Privy Council Appeals Nos. 10, 11, 12 *of* 1922.

Allahabad Appeals Nos. 1, 2, 3 *of* 1919.

Deo Narain Pande - - - - - - - - *Appellant*

v.

Agyan Ram Pande, since deceased, and others - - - *Respondents*

Deo Narain Pande - - - - - - - - *Appellant*

v.

Musammat Ram Piari and others - - - - - *Respondents*

Deo Narain Pande - - - - - - - - *Appellant*

v.

Agyan Ram Pande, since deceased - - - - - *Respondent*

(*Consolidated Appeals.*)

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 10TH DECEMBER, 1926.

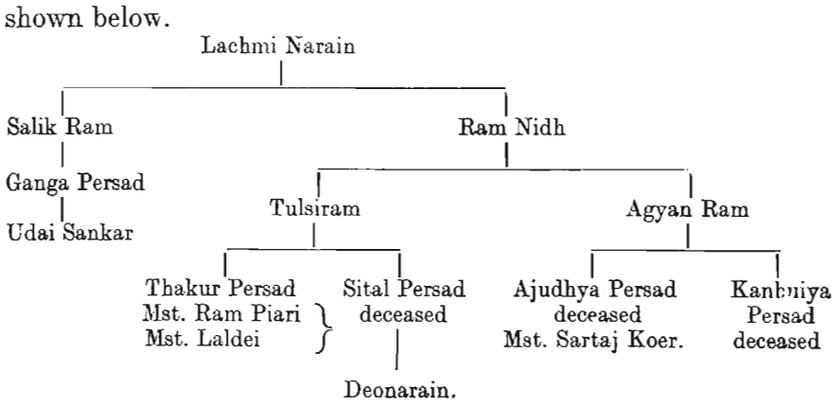
Present at the Hearing:

LORD SINHA.
LORD BLANESBURGH.
LORD SALVESEN.
SIR JOHN WALLIS.

[*Delivered by* LORD SINHA.]

The principal question in these appeals is whether or not Deonarain Pande and Thakur Persad Pande were at the time of the latter's death, members of a joint Mitacshara family.

The family pedigree, about which there is no dispute, is shown below.



Thakur Persad died on the 3rd February, 1911, leaving 2 widows, Ram Piari and Lal Dei, but no children. Thereupon, there was what has been called the inevitable preliminary contest for mutation of names in the Revenue Courts. Deonarain claimed that his name should be registered in lieu of Thakur Persad's in respect of all properties which stood registered in his name, jointly or otherwise, on the ground that Thakur Persad's interest had passed to him by right of survivorship. The widows claimed that they had succeeded to that interest, as Thakur Persad was separate from Deonarain when he died. Agyan Ram did not put forward any claim of his own in these mutation proceedings.

The Revenue Courts decided in favour of the widows and against Deonarain. Thereafter on the 13th January, 1914, Deonarain instituted 2 suits in the Court of the Subordinate Judge of Basti—Nos. 13 and 14 of 1914.

Suit No. 13 of 1914 was brought against Agyan Ram and the 2 widows of Thakur Persad in respect of an elephant which was claimed as belonging to the joint estate of Thakur Persad deceased and the plaintiff Deonarain.

Suit No. 14 of 1914 was brought against the widows Msts. Ram Piari and Lal Dei for the recovery of the properties in dispute as forming the said joint estate.

Agyan Ram also brought a suit against the widows and Deonarain (No. 97 of 1914) claiming that he and not Deonarain was joint with Thakur Persad when the latter died.

All the 3 suits aforesaid (No.13, No. 14 and No. 97 of 1914) were tried together, and the two principal issues raised were

1. Whether Thakur Persad when he died was joint with Deo Narain or Agyan Ram or neither ? and

2. Did Agyan Ram take possession of any elephant belonging to Thakur Persad and Deonarain (jointly). If so, what was its value ?

After recording evidence, both oral and documentary, on behalf of all 3 parties, the Subordinate Judge, in an exhaustive and careful judgment, held that when Thakur Persad died, he was joint with Deo Narain but separate from Agyan Ram. He also held that Agyan Ram had taken an elephant, belonging to the joint estate of Thakur Persad and Deonarain and of the value of Rs. 2000. He accordingly made a decree in favour of Deonarain in each of his suits (Nos. 13 and 14) and dismissed Agyan Ram's suit (No. 97).

The widows and Agyan Ram filed separate appeals to the High Court against the two former decrees and Agyan Ram also appealed against the decree in suit No. 97.

The High Court heard all these appeals together and held that neither DeoNarain nor Agyan Ram was joint with Thakur Persad when the latter died and accordingly decreed the widows' appeal and dismissed Agyan Ram's appeal in suit No. 14. They decreed Agyan Ram's appeal in the elephant case

on the ground that as Deonarain had no present interest in Thakur Persad's estate, he had none in the elephant, even if it did belong to that estate and not, as Agyan Ram claimed, to his daughter-in-law's estate of Luggupur.

Deonarain has appealed to His Majesty in Council against both the High Court decrees against him, viz., the one in favour of the widows, and the other in favour of Agyan Ram. The respondents in these appeals which have been heard together have not appeared and they have consequently been heard *ex parte*. Their Lordships have considered the whole of the evidence, which has been fully and fairly placed before them by the appellant's counsel.

As is not uncommon in cases of this class in India, the bulk of the very considerable body of oral evidence in these cases on behalf of all the 3 parties was considered unsatisfactory and unreliable by both the Subordinate Judge and the High Court, and their Lordships agree in that opinion. Unfortunately, a good deal of the documentary evidence also is more or less inconclusive. Both Courts therefore found considerable difficulty in coming to a conclusion upon the evidence on what appears at first sight to be a simple question of fact.

In these circumstances, their Lordships would first consider what are the facts which were undisputed or have been concurrently found by both the Courts, and they appear to be as follows :—

At one time, the two branches of the family of Lachminarain Pande were joint, with their ancestral home at village Datua Khor, where they had 2 houses, one large and one small. They owned a number of villages, including one called Gumanari, in which they had a sort of hut called a *Khalunga* (collection or cutcheri-house). Sometime prior to March, 1889, there was a separation between the two branches, *i.e.*, between Salikram's branch, represented by Ganga Persad, and Ram Nidh's branch, represented by Tulsiram and Agyan Ram. It is not clear whether there was at the same time a separation *in fact* between Tulsi Ram and Agyan Ram *inter se*. It is argued that when Ganga Persad separated the whole coparcenary was dissolved as a matter of law, and Tulsi Ram and Agyan Ram became necessarily separated, though Tulsiram from that time would continue joint with his own son and grandson (Thakur Persad and Deonarain) who from then onwards constituted a new joint family. The case reported in L.R. 51 I.A. 163 is relied upon as authority for this proposition.

However that may be, it has been concurrently found by both the Courts that some time between 1889 and 1892 Agyan Ram did actually separate from his brother Tulsi Ram and his branch. Thereafter he never had any transaction jointly with Thakur Persad or his branch, and was separately recorded in the Revenue Register and the village papers, with regard to the

villages jointly owned. Their Lordships have no hesitation in accepting this concurrent finding that Agyan Ram became separate from his brother Tulsi Ram's family before 1892.

The next undisputed fact in the history of the family is that about the year 1889 Tulsi Ram and his branch of the family left the ancestral home at Datua Khor and migrated to Gumanari where they converted the little *Khalunga* into their family residence. Agyan Ram continued to live with his family in the old home at Datua Khor. Tulsiram died shortly after 1889 and thereafter Thakur Persad and his minor nephew Deonarain continued to live at Gumanari, until Thakur Persad built a new house at village Mohna Khor, some time between 1901 and 1904, to which he removed with his two wives, leaving Deonarain to live in the Gumanari house with his family. Both Courts have found and their Lordships agree that neither Deonarain nor Agyan Ram ever lived in this house at Mohna Khor.

The reason why Thakur Persad removed to Mohna Khor has been variously stated in the evidence. It is not necessary to go into that matter, as it is not the case of any of the parties to this litigation, and there is no evidence even to suggest that a partition took place between Thakur Persad and Deonarain at the time when the former removed his residence from Gumanari to Mohna Khor.

Deonarain was a child when Tulsi Ram's family removed to Gumanari about 1889 and after Tulsiram's death he remained joint with his uncle Thakur Persad; and the sworn testimony of Thakur Persad himself, in suit No. 781 of 1896, recorded on the 13th of January, 1897, proves incontestably that on that date he and Deonarain were still joint. The onus of proving a separation between them subsequent to that date is of course on the party alleging such separation.

The case made on behalf of Thakur Persad's widows—and in this respect Agyan Ram supported them—was that such separation took place in fact some time towards the end of 1897 or early in 1898, shortly after Deonarain attained his majority. Considerable oral evidence was adduced to prove that at this time Deonarain was pressing for a partition which was effected and by which Deonarain gave up his share in the different villages over which the family estate was scattered and took in lieu thereof the whole of the 12 annas share or patti in village Gumanari which previously belonged jointly to himself, Thakur Persad *and Agyan Ram*.

The Subordinate Judge rejected the case so made. It was, he considered, invented after the mutation proceedings, as no such case was at that time made by the widows or by Agyan Ram who was then supporting them.

The High Court on the other hand accepted this case. Mr. Justice Walsh considered that though the evidence of express partition could not be accepted, Deonarain's own course of conduct,

in residence, business and life and his insincere efforts to explain them away show conclusively that he had separated from Thakur Persad. Mr. Justice Piggott in a careful judgment reviewed the whole evidence and while agreeing with the Subordinate Judge that much of it was unreliable also came to the conclusion that the circumstances of the case generally and the documentary evidence afforded a great deal of corroboration to those witnesses who deposed to a definite separation between Deo Narain and Thakur Persad shortly after the former had attained his majority.

Taking first the direct evidence, it appears that Mr. Justice Piggott was inclined to accept the evidence, in part at least, of 2 of the witnesses who deposed to an actual and formal separation in 1897 or 1898, viz., Shivraj Ram Sukul, the family priest, examined on behalf of Agyan Ram, and Tribeni Lal, the village Patwari (a witness for the widows). Apart from the discrepancies in their evidence, to which the learned Judge himself alludes and the unfavourable comments thereon by the Subordinate Judge, it appears to their Lordships that this evidence cannot be accepted for the following substantial reasons. Firstly because the partition they speak to as having taken place in 1897–8 is one between the *three* co-sharers, viz., Thakur Persad, Deonarain, and Agyan Ram, and not merely between the two former. Having regard to the finding that Agyan Ram had separated before 1892, it is impossible to accept the story which assumes that he remained joint till 1898. But the matter does not rest there. If the story was true, Agyan Ram in 1898 gave up his share in village Gumanari to Deonarain. But the Revenue Registers show that Agyan Ram continued to be recorded as proprietor of a 3 annas 10 pies 8 chataks share not only in 1911, when Thakur Persad died, but even after the widows got their names registered. What is of even greater importance is that the Patwari's village papers (Ex R. & Ex 5), filed on behalf of the widows, show beyond doubt that Agyan Ram continued to realise the rents of his share of Gumanari, through his agent Chail Behari Lal in 1315 and 1316 Falsi (1908/9). Thus the whole basis of the alleged partition by which Deonarain took the share of Agyan Ram in Gumanari in addition to his own and Thakur Persad's fails entirely. There is the further fact referred to in the judgment of the Subordinate Judge that the alleged partition would have also affected the shares of Thakur Persad and Agyan Ram as between themselves in the other villages in such a manner that thereafter Agyan Ram would collect two-thirds and Thakur Persad one-third of the rents thereof—a fact which is not only not borne out but disproved by the evidence. Nor is it possible altogether to ignore the fact that no such partition was alleged by the widows in the mutation proceedings.

There remains for consideration the circumstantial evidence which was considered by the High Court to support the story of a partition in 1897–8. That resolves itself into (1) separation of residence and (2) documents after 1898 showing that Thakur Persad and Deonarain were transacting business separately.

As regards residence, it is sufficient to observe that Thakur Persad admittedly did not remove to Mohna Khor till after 1901 – possibly 1904. This change of residence is hardly any evidence to prove a partition in 1897–8.

As regards documents, showing transactions by members of the family, quite a number were proved to make out either joint or separate dealings. There are 17 such on the record executed between 1896 and 1911. Of these the most important are 4 conveyances or sale deeds—all of them in favour of Thakur Persad and Deonarain jointly. One of these four, Ex. 3, is a conveyance by which Thakur Persad and Deonarain purchased in their joint names a small share in village Datna Khor on the 21st of October, 1908, *i.e.*, more than 10 years after the alleged partition. With regard to this document, it cannot be argued, as it can in support of some of the others, that the consideration was money owed to the family prior to 1898, for in this case the consideration was partly in cash and partly money owing under mortgages of as late as 1906 and 1907.

The rest of the documents, fully summarised by the Subordinate Judge are either insignificant or inconclusive in their nature; so far as they show joint dealings they discredit the alleged partition, and the mere fact that either of them had small transactions of their own does not prove that they were necessarily separate.

On the whole their Lordships are of opinion that the widows did not discharge the onus which rested upon them of proving that there was a separation between Thakur Persad and Deonarain in 1897–8 or at any time prior to the death of the former in 1911.

There remains the question of the elephant in suit No. 13 of 1914. The Subordinate Judge held that an elephant belonging to the joint estate was wrongfully taken possession of by Agyan Ram and that the latter's defence to the effect that it belonged to his daughter-in-law Sartaj Kueri, proprietress of the big Luggupur estate, was not made out. Agyan Ram appealed. As the High Court held that Deonarain was separate from Thakur Persad, and therefore took no present interest in his estate or in the elephant, even if it belonged thereto, they decreed the appeal. As their Lordships have arrived at a different conclusion on the main question, it is necessary to consider how far the Subordinate Judge's judgment and decree for Rs. 2000 in favour of Deonarain is well founded.

Having considered the evidence placed before them, their Lordships see no reason to interfere with that decree.

Their Lordships will accordingly humbly advise His Majesty that the decrees of the High Court appealed from should be set aside with costs and the decrees of the Subordinate Judge restored and that the respondents pay the costs of these appeals.

In the Privy Council.

DEO NARAIN PANDE

v.

AGYAN RAM PANDE, SINCE DECEASED, AND OTHERS

DEO NARAIN PANDE

v.

MUSAMMAT RAM PIARI AND OTHERS

DEO NARAIN PANDE

v.

AGYAN RAM PANDE, SINCE DECEASED.

(*Consolidated Appeals.*)

DELIVERED BY LORD SINHA.

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