Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chandrasang Himatsang v. *Mohansang Hamirsang, from the High Court of Judicature at Bombay, delivered the* 22*nd June* 1906.

Present at the Hearing:

LORD MACNAGHTEN.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Sir Arthur Wilson.*]

This is an Appeal from a Judgment and Decree of the High Court of Bombay, dated the 7th March 1899, which reversed a Decree of the Assistant Judge of Broach of the 10th November 1897. The question raised is one of fact, whether the Appellant Chandrasang, the principal Defendant in the suit, is entitled to the name he bears, and to the estates which prior to the suit he had long enjoyed, as the son and heir of Himatsang, or whether, as maintained by the Plaintiff in the suit, now the Respondent, the real Chandrasang died in infancy and the Appellant was fraudulently substituted in his place. The First Court held the Appellant to be the genuine Chandrasang, the High Court thought otherwise.

Himatsang, who died on the 20th January 1882, was the Thakor of Matar, and as such was possessed of estates in the district of Broach and in Baroda territory, which by custom descended to a single male heir in accordance

with the rule of primogeniture. He left surviving him four widows, of whom the first three were childless, while the fourth, Jitba, had an infant son, Chandrasang, born on the 31st October 1881, a few months before his father's death. And there is no question that this son was his father's lawful heir. Himatsang also left surviving him collateral agnates in two lines. The elder line was represented by Parbhatsang, who would have been the nearest heir of Himatsang if the infant had been out of the way. He died in July 1883, and his rights, if any, passed to his grandson Chhatrasang, who in turn died in 1885; and with him the elder line of collaterals became extinct, and its rights, if any, passed to the second line. The second collateral line was represented at first by Hamirsang, and after his death in 1894 by his son Mohansang, the Plaintiff in this suit and Respondent in the present Appeal.

Upon the death of Himatsang the title of his infant son Chandrasang was at first not disputed; the conflict was as to the administration of his estate. But as soon as that controversy was settled, Parbhatsang claimed the estates as his own, on the allegation that Himatsang had really died childless, and that Chandrasang was a child, of other parentage, fraudulently put forward as the child of Jitba and as the heir of her husband.

From that time that is to say from March 1882 down to June 1884, this story was the only basis of the claims put forward. It is now clear, indeed it is the case of both sides, that that story was untrue. Its only present importance is in its bearing upon the good faith or bad faith, the probability or improbability, and thus upon the truth or falsehood of another case, based upon events said to have happened at a later period. It is therefore unnecessary

to examine the earlier proceedings in detail; but three points may be usefully noted. First the early claim was by the elder collateral branch; the four widows supported the rights of the infant, and the then representative of the junior collateral branch sided with them. Secondly, the Collector of Broach was in possession of the estates as guardian of the property of the infant, duly appointed by an Order of Court. Thirdly, though in July 1882 criminal proceedings were instituted before the Political Agent Rewakantha, they were withdrawn; and no suit was ever brought to enforce the claim on the ground now referred to adversely to the infant. That state of things continued down to May 1884, two years and a quarter after the death of Himatsang.

The second ground of claim to the property, which is the ground now in question, arises out of events alleged to have occurred on, and immediately after, the 14th May 1883, on which day, it has been alleged, on behalf of the succesive claimants, that the boy Chandrasang died, and that another boy, by name Jiku, a son of Jitba's brother, and a boy considerably older than Chandrasang, was fraudulently substituted in place of the deceased. This story was not told in place of the former complaint that Chandrasang himself was a spurious child, for that story was still maintained for some time by the successive claimants, though it is now abandoned. The story of the alleged death and substitution on the 14th May 1883 was in addition to this story.

In 1884 Parbhatsang, the original head of the senior collateral line, was dead, and his grandson Chhatrasang had succeeded to his place. In the middle of May 1884 he entered into an arrangement with one Kurnaram, a pleader of the District Court of Broach, in pursuance

of which the latter at once took active steps to further the interests of his employer.

On the 30th May 1884 Kurnaram made an application for assistance to the Collector of Broach. He asserted the death of Chandrasang, and alleged the intention to substitute another boy in his place. In accordance with that application the Collector took steps which led to certain investigations and enquiries, the result of which has had an important bearing upon the decision of the case by the High Court. But as these matters will have to be considered in some detail at a later stage it is unnecessary to examine them at this point.

On the 8th September 1884, Chhatrasang made a complaint to the first-class magistrate at Broach against Jitba on a charge of cheating by personation, the charge being based upon the alleged death of Chandrasang and substitution of Jiku. The magistrate took depositions on oath, and considered the matter once and again. His conclusion was that the story was untrue, and that there was no reasonable ground for a criminal prosecution, and accordingly on the 10th June 1885 he finally dismissed the complaint under Section 203 of the Criminal Procedure Code. That order was confirmed by the District Magistrate, and the High Court on the 25th November 1885 refused to interfere by way of revision.

While the criminal proceedings just mentioned were pending, on the 16th April 1885, Chhatrasang brought a civil suit against Chandrasang and others, in which he alleged the death of the real Chandrasang and the substitution of Jiku into his place and name, and asked for declarations of the spuriousness of the so-called Chandrasang, and of the validity of his own title as heir, Various delays occurred. Chhatrasang died leaving no male issue, and his

rights, if any, passed to Hamirsang, the head of the junior collateral line, and the latter was substituted as Plaintiff. The Collector of Broach had to be added as a party, and the plaint had to be returned in order that it might be presented in another Court. That suit was never tried on the merits. It came on before the Assistant Judge of Broach on the 26th March 1888 for the disposal of certain issues of law, and was dismissed for want of a proper stamp. The Assistant Judge said:—"As the Plaintiff "still persists in declaring that his suit is one "for a mere declaration, and that it is properly "stamped with a stamp of Rs. 10, the only "course open to me is to dismiss the suit with "costs." Against this decision there seems to have been no Appeal.

From August 1893 till near the end of 1894 negotiations were in progress for a compromise between the parties interested, but nothing came of them. It may be noted however that during the progress of those negotiations the Appellant was married, and the principal ceremony on the occasion was performed by Hamirsang, whose son the Respondent is, and through whom he claims.

On the 12th December 1894 the present suit was instituted by the Respondent against Jitba, the alleged mother, and the Appellant her reputed son, and others, including the Collector of Broach as administrator of the Matar estates. Its material allegations were that Jitba gave birth to Chandrasang on the 31st October 1881, that Chandrasang died in his infancy in June 1883, in the village of Majrol, in Baroda territory, and that Jitba, with the aid of others, concealed the death of Chandrasang, and in his place kept with her her brother's son, whose real name was Jiku, giving him the false name of Chandrasang. The Plaintiff asked for a declaration

that the Appellant was not the son and heir of Himatsang, and a declaration that the Plaintiff, now Respondent, was entitled to the properties in Broach, and that the Collector should deliver him possession. The allegations just quoted were denied, and thus was raised the sole issue now of any importance.

At the trial before the Assistant Judge the story told was, that, on the 14th May 1883, Chandrasang was removed by his mother, accompanied or followed by certain persons named, in a cart from Matar to Majrol in Baroda. (That mother and child left Matar is admitted, but it is said for Chhaliar). It is asserted that on the road the child became dangerously ill, that he died at Majrol the same evening, that his body was at once sent for burial, and that the now Appellant, said to be Jiku, was sent for and arrived on the 16th, and from thenceforth was held out as the genuine Chandrasang. The genuine child was at that time aged $2\frac{1}{2}$, Jiku, it was said, was at the same time some six or seven years old.

The direct evidence in support of the case so stated was that of three witnesses, as to each of whom the Judge at trial recorded that his evidence was unsatisfactory and untrustworthy, and he totally disbelieved them. He also disbelieved the subsidiary story of an alleged attempt made almost at the same time to obtain another child, presumably less unsuitable in age.

The Assistant Judge dismissed the suit with costs. The High Court, upon appeal, reversed that decision and gave a Decree in favour of the Plaintiff, the now Respondent, but without costs, and against that decision the present Appeal has been brought.

The story told is in itself one difficult to accept. The attempt to substitute a boy of

Jiku's age for a child of 2½ years would be an extraordinarily daring one, the more so, because no attempt appears to have been made to keep the boy in seclusion, or screen him from general observation.

The fact that the Judge, who heard and saw the witnesses, and whose very full judgment shows the great care and attention which he devoted to the case, disbelieved the witnesses, is entitled to the utmost weight.

Again, it is impossible to approach the story now told without a certain suspicion, arising from the attack so long maintained upon the real parentage of the Chandrasang now admitted to be the genuine child of Himatsang. And this suspicion is necessarily increased by the inconsistent and shifty conduct of the now Respondent and his immediate predecessor in title.

The extraordinary length of time which was allowed to elapse after the 14th May 1883, the date upon which everything turns, and the 12th December 1894, when the present suit was filed, is also a circumstance very adverse to the Respondent. During all that interval, with the exception of a part of 1893 and 1894, when negotiations for a compromise were in progress, there was never a time at which proper steps might not, and ought not, to have been taken to secure a full trial of the question in issue; and that question is one which from its nature specially required to be disposed of while the facts were fresh. When a suit was brought in 1885 it was never pressed to a trial, but allowed to terminate for want of proper stamp duty. The whole course of proceedings from 1883 to 1894 seems to their Lordships difficult to reconcile with a reasonable desire, on the part of the claimants, to have the question of fact investigated before the proper tribunal, and with proper promptitude.

In his Judgment upon the Appeal to the High Court, Candy, J., said "The question is " whether the Majrol story is proved. It stood " the test of the cross-examination of the " witnesses in the witness box, but after this " lapse of time much more than that is " necessary before the Court can eject the second " Defendant from the estate. The story must " be supported by overwhelming circumstantial " evidence." That support, the learned Judges thought, was supplied by the result of the enquiries made in June 1884 by two officials, the Thanedar of Pandu in Rewakantha, and the Mamlatdar of Amod in Broach. Those enquiries have been briefly referred to in an earlier part of this Judgment, but inasmuch as they formed the substantial ground upon which the High Court overruled the Judgment of the first Court, they call for further consideration.

On the 30th May 1884, Kurnaram, the pleader acting on behalf of Chhatrasang, applied to the District Magistrate of Broach for assistance, and accordingly the Magistrate wrote a letter to the Political Agent Rewakantha, which he entrusted to Kurnaram. The terms of that letter explain the circumstances. It ran--

" Mr. Kurnaram Durgaram Vakil, the bearer, has just " informed me that the heir of the Matar Thakore died about " nine months ago, and that there is now at Chhaliyar, in the " Darbar, a boy whom they intend to substitute for the dead " boy.

" Mr. Kurnaram acts for the presumptive heir of the " Thakore. He says that if enquiries are at once made at " Chhaliyar the fraud will be detected, because the deceased " Chandrasang was born on Kartik Sud, 9th of 1938, that is " about two and half years ago, whilst the young pretender is " about eight years old. Also that the latter's parents are " living in Nandod.

" For the present I do not wish to make the matter public " by searching for details in my office. But I shall be much " obliged if you will have the goodness to make enquiries at " your earliest convenience, so that it may be fixed what boy " is asserted to be heir and what is his age, otherwise a boy of " the proper age might be found. Mr. Kurnaram is furnished

" with full particulars. I request that you will favour me with " the result of your enquiries."

This letter was taken by Kurnaram to the Political Agent, who on its receipt gave instruction to the Thanedar of Pandu, Parbhuram by name, to take with him Kurnaram and make the desired enquiries in his presence, and to report.

Parbhuram and Kurnaram went together to Chhaliar. There they are said to have taken a statement from the boy himself, statements from three other persons, a schoolmaster, a chobdar, and a kharbhari, and to have, with the assistance of others, formed the opinion that the boy was about seven years old, and to have caused him to be measured, with the result that his height was found to be three feet six inches.

Parbhuram made his report to the Political Agent, enclosing the statements said to have been made in his presence, and a *Punchnama* said to have been signed on behalf of the members of what was called a *Punch*, which was composed in fact of two sowars in attendance on Parbhuram. Kurnaram was dead before the trial. The evidence of Parbhuram was taken on commission. The schoolmaster was a witness at the trial. The chobdar and the kharbhari were not called, nor were the two sowars.

The enquiries at Chhaliar went no further, the boy being removed by his mother to Matar. Thereupon the District Magistrate gave another letter to Kurnaram addressed to the Mamlatdar of Amod, in the district of Broach, in which he appears to have instructed the Mamlatdar " to " make the enquiries Mr. Kurnaram may " suggest as secretly and rapidly as possible " and allow the Darbar people no time to " commit a fraud in regard to a boy whom the " Vakil asserts the Darbar have attempted to " substitute for the real Thakore who it is " alleged died some months ago."

In accordance with that order the Mamlatdar accompanied by Kurnaram proceeded to make enquiries. He is said to have taken a statement from Jitba, the boy's alleged mother, and at Kurnaram's suggestion to have caused a measurement to be taken with a tape measure of the boy's height while he was lying on a cot, and that height was said to be found to be 3 feet 5½ inches.

When the case was before the High Court, and again on the argument of the Appeal before their Lordships, objection was taken to the admissibility in evidence of much of the materials relating to the two enquiries just mentioned, and as to some of them at least it would apparently be very difficult to support their admissibility if it were necessary to decide the point. But the whole evidence seems to have been admitted without objection in the First Court, and their Lordships would have regretted if they had been obliged to dispose of the present Appeal upon a question of legal admissibility, and the more so as the Appeal has been heard *ex parte*. Their Lordships are not under any such necessity because they think that, assuming the evidence to be admissible, it is of little, if any, value. This appears to them to follow from the purpose, the nature, and the circumstances of the enquiries.

The District Magistrate received information from Kurnaram which he apparently believed, and which, if true, showed that a grave crime was being, or was about to be, committed, which, if successful, would result in a great wrong with respect to properties in his district; and their Lordships do not doubt that that officer acted rightly in taking such steps as seemed to him necessary, in the emergency, for the prevention of the crime. But it must be observed that those

enquiries, if they can be called official in any sense, were certainly not judicial. The effect of the orders was to place the services of the officials employed at the disposal of Kurnaram, the pleader of the complainant, in order to enable that gentleman to obtain material in support of a foregone conclusion. The enquiries were secret, no notice was given to anybody on behalf of the boy. Nobody was present throughout the enquiries to represent the boy or protect his interests. There was nobody to check the mode in which the alleged statements were elicited, whether by leading questions or otherwise, nobody to test the statements by cross-examination, nobody to watch the accuracy with which they were recorded.

Upon these broad considerations and without examining in detail the various inconsistences and defects in the records and in the evidence relating to the enquiries, their Lordships are of opinion that practically no weight can properly be given to the proceedings at, or the results of, those enquiries.

As to the alleged statement by the boy himself, assuming it to be correctly reported, there is nothing to show whether the language is in any part his own, or whether it was put in his mouth by the person conducting the examination; and nothing could be easier than to extract by the latter process almost any statement from a frightened child, who suddenly finds himself alone in the custody of strangers, and some of them officials.

The alleged deposition of Jitba, so far as it was relied upon, refers to matters of which she could have no personal knowledge.

The evidence as to the apparent age of the boy, and as to the alleged measurement of his height, appears to their Lordships, on the

grounds already stated, to be wholly untrustworthy. And in this they find themselves in agreement with both the Magistrates who dealt with the criminal charge in 1884 and 1885 and with the Judge who tried this case.

Their Lordships will humbly advise His Majesty that the Decree of the High Court should be discharged and the suit dismissed with costs in both the Courts in India. The Respondent must pay the costs of this Appeal.