of Lala Harnam Das, presented it to the Revenue Court. There can be no doubt that at that time it was intended by Faqir Chand and Sheocharan that the whole of the property which was left by Lala Harnam Das should be claimed by Sheocharan as his adopted son. Subsequently on the 25th May, 1905, Sheocharan alleged that he "was the heir to, and the owner of, the estate of Lala Harnam Das, deceased, on account of his being an adopted son." Faqir Chand had also had prepared a power of attorney, dated the 20th October, 1892, according to which Sheocharan Lal, "adopted son" of Lala Harnam Das and Mussamat Kashmiro, widow, appointed Faqir Chand and Mahesh Das their general attorneys for, amongst other purposes, an application to the Revenue Court for mutation of names. That power of attorney was signed by Sheocharan, and the mark of Mussamat Kashmiro was put to it by Piyare Lal. The reference in that power of attorney to Sheocharan as the adopted son of Lala Harnam Das is the only piece of evidence to which their Lordships' attention has been called as suggesting that Mussamat Kashmiro had on any occasion recognised Sheocharan as the adopted son of her late husband. It is exceedingly improbable that she knew how Sheocharan was described in the power of attorney or the purposes for which that power of attorney might be used. She was then acting under the guidance and on the advice of her brother-in-law Faqir Chand. Although the design of making it appear that Sheocharan was the adopted son of Lala Harnam Das, and of having his name entered in the registers as the owner of the Zamindari property, which Lala Harnam Das had acquired, was soon abandoned, the application to have his name entered in the registers as the owner is of importance, as it shows that at that time Faqir Chand and Sheocharan were treating the property which Lala Harnam Das had acquired as being the self-acquired property of Lala Harnam Das, and not as property which he had acquired as a member of a joint Hindu family.

Shortly after the 20th October, 1892, Faqir Chand came to the conclusion that it would be more to his interests that his name, and not that of Sheocharan, should be entered in the Revenue Registers as the owner, and on the 2nd November he sent to Sheocharan drafts of applications for mutation of names in his, Faqir Chand's, favour, and of an agreement giving him authority to act as manager. Sheocharan sent a vague and

evasive reply, and finally on the 19th November, 1892, Faqir Chand filed applications in the Revenue Court for a stay of the mutation proceedings. On the 20th November, 1892, Faqir Chand, Mahesh Das, and Piyare Lal went to Mussamat Kashmiro at Meerut. The following entry of the 20th November, 1892, in the diary of Faqir Chand is instructive as showing the influence which was brought to bear upon this illiterate pundahnashin lady :—

“Sunday, the 20th.—I went to ‘Bhabhi Saheba’ at Meerut along with Mahesh Das and Piyari Lal. ‘Bhabhi Saheba’ said that she wanted to have mutation of names in respect of the property effected in her favour alone, that she did not want to have it effected in favour of anyone else, and that she had no confidence in anyone. After a long conversation, entreaties, and hesitation, she consented to mutation of names being effected in my favour; and a telegram asking Sheocharan Lal to come, was sent. Drafts of the applications were caused to be prepared by Shaikh Ghulam Rasul.”

Owing to some objections on the part of Sheocharan, the arrangements proposed by Faqir Chand fell through, and it appears from the following entry of the 26th November, 1892, in the diary of Faqir Chand, that a new arrangement was agreed to between Faqir Chand, Mahesh Das, Sheocharan, and Piyare Lal :—

“Saturday, 26th (Meerut).—A conversation took place after 12 o’clock in the presence of Faqir Chand, Mahesh Das, Sheocharan Lal, and Piyari Lal, . . . the funds were agreed to be joint; it was further agreed that the Mussamat (as one party), Faqir Chand (as second party), and Mahesh Das, Parbhu Lal, and Sheocharan Lal (as third party) were entitled to one-third share each. The property in respect of which Sheocharan Lal’s name was entered in the life-time of the brother, and the funds belonging to Faqir Chand, which were separate from the joint funds, were kept separate.”

It will be observed that on the 26th November, 1892, Sheocharan abandoned the position which he had taken up as an adopted son of Lala Harnam Das and abandoned the claim that the property which Lala Harnam Das had acquired was the self-acquired and separate property of Lala Harnam Das, and claimed a share through his natural father, Chajju Mal. It will also be observed that it was at that meeting agreed that Mussamat Kashmiro, who, if the property was joint family property was not entitled to any share, was to have a one-third share in it. The agreement that she should have a one-third share is explained by the fact that Piyare Lal was present and assenting and by the fact that he had been promised by Faqir Chand 10,000 rupees if he would consent. Piyare Lal had no interest in the property if it was in fact joint property; he had, however, a mere contingent reversionary interest of a then unascertainable value in the property if it had been separately acquired property of Lala Harnam Das.

On the 27th November, 1892, Sheocharan and his brother

Mahesh Das, expressed their dissent from the arrangement to which they had agreed on the 26th. However, on the 28th November, 1892, an agreement of reference to arbitration was drawn up and was executed by Faqir Chand, Mahesh Das, Sheocharan, "Mussamat Kashmiro, by the pen of P. yari Lal," Parbhu Dayal, Piyare Lal, and Kedar Nath, who was the husband of Mussamat Kaki. By that agreement the arbitrators were not bound to allot to Mussamat Kashmiro a one-third share; they might if they so chose allot to her an infinitesimal share; but out of the share which they might allot to her they were bound to allot a share, to be enjoyed at once, to Mussamat Bhagwan Dei, and a similar share to Mussamat Kaki, neither of whom could in any view of the law have been entitled to a share to be enjoyed during the lifetime of Mussamat Kashmiro. Execution of that agreement was admitted by Mussamat Kashmiro to the District Sub-Registrar, but it is impossible to believe that she understood the nature and effect of the agreement, and equally impossible to believe that anyone who had any regard to her interests could have advised her to be a party to it.

The arbitrators called for statements from the parties, but do not appear to have examined any witnesses, and on the 10th January, 1893, they made their award, and allotted to Faqir Chand a 4-anna share, to Parbhu Dayal, Mahesh Das, and Sheocharan, a joint 4-anna share, to Mussamat Bhagwan Dei a 2-anna share, Mussamat Kaki a $1\frac{1}{2}$ -anna share, and to Mussamat Kashmiro (to include the share of her three daughters) a $4\frac{1}{2}$ -anna share, and awarded that after the death of Mussamat Bhagwan Dei, her male issue should get her share and the profits accruing therefrom. It appears from the award that Mussamat Kashmiro had given to the arbitrators a written statement signed by the pen of Piyare Lal, in which she alleged herself to be the sole heir and entitled to the estate of Bala Harnam Das, and prayed that she should get the whole estate. The arbitrators had under the agreement of reference power to appoint a manager of the estate, and Faqir Chand was appointed the manager.

It has been contended on behalf of the plaintiff that some answers which were given by Mussamat Kashmiro to interrogatories on a commission in a suit in 1895 show that Mussamat Kashmiro had fully understood the nature and effect of the agreement of reference of the 28th November, 1892, and that the award had been read over to her, and that she had acquiesced in it. It appears to their Lordships that the answers to these interrogatories had been dictated to her by Faqir Chand, and were not such answers as might have been expected from an illiterate purdahnashin lady like Mussamat Kashmiro, and their Lordships attach no importance to them.

The learned Additional Judge of Meerut who tried this suit found that the award was made with the knowledge of Mussamat Kashmiro, and was explained to and understood by

her, and she accepted it. The Additional Judge came to no precise finding on the question as to whether Lala Harnam Das, Faqir Chand, and Chajju Mal had separated, but he appears to have considered that there may have been some partial separation, and that the brothers, or at least Lala Harnam Das and Chajju Mal, subsequently reunited. Assuming that there was a separation, their Lordships consider that there is no conclusive evidence that the brothers, or any two of them, reunited. The view of the situation of the Additional Judge, apparently, was that Faqir Chand and Mussamat Kashmiro had conjointly defrauded Sheocharan, and had, by guile and trick of the award, got three-fourths of the property out of his hands. This view, it may be observed, involved the assumption that the three brothers, Lala Harnam Das, Faqir Chand, and Chajju Mal, had separated, and that none of them had afterwards reunited, and that the property left by Lala Harnam Das was his property, self-acquired after the separation; and the further assumption that Lala Harnam Das had adopted Sheocharan. The Additional Judge gave the plaintiff a decree. From that decree the defendants appealed to the High Court.

On the appeal the High Court considered that two main questions arose:—

“1. Were the arbitration proceedings and the award valid and binding? and

“2. Ought these proceedings to be regarded as a fair family settlement even if the Court considers that there was no real arbitration in the strict sense?”

The learned Judges considered that the second question arose because, as they said, it often happens that the machinery of a pretended arbitration is had recourse to in order to carry out what is in reality a family compromise or arrangement. They found, and their Lordships agree with them, that there was in fact no real arbitration and that the so-called “arbitration was nothing short of a sham.”

In arriving at a conclusion as to whether the award could be regarded as embodying an agreement as to a fair family settlement, the learned Judges in the appeal considered (1) How far the claim of Sheocharan to be the adopted son of Lala Harnam Das was honest? (2) How far the claim of Faqir Chand that the family was joint was honest? and (3) How far the interests of Mussamat Kashmiro were protected, and what knowledge she had of the proceedings? They considered, and their Lordships agree with them, that if Sheocharan was really the adopted son of Lala Harnam Das he would never have given up his position as an adopted son. Sheocharan was a Munsif and must have known what his rights were if he was in fact an adopted son. It could not have been difficult for him to prove in 1892, if it was the fact, that he had been adopted by Lala Harnam Das. If he had been the adopted son of Lala Harnam Das and the family was joint, his share in the

property which Harnam Das had accumulated would have been of the value of nearly 100,000 rupees; if, on the other hand, that property was self-acquired by Lala Harnam Das, Sheocharan would have taken the whole of it, which was of the value of nearly 300,000 rupees. By abandoning the position of an adopted son, which he had at first on the death of Lala Harnam Das taken up, he reduced his interest in the property, if joint, to a share of about the value of 50,000 rupees. If the award embodies a family agreement, Sheocharan's claim to share in the property was through his father Chajju Mal and not as the adopted son of Lala Harnam Das, and Sheocharan must have known as a Hindu and as a lawyer that if he had been adopted by Lala Harnam Das he could not claim a share through his natural father.

The learned Judges on the appeal found, and their Lordships agree with them, that the three brothers had separated, that there had been no reunion, and that the property which Lala Harnam Das had accumulated was his self-acquired property. They shrewdly observed that if Faqir Chand had been joint with Lala Harnam Das he would never for a moment have allowed an application for mutation of names in favour of Sheocharan to be made, nor would he have called Sheocharan the adopted son of Lala Harnam Das in the draft agreements which he prepared.

The learned Judges in the appeal to the High Court, having carefully considered the evidence, were of opinion that there was no fair family arrangement arrived at, and found that it had not been shown that Mussamat Kashmiro had any independent advice, or understood the effect of the so-called award on her interests; they believed that she never knowingly consented to the division of her husband's estate, and they allowed the appeal and dismissed the suit with costs.

Their Lordships must not be taken as dissenting from the conclusions of the learned Judges of the High Court, but their Lordships consider that this appeal may properly be dismissed on the broad ground that on the death of Lala Harnam Das his widow, Mussamat Kashmiro, came under the influence of her brother-in-law, Faqir Chand, who was an interested party in all the subsequent proceedings, whom she trusted to advise her, and on whose advice she acted until he died in 1905. His interests conflicted with hers. Faqir Chand advised her in his own interests, and not in hers. He concealed from her the true nature and effect of the different proceedings in this case, and misled her. She was not a woman of business, and he managed the property from 1893 until he died, and she believed that he was acting as manager for her. From the death of her husband Faqir Chand stood to her in a fiduciary relationship, which continued until he died, and she was entitled to receive from him a full disclosure of all the affairs which concerned her, but he betrayed his trust. Piyare Lal, who was her husband's grandson, and in whom Mussamat Kashmiro also trusted as an adviser, acted

from interested motives in collusion with Faqir Chand and betrayed the confidence which she reposed in him.

Under such circumstances, the award, whether regarded as an award, or as a document embodying a family arrangement, cannot stand, it must be treated as a nullity. Mussamat Kashmiro cannot be regarded as an assenting party to any arrangement for the division of the property which was left by Lala Harnam Das. The question in such a case as this is, not whether Mussamat Kashmiro knew what she was doing, had done, or proposed to do, but how her intention to act was produced: whether all that care and providence was placed round her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf. Fraud, such as there was in this case, cannot be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length. [See *Huguenin v. Baseley*, 14 Ves. Jun. 273; *Moxon v. Payne*, 8 Ch. App. 881.]

It has been contended here that limitation is a bar to Mussamat Kashmiro's defence. The Indian Limitation Act would not apply to her defence. Even if she were suing to recover possession of property of which she was deprived by the award, time would not, under the circumstances of this case, begin to run against her until Faqir Chand died.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the first respondent, who alone appeared.

In the Privy Council.

(No. 32 of 1914.)

SRI KISHAN LAL

2.

MUSSAMAT KASHMIRO AND
OTHERS.

DELIVERED BY SIR JOHN EDGE.