

Privy Council Appeal No. 33 of 1937

Patna Appeal No. 98 of 1934

Nand Kishwar Bux Roy - - - - - *Appellant*

v.

Gopal Bux Rai and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 18TH MARCH, 1940

Present at the Hearing :

LORD THANKERTON
SIR GEORGE RANKIN
MR. M. R. JAYAKAR

Delivered by MR. JAYAKAR

This is an appeal from the judgment and decree of the High Court of Judicature at Patna dated 2nd March 1936, which reversed the judgment and decree of the Additional Subordinate Judge of Palamau dated 17th March 1933, and decreed the suit of the plaintiffs respondents 1-7 for recovery of possession of an impartible estate called Deogan estate, in succession to the last holder Surendra Bux Rai (hereinafter called Surendra).

The suit was instituted on 8th March 1924, by the plaintiff (respondent 1) claiming a declaration that the property in the suit, being an ancestral impartible estate of the joint family of Surendra and himself, devolved on him by survivorship, on the death of Surendra and that plaintiff 1 was alone the rightful owner thereof under the Mitakshara law and by virtue of the customs of primogeniture and female exclusion, which governed the estate. He also asked for possession.

Plaintiffs 2-7 were subsequently brought on the record, as assignees under a permanent lease obtained from plaintiff 1, in consideration of amounts lent for financing the litigation.

The defendants were:—1, Binodini Devi, the widow of Surendra (shortly described as the Dulhin); 2, Mr. Coutts, the manager of the estate appointed under the Chota Nagpur Encumbered Estates Act; 3-8, the members, near and remote, of the said joint family; 9, Nand Kishwar (appellant before the Board), who claimed to be the posthumous son of Surendra born of defendant 1, and 10, Sham Sunder Kuer, the daughter of Surendra, born of defendant 1.

It is to be noted that the mother of Surendra, shortly described as the Rajmata, was not a party to the proceedings. Certain issues were raised, out of which, the only one which now survives for the consideration of the Board is issue No. 4, viz., whether defendant 1 gave birth to defendant 9 as alleged by the defence. On this issue, the trial Court held in the affirmative. The High Court has differed, Courtney Terrell C.J. and Dhavale J. holding in the negative and Agarwala J. in the affirmative.

From this decision an appeal has been preferred to His Majesty in Council.

It has been found that the Deogan estate, though impartible, is the property of the joint Hindu family, of which Surendra and respondent 1 were members, that it is an impartible jagir governed by the rule of primogeniture under the Mitakshara law and that respondent 1 would be entitled to succeed by survivorship to the estate, unless the appellant proved that he was the son of Surendra. The findings on these issues are no more in controversy.

The appellant's counsel argued at the outset that the burden of proving that the appellant was not the son of Surendra lay upon the plaintiff (respondent 1). Reliance was placed on the pleadings and certain sections of the Indian Evidence Act. It was urged that as the plaintiff was suing for possession from the appellant who was in possession at the date of the suit, the suit was in the nature of an ejectment action and section 110 of the Indian Evidence Act applied. Sections 101 and 112 of that Act were also relied upon. The last section, however, can have no application to the facts of this case, where the maternity of the appellant is in dispute and not his paternity. It was further argued that as the plaintiff made in the plaint charges of fraud, it is for him to prove them. The simple answer to these arguments is first, that it has not been satisfactorily proved that at the date of the suit, 8th March 1934, the appellant was in possession of the property. It is enough to refer in this connection to the clear admission of the Dulhin, the appellant's mother and guardian *ad litem*, made in her objections to the appointment of a receiver dated 20th September 1925, that the estate was released from the management of the encumbered and wards estate office in April 1924, which would be after the date of the suit. The entry relied upon by the defendant in the extract from the survey register confirms this view. It shows that the name of the Dulhin, the mother and guardian *ad litem* of the appellant, was entered as proprietor of the estate in the year 1924-5 and as the official year would commence on 1st April and the number of the entry is 568 suggesting its lateness in the year, it is clear beyond doubt that, at the date of the suit, neither the appellant nor his mother on his behalf was in possession of the property.

Apart from this, which is a complete answer to the appellant's contention, it is hardly possible to apply to this case, where the dispute substantially relates to two rival titles, the principles governing ejectment suits and even if it were

proved that the appellant was technically in possession for a few months under a paper entry, that fact, in their Lordships' opinion, would furnish very little indication of the superiority of his title over his opponent's. As has been frequently held by this Board, mutation proceedings are merely in the nature of fiscal inquiries, instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of the property may be put into occupation of it with the greater confidence that the revenue for it will be paid.* The provisions of section 106 of the Indian Evidence Act likewise require that as the facts relating to the pregnancy of the Dulhin and of the appellant's birth are within her knowledge, the burden lay on her to prove them. As for the fraud alleged in the plaint, it is irrelevant to the plaintiff's claim, which is based on his undeniable relationship to the last holder of the estate. Their Lordships are therefore of the view that it lay upon the appellant to prove his case beyond all reasonable doubt.

Turning to the High Court's judgments it does not appear that the case was decided on the ground of onus. As the learned Chief Justice observed, the question of onus of proof was of no great importance, because both sides had entered into evidence. There are likewise enough indications in the judgments of the other two judges to show that the facts proved by the evidence and the probabilities of the case formed largely the basis of their decision.

The material facts of the case are as follows: On 7th April 1922, Surendra, the last holder of the Deogan estate, committed suicide at his residence at Nawa. He was then 22 years old. He had become infatuated with a mistress, whom he was keeping in his house. In answer to the protests raised against such conduct, he killed first the mistress and then himself. He left a widow, the Dulhin, defendant No. 1, and a daughter aged 2, who was defendant 10 (respondent 8). He also left a mother, the Rajmata. At the time of his death the Deogan estate was in the charge of a manager Mr. Coutts, appointed under the Chota Nagpur Encumbered Estates Act (Act No. 6 of 1876). Owing to this fact, it was necessary for the authorities to decide the question of succession. This involved an immediate inquiry as to whether the Dulhin was pregnant. The Deputy Commissioner Mr. Elmes and Mr. Coutts came to Nawa on the day after the death. They were then informed both by the Rajmata and the Dulhin that the latter was pregnant. Previous to this, they had sent a boy called Mona Bux, son of defendant 4, to inquire and report and it is alleged on behalf of the appellant that both the Rajmata and the Dulhin informed the boy that the latter was pregnant. Mona Bux is said to have reported the fact to the authorities. Petitions were subsequently presented to the authorities on behalf of the first respondent denying the pregnancy. A medical examination of the Dulhin was suggested. The Dulhin and the Rajmata did not agree to such examination, on the ground, it is said,

* *Nirman Singh v. Lala Rudra Partab*, I.R. 53, I.A. 220, 227.

that if held in Nawa or nearabout, it would, they feared, affect the prestige of the family. Rabindra Deo, a cousin of the Dulhin, was sent by the Dulhin's mother—Dilraj Kumari—to see her on the death of her husband and, it is alleged, that, on that ground and also because she was pregnant, to take her if possible to her mother's house in the Bamra State of Orissa. On this becoming known, more insistent pressure was brought to bear on the Rajmata and the Dulhin to consent to the latter's medical examination. As before, they refused to agree but ultimately consented to such examination being held at Gaya in the course of the Dulhin's journey to her mother's residence. Thereafter commences the story of an interesting itinerary, which, for the purpose of considering the evidence, may be divided, as the lower courts have done, into incidents occurring at five successive stages as follows:—

- (1) Incidents prior to and shortly after the death of Surendra.
- (2) Those at Gaya.
- (3) At Bamra.
- (4) At Calcutta.
- (5) Post-Calcutta incidents.

(1) AT NAWA.

The appellant's evidence about incidents which happened at Nawa before and shortly after the death of Surendra is briefly as follows:—

The Rajmata says that about a month before the death of Surendra, she learned from the Dulhin that she was pregnant and communicated the information to the Dulhin's mother. During this period, two ladies related to the family, Sampat Raj Kuer and Ganesh Kuer, paid visits, both before and after the death of Surendra; there was no surreptitious concealment of the news about the Dulhin's pregnancy; she gave the information at the earliest opportunity to the authorities who made inquiries into the matter. The appellant's evidence principally consists of the testimony of the Rajmata and of the two ladies Sampat Raj Kuer and Ganesh Kuer. The Dulhin has not given evidence in the case. Sampat Kuer says that she paid a condolence visit to Nawa five or six days after the death of Surendra, when she made inquiries of the Dulhin and found from her answers and the nausea she was having that she was pregnant; she visited again in July-August and observed that she was pregnant. Ganesh Kuer's evidence is much to the same effect. She paid three visits, the first, sometime in Fagua (13th February-13th March), when both the Rajmata and Dulhin said that the latter was pregnant. She thereafter paid two visits, one after Surendra's death, when she saw that the Dulhin was having nausea and was told that she was pregnant. During her third visit in May-June, she saw herself that the Dulhin bore signs of pregnancy. The Trial Judge has very strongly relied upon the evidence of the two ladies. He had the advantage of hearing their evidence given and of observing

their demeanour, which the High Court had not. They were distantly related to both the plaintiffs and defendants side and are not interested in dishonestly supporting the defendants' side against the plaintiffs—a taint which may attach in a large measure to the Rajmata's evidence. Their Lordships feel compelled to observe that if matters had stood there and the issue had not been clouded by many suspicious acts and omissions disclosed at the later stages of this case as hereinafter stated, they would have found considerable difficulty in rejecting this evidence, so strongly relied on by the Trial Judge. In the present case, however, it is difficult to judge of the truth or falsehood of the evidence in compartments, as the Trial Court appears to have done. When dealing with a version spread over several consecutive stages, it is inevitable that careful regard should be had to them all and their truth or falsehood tested on a review of the entire case. The incidents have to be judged in the light of what preceded and followed; and it would be an error to segregate the incidents and test their veracity in isolation.

The concurrent judgments of the High Court have rejected this evidence primarily on the ground that it would be impossible, even for the Dulhin and the Rajmata, to discover the pregnancy at such an early stage. The learned Chief Justice has strongly relied upon the circumstance that, taking the 8th of December 1922 as the date of birth and the fact that the birth was normal (as disclosed by the evidence) it would be difficult to accept the possibility that, at any stage prior to 7th April, there would be any signs by which either the Rajmata or the Dulhin could have detected the pregnancy. The difficulty of accepting this view is that the witnesses gave evidence many years after the incident. They were ladies of advanced age untrained to accurate observation or memory of time and dates and it is more than probable that in giving definite dates or periods, they exaggerated their impressions or made mistakes. It is undoubtedly correct that, taking the rule of 280 days as the period of normal gestation, the insemination took place on or about 3rd March. Their Lordships' attention was invited to medical treatises to show that, in the case of sensitive persons, nausea appears as the result of pregnancy shortly after conception, though ordinarily it occurs after two months and never after four months. It is not, therefore, absolutely impossible that the Dulhin or the Rajmata, who was apparently experienced in such matters, may have discovered the earliest signs of pregnancy. There is no evidence as to when the Dulhin's last period was passed. If it was shortly after the insemination and three weeks had passed after such disappearance it was not difficult for a shrewd and experienced lady like the Rajmata to suspect the pregnancy, and, in the honest belief that it was so, she gave currency to the news. One point, however, which weakens the defendant's case is the omission to produce the letter by which the Rajmata says she communicated the happy news to Dilraj Kumari the Dulhin's mother about a month before Surendra's death. There is likewise a noticeable discrepancy

on this point between the evidence of the Rajmata and of Dilraj Kumari. On the other hand, the plaintiff's evidence relating to this period is not at all helpful. It is practically worthless. The plaintiff No. 1 knows nothing about this matter nor does defendant 4, who is the soul of this litigation on the plaintiff's side. Plaintiff 1 relies upon the information of his wife, who is not examined in this case, although her name was mentioned amongst the witnesses to be called on the plaintiff's behalf. Defendant 4 similarly relies upon the information of his wife and aunt, who have not been examined. It is proved that the two families were living in two different compartments of the same house and the ladies upon whom the plaintiff relies must have had excellent opportunities of observing the Dulhin during this period. They have not ventured to give evidence. Another witness was examined, a maid servant, Thakuri Kaharin, who says, from her observation, that the Dulhin was not pregnant. Gopal Ojha, who claims to be the Guru of the family testifies similarly. The story told by these two witnesses is palpably false and no attempt was made before their Lordships to resuscitate these two witnesses rejected by the lower courts.

(2) AT GAYA.

Leaving this evidence in the state described above, it will be helpful to turn to the next group of events to ascertain how they affect the probability of this evidence being true. These are the incidents at Gaya, mainly the medical examination held by a lady doctor, first on 5th July 1922 and subsequently in February 1926. What happened at Gaya can be briefly told:—

On 4th July 1922, the Dulhin, the Rajmata, Rabindra Deo, cousin of the Dulhin and Sitaram, a son-in-law of the Rajmata, with attendants and servants (including one Sukumari) forming one party, and Mr. Coutts and Mona Bux, since deceased, forming another, travelled by the same train to Gaya. Mona Bux was about 14 years old and owing to that fact, it was intended that he should have access to the zenana in order to identify the Dulhin before the examining doctor. It appears that at Gaya the Rajmata's party stayed at the rest house and Mr. Coutts and Mona Bux stayed elsewhere. Mr. Coutts arranged for a lady doctor, Miss De Menezes, the then Medical Superintendent of the Lady Elgin Hospital at Gaya, to examine the Dulhin at the rest house. On 5th July, Miss D. Menezes examined a woman, alleged by the defence to be the Dulhin, at the rest house and found her to be five or six months pregnant. The lady doctor gave a certificate in the following terms:—

Gaya.—“ This is to certify that I have examined Dulhin Binodini Devi, identified as such by Lal Rabindra Nath Deo of Deogarh and Babu Sitaram Singh of Chogam and find her to be between five or six months pregnant.”

(Signed) Miss L. D. MENEZES, F.R.C.S.I.

Gaya, 5th July 1922.

If matters had stood there, this certificate would have placed the defence case beyond all reasonable doubt. Here was a certificate given by an independent and competent lady doctor, stating in clear terms the matter in controversy. But the matter does not end there. In February 1926 the same lady doctor examined the real Dulhin and came to the conclusion that the person she examined on 5th July 1922 was another woman, completely different in appearance from the Dulhin. A doubt is thus cast on the value of the certificate by its very author and the question arises how far Miss De Menezes' opinion and veracity are to be trusted. Miss De Menezes was examined on three different occasions: on commission on 21st September 1927 at Gaya, again on commission at Cawnpore on 1st September 1929 and lastly before the High Court on 24th October 1935. The High Court by a majority has relied upon her evidence very strongly. The judges had the advantage, which the trial judge had not, of seeing her demeanour in the box and it will be difficult to reject their appreciation, except upon grounds which clearly prove that their view was wrong. The High Court thought it necessary to examine her by reason of the explanation given by her of the certificate mentioned above and in order to remove any possibility of ambiguity and irrelevance affecting her testimony. The learned Chief Justice remarks that he is entirely satisfied that she is a witness of truth. Her evidence is that on 5th July 1922 she went to the rest house and with her went Mona Bux. The Rajmata admits that Miss De Menezes brought the boy with her, but that as his name was not mentioned and the Rajmata did not know that the boy was Mona Bux, she did not permit him to identify the Dulhin. It is difficult to accept the Rajmata's story that she did not know either that Mona Bux was in the party, or that he was the boy proposed for identifying the Dulhin. Referring to her visit on 5th July, Miss De Menezes further says that she was first shown into a room in which a number of people were assembled whom she did not know. She was told that she would be shown the Dulhin and would then examine her. She had been warned by Mr. Coutts—the manager, who was present throughout—that possibly an attempt would be made to substitute another person for the Dulhin. She was then taken to another room and met by the Rajmata. It was at this stage that the Rajmata refused to allow Mona Bux to go in and identify the Dulhin. It is difficult to understand, although it does not affect her evidence very much on material particulars, why Miss De Menezes, on finding the Rajmata obdurate about not allowing Mona Bux to go in, did not refuse to examine the woman presented to her; why she did not come out immediately and complain to Mr. Coutts, who was in charge of the identification on behalf of the responsible authorities. She appears to have felt no such doubts and went in alone. She saw a young woman seated on a chair, who the Rajmata said was the Dulhin. By reason of Mr. Coutt's warning about the possibility of impersonation, Miss De Menezes took particular pains to look

at the countenance of the young woman and took care to remember it well. She pushed back the sari from the woman's face. She remembered the face quite well. It was oval, fair, with high-bridged nose and light eyes. She made an examination both internally and externally and found the patient to be five or six months pregnant. Miss De Menezes left the room and returned to the room which she had first entered and sat down to write her certificate in terms mentioned above. Mr. Coutts was present. She pointed out to Mr. Coutts the persons who had identified the woman to be the Dulhin. Mr. Coutts then supplied their names, which were Lal Rabindra Nath Deb and Babu Sitaram Singh, which she entered in her certificate.

With reference to her examination of the Dulhin in February 1926, Miss De Menezes says that on that occasion she saw two ladies, one of whom she at once recognised to be the Rajmata. The other was certainly not the person she had seen in July 1922. The Rajmata persisted in assuring her that she was the same person, but Miss De Menezes adhered to her opinion; the lady she examined on the second occasion was dark, her face was more broad than oval and had a different type of nose. She was definite in her view that the two were entirely different persons.

Objections have been urged against Miss De Menezes' testimony, that her memory is not clear or correct as regards the identification by Lal Rabindra Nath Deb and Babu Sitaram Singh and that she is not accurate when referring to the stage at which she submitted the report; but it should be noted in answer to this that she was giving evidence before the High Court nearly 13 years after the event. It was not her duty to look to the identification. There was Mr. Coutts to see to that. She was there to examine the person who was presented to her. She had never met the Dulhin before and could not say whether it was the right person who was presented for her examination. As she says in one of her answers, "I knew there was the question of identity and I was therefore careful in giving my certificate." The certificate, on the face of it, bears her out, especially the words, "identified as such" and, commenting upon this wording, Miss De Menezes' explanation, given before the High Court, is convincing. She says, "I was careful to say, 'identified as such by so-and-so.' To me she was only a person who claimed to be so-and-so, so I guarded myself that she was identified as such by so-and-so." She further admits, "Perhaps I used a wrong English word. I should have said, 'alleged to be so-and-so.' I told Mr. Coutts that these gentlemen say she is so-and-so. Mr. Coutts gave me the names." There is some confusion in her evidence as regards certain matters, e.g., the stage when she wrote the report, but on careful perusal of her entire evidence, their Lordships feel no difficulty in agreeing with the concurring judges of the High Court, that, notwithstanding some confusion and inaccuracies in matters of detail, she spoke the truth. A point was made which was not satisfactorily

answered by the plaintiff, that if substitution took place as alleged by the plaintiff, how did Mr. Coutts feel satisfied about the correctness of the identification or certificate. He had every reason to be cautious and circumspect. He knew that Rabindra Deb and Sitaram Singh, to whom he apparently left the identification, were both interested in and related to the Dulhin and the Rajmata. Besides, Rabindra had come, according to Mr. Coutts' information to surreptitiously take the Dulhin away to her mother's residence before any examination could take place. He knew the Dulhin and he had besides good reasons for suspecting impersonation because of the initial circumstance that Mona Bux had been refused permission to go in. Another point which has likewise not been sufficiently explained is why should the Rajmata, who is, on the plaintiff's own hypothesis, a very intelligent, masterful and intriguing lady, risk substituting another woman so entirely different in appearance from the Dulhin as Miss De Menezes has testified; she knew that Mr. Coutts would be present on the occasion and on the watch to detect falsehood, and he knew the Dulhin personally. The plaintiff's challenge had already been made openly and on more than one occasion. All these circumstances are urged as pointing to the impossibility of the lady doctor's certificate being untrue. These are undoubtedly difficulties in the plaintiff's way which have not been cleared. He has perhaps added to them by taking upon himself the unnecessary burden of proving that a woman called Nathunia was substituted for the Dulhin on 5th July, a theory which has been rightly rejected by the lower courts. But it is clear that these points could only have been cleared up, some by Mr. Coutts and some by the Dulhin, if they had given evidence. In the absence of this evidence any explanation offered in solution of these doubts, must largely be in the nature of a surmise. But whatever value these difficulties may have on the probabilities of the case, the fact remains that if Dr. De Menezes' evidence is accepted as truthful, as the concurring judges of the High Court have done, there is no escape from the conclusion that the woman she examined on 5th July was not the Dulhin. As supporting her testimony, their Lordships attach considerable importance to the wording of her certificate, especially the words, "identified as such," and her explanation that she used them in order to protect herself from any future possibility of disbelief. An attack was made on this lady's evidence on the ground that, as she was a very busy practitioner, it was impossible for her, in the absence of a note of the examination made in July 1922, to remember the details of the appearance of the lady she examined on that occasion. She has, however, given an explanation which appears satisfactory. She knew this to be an important case likely to appear in court; she was warned to be careful about the person she examined, and that owing to these special circumstances and also because the case related to an aristocratic family, she took particular care to examine the appearance and she has, in consequence, a clear memory of the countenance of the woman she examined in 1922.

The contrary evidence is of the Rajmata and Rabindra. As against the clear and independent testimony of Miss De Menezes, it is difficult to believe these two witnesses. The evidence of Rabindra is open to many objections, as pointed out by the High Court and the evidence of the Rajmata has to be accepted with considerable caution, whenever her testimony is opposed to that of independent witnesses. Their Lordships do not agree with the learned Subordinate Judge's view that the Rajmata did not derive any benefit from the birth of a son to Surendra. It is obvious that if defendant 9 was the son of Surendra, the estate would remain in the line of her son with all consequent advantages to her branch of the family. It may be that her personal benefits, namely rights of residence and maintenance in the family as a Hindu widow, would not be affected by the events either way, but it cannot be denied that she was very keenly interested in the main issue of the case. Her subsequent conduct also shows that from the beginning she took the keenest interest in this case and, at a later stage, when the Dulhin dropped out, she continued the proceedings with great perseverance, taking upon herself the burden of being the guardian *ad litem* of defendant 9.

(3) AT BAMRA.

The incidents at Bamra are mainly to be found in the evidence of the Bara Kumar, the Dulhin's uncle, his brother Rajib Lochan, her mother Dilraj Kumari and her cousin Rabindra, who has already been mentioned in connection with the incidents at Nawa and Gaya. These are the witnesses for the defence. On the other side there is the evidence of Mr. McPherson, the then Superintendent of the Bamra State and to the testimony, somewhat extraordinary, of a lady assistant surgeon, Mrs. Mazumdar, who examined the Dulhin. The Dulhin remained at Bamra until November, when she left for Calcutta in the circumstances which will be narrated later. Their Lordships are not disposed to attach much importance to some of the incidents which happened at Bamra. The evidence of the plaintiff's witnesses who testify to the Bamra incidents is material on two points: (1) as showing that the Dulhin had a miscarriage during or previous to her stay at Bamra; (2) as proving, from the personal observation of the Dulhin by some of the witnesses at Bamra, that the Dulhin, during her stay there, was not pregnant. The Dulhin's pregnancy during her stay at Bamra, if it existed at Nawa, would be far too advanced to remain unobserved. It is this fact which makes the testimony of the Bamra witnesses on the second point very material.

As for the theory of miscarriage, their Lordships do not attach importance to it, because it was never seriously suggested by the plaintiff's side, nor even seriously pursued. It is also inconsistent with the view established by the foregoing evidence that the Dulhin was not shown to be pregnant at Nawa or Gaya. In support of the theory of miscarriage,

there is, in their Lordships' opinion, very little satisfactory evidence. The theory appears to have arisen mainly out of the impressions of Mr. McPherson. He had arrived in Bamra in 1922 and under him was working the Bara Kumar, the Dulhin's uncle. His evidence, on the points on which it is clear, is that he saw the Dulhin with his wife and the Dulhin admitted to him in course of the talk that she had been pregnant, but that she had a miscarriage and she was no longer pregnant, and he accordingly made a report to the Deputy Commissioner that she was not pregnant. The report has not been put on the record and there is no means of testing the accuracy of the witness's memory, which does not appear clear on many points of details put to him on the course of his deposition. Mr. McPherson admits that he got the impression from what the Dulhin told him. The conversation was going on in the Uria language and had to be interpreted from time to time by the Bara Kumar. The explanation given by the defendants' side, which is not unsatisfactory, is that the Dulhin stated that she had blood discharges, a fact supported by her mother's evidence, and that the expression (*rakta sarab*) which she used led Mr. McPherson to imagine that she had admitted miscarriage. If, as the plaintiff says, the Dulhin had been consistently pretending pregnancy during the period April-October, it is difficult to believe that she would willingly admit miscarriage in October, thereby destroying the edifice which she and the Rajmata, with the aid of their relations, had built with such patient effort. It is also equally difficult to understand why, after making an admission of miscarriage, she would think of going to Calcutta, thereby reviving her story of pregnancy after it had been abandoned.

Mr. McPherson's memory, judging by what he stated before the High Court, where he was deposing more than 13 years after the incidents, is not very clear. His deposition shows that he did not remember many incidents and made mistakes on important details; for instance, he was not clear whether his visit to the Dulhin was in 1922 or 1923, when the report to the Deputy Commissioner was made, whether before or after he saw the lady, whether he saw the Dulhin at the date of the report, namely January, 1923, or in the previous October, or whether the Dulhin's visit itself to Bamra was October, 1922, or January, 1923. Many of his answers in cross-examination or in reply to questions put to him by the High Court judges are equally confusing and he is unable to give satisfactory answers to many vital questions, e.g. as to why the Bara Kumar's and Mrs. Mazumdar's statements were not recorded till January, 1923, when the events to which they related took place in October, 1922. But, in spite of these infirmities of his evidence, which perhaps are natural, he is clearly of the opinion, based on his own observation, that the Dulhin was not pregnant when he saw her. He was asked more than once, "What is your impression about the state of pregnancy?" "In my opinion, she was not pregnant." The witness added that she was not "in the state of pregnancy which had been reported to him,"

that is about eight months, that is she was not visibly in a state of pregnancy. He makes it clear how he could come to this impression from her appearance. Asked for details, he says that she stood up, passed her hand over her body and therefore he saw her. The interview must have lasted ten minutes at least. He was perfectly satisfied from what she said to him and from what he saw that she was not pregnant. On this point, his evidence has not been shaken in the course of a long cross-examination. While their Lordships feel difficulty in accepting his version about the miscarriage, it is not easy to reject his testimony on the point of pregnancy. He was a disinterested witness, acting on behalf of the authorities, who, at this stage, were either neutral or disposed to support the defendant's claim. He was seen by the judges of the High Court, two of whom have relied very strongly on his deposition and their Lordships see no reason to differ from their view.

The Bara Kumar gave evidence on commission for the defence on 6th December, 1927. He did not appear to give evidence before the High Court, although given an opportunity of doing so. His deposition, taken on commission, contradicted Mr. McPherson's evidence on material points, but he made a statement in writing before Mr. McPherson at a later stage, namely 9th January, 1923, in which he states. "I accompanied Mr. McPherson to the Dulhin's mother's house where the Dulhin was staying and I was present when Mr. McPherson interviewed her. The Dulhin told us that she had had a miscarriage and that she was no longer pregnant. This was in October last. I saw the lady myself and she did not show any signs of pregnancy." An attack has been made on the admissibility and value of this statement on many grounds, but without considering the details of the objection, their Lordships think it unsafe to rely on this statement for various reasons. The Bara Kumar denies having made such a statement and he has not been confronted with it, as required by the provisions of section 145 of the Indian Evidence Act. He had no opportunity of explaining this statement. It was besides made four months after the event in January, 1923. It is in Mr. McPherson's handwriting and the Bara Kumar only signed it. He must have known, at the time he made the statement, that the Dulhin was claiming to have given birth to the appellant in the previous December. On the plaintiff's own hypothesis, he was in the conspiracy, if so, it is difficult to understand how he could have made this statement voluntarily. A suggestion was made on behalf of the appellant that the Bara Kumar was a subordinate of Mr. McPherson and made the statement under his influence. This may or may not be so. But it is obvious that there are many difficulties in the way of accepting this statement at its face value and their Lordships have thought it proper to exclude it from their consideration.

As regards Mrs. Mazumdar's evidence, their Lordships have equal difficulty in accepting her testimony. She was examined on commission for the plaintiff on 25th November,

1929. She appears to have been an unwilling witness, took every opportunity to protract her deposition from day to day and her evidence on material particulars is contradicted by Mr. McPherson's evidence and by parts of her report in writing, made to Mr. McPherson at a later date, 17th January, 1922. In her deposition, she says that she saw the Dulhin in October, 1922, at her mother's place at the request of Mr. McPherson. It was cold at the time and the Dulhin was wearing warm clothing on her person. "Her entire body was covered with clothes. I only saw the face. When I went there I found many ladies and I told them that I had come to examine the Dulhin for pregnancy. At this all of them got annoyed and the Dulhin began to weep. After this I did not get her body uncovered to examine her. I only saw her face. I asked the Dulhin whether she was having her monthly courses and she said 'Jao, Jao (leave me alone). I am getting everything.' I understood from their behaviour that they uttered these words angrily. I could not form any opinion as to her pregnancy. I told Mr. McPherson that I could not form any opinion as to her pregnancy". In her written report to Mr. McPherson, made on 17th January, 1923, she says that she examined the Dulhin in the first week of October and found no outward sign of pregnancy. Further, the Dulhin told her that she was not then in the family way and she was still having monthly courses. Asked how she came to make such a report and why the important details mentioned in her deposition were omitted, especially her inability to form any opinion, she explained it by saying that it was at Mr. McPherson's instance that the report was made. This may or may not be true; but on a review of the whole evidence, their Lordships think it unsafe to rely upon her evidence or her report and they have less difficulty in doing so, as they reject the entire story of a miscarriage at Bamra.

The remaining evidence is that of Dilraj Kumari, the mother of the Dulhin, who says that when the Dulhin came to Bamra she was pregnant and remained so during her stay there; that she had blood discharges after a stay of a month and a half, but no doctor was called in. She denies that Dr. Mazumdar saw the Dulhin at all during her stay at Bamra. She is unwilling to admit even innocent details about Mr. McPherson's visit, of which she must have known. She is, of course, very much interested in the issue of this case. Her subsequent conduct after the birth of defendant 9 dealt with later in connection with the "post-Calcutta occurrences", throws great light on the probability of her testimony being untrue. In dealing with her evidence as with that of the Rajmata, their Lordships think it unsafe to accept her testimony where it is contradicted by that of independent witnesses, or the probabilities of the case.

(4) AT CALCUTTA.

The next stage is at Calcutta. The material witnesses for the defence on this episode are Rabindra, cousin of the Dulhin, Mrs. Roy, the lady doctor who attended at the

delivery and the maid-servant, Sukumari, alleged to have been present when the child was born. The defendant's version is that the Dulhin was sent to Calcutta for two reasons: (1) because of the family custom of ladies visiting Calcutta for delivery and (2) because the blood discharges were continuing and required medical treatment. While she was there she lived in the house of one Pravash Chandra Ghose, and it is alleged that three or four days before the delivery of the child, the lady doctor (midwife) Mrs. Roy was called in to see the Dulhin, that on the 8th December, 1922, the Dulhin gave birth to a male child, who is defendant 9 that Mrs. Roy was present at the delivery and that she attended the lady thereafter consecutively for 8 to 10 days and later at intervals.

There were at this time present with the Dulhin in Calcutta other relations, some of whom have not been examined in this case. These are the Dulhin's sister-in-law (husband's sister), Murali Sham Kumari and her husband Shri Prasad. The former was available as a witness before she died in 1927 and Shri Prasad is still alive. There were also living with the Dulhin at this time, Rabindra, cousin and Rajib Lochan, uncle of the Dulhin, who have been examined on behalf of the defence. Rajib Lochan, though examined in detail, makes no mention of the pregnancy of the Dulhin as coming under his observation in Calcutta; in fact no question has been asked to him as regards her pregnancy. He was a very near relation and stayed with her for four or five days. If the pregnancy existed, he would have seen it, as it was very advanced at that stage. Though he went with the Dulhin to Calcutta to keep her company in her travail, he left her before she was delivered. From his evidence he appears to be a very unobservant witness. As regards the maid-servant Sukumari she is clear in her deposition that a son was born to the Dulhin in Calcutta, that she was present in the delivery-room and that the sister-in-law was also present along with the lady doctor. In addition to the fact that she is a maid-servant completely under the control of the Dulhin and the Rajmata, there are many parts of her deposition indicating that she is neither an observant nor a truthful witness and their Lordships think that the concurring judges of the High Court rightly rejected her testimony.

As for Mrs. Roy's evidence the learned Chief Justice has commented adversely on it, relying on an important detail, that she gave what he thought was a false address. Their Lordships do not think that the point is clear from her evidence, nor would it be an adequate reason for discrediting her testimony if it was otherwise reliable. The main infirmity of her testimony however, assuming its truth, is that it is not helpful on the material question whether the lady she delivered was in fact the Dulhin. She was a total stranger to the Dulhin, had never met her before and her testimony furnishes no convincing proof that the woman she delivered was the Dulhin. She admits in her cross-examination, "As all people in the house used to call her Dulhin,

I came to know her as such." She apparently had no personal knowledge of the Dulhin. There are many other features of her deposition which show that her testimony cannot be implicitly relied on. She is a professional midwife and her status and position are not such as to compel the acceptance of her testimony, as against the several difficulties which this case presents, including the testimony of a well qualified doctor, Miss Hamilton Brown, whose evidence will be dealt with later. One point, however, which Mrs. Roy clearly states is that the child which took birth at Calcutta on the 8th was a child born in normal time. Similar difficulty arises in accepting the testimony of the landlord Pravash Chandra Ghose and the astrologer Pandit Mahadeo Dutta Sharma. To both these witnesses the Dulhin was a total stranger. They heard from the persons in the house that it was the Dulhin who had given birth to a child and they accordingly thought so. They did not know, of their own knowledge, who had given birth to the child.

As against this evidence, the plaintiff has tendered two witnesses, who are independent and have no interest in the issue of the case. The first is Mr. Lyall, the Commissioner of Chota Nagpur Division and connected with the encumbered estates of Palamau and Deogan. He apparently occupied a detached position and was the person who had kept himself in touch with Mr. McPherson. He says that he called on the Dulhin with the lady doctor, Miss Hamilton Brown, on receiving a telegram from the Dulhin, informing him of the birth of the child. His object in paying this visit was to obtain irrefutable evidence of the Dulhin giving birth to the child, as her pregnancy had been challenged. He took Miss Brown with him for the purpose of having the Dulhin examined at a time when the physical evidence of the delivery would be fresh and noticeable. He warned the Dulhin's relations, whom he met at her residence, of the importance of such an examination and also of the consequences of a refusal. His warning was in clear terms, that if the opportunity of having independent medical testimony was not availed of, an adverse inference would be drawn against the authenticity of the birth and that he had got the best lady doctor for the purpose of the examination. In spite of this warning, the Dulhin's friends reported that she was not willing to be examined. To relieve any possible anxiety of the Dulhin, Dr. Hamilton Brown assured her that the examination would cause no pain. Still the refusal was persisted in. Mr. Lyall then asked Dr. Hamilton Brown to pay a second visit on any day during the period of ten days, to examine the Dulhin and find out whether she had given birth to a child. Accordingly, Miss Hamilton Brown paid a second visit, when also she was not given an opportunity of examining the lady, but only the child was shown to her.

On all important points, Mr. Lyall is corroborated by the testimony of Dr. Hamilton Brown, who gave her evidence by way of answers to written interrogatories. She confirms Mr. Lyall's memory of the two visits, on both of which occa-

sions she was denied permission to examine the Dulhin and on the second occasion only a child was shown to her. She repeats that clear warnings about the adverse consequences of the Dulhin's refusal to be examined were given to the Dulhin and her friends without any success.

The explanation of this refusal offered on behalf of the defence is twofold (1) that the Rajmata was not present in Calcutta and, in her absence, no one would take the responsibility of having an internal examination of the Dulhin by a strange European doctor. (2) The sentiments of the family were averse to taking the child out of the delivery-room during the first few days of child-birth, when it is considered unpropitious to expose the child to the observation of strangers. This latter ground loses its weight, when it is remembered that on the second occasion, which was within ten days, the child was in fact shown to Dr. Hamilton Brown. As regards the first ground, it is not of much value, as the Rajmata was then residing at a day's distance by rail and her permission by letter or telegram could have been speedily obtained.

It was suggested on behalf of the appellant that as Dr. Hamilton Brown was entirely a stranger, the refusal could not be imputed to a fear of her discovering that the patient was not the Dulhin. The probable answer is that, having regard to the happenings at Gaya and Bamra, Mr. Lyall would perhaps have taken greater care about identification, for instance, by obtaining a thumb impression of the Dulhin, so as to place the case beyond all possibility of doubt. The defence knew, at this last stage of what they called the plaintiff's persistent persecution of the Dulhin, that this was their final chance of indisputably establishing the identity of the Dulhin. The Dulhin then had the advice of two male relations, Shri Prasad and Rabindra, who must have realised the consequences of the refusal. The refusal, therefore, is very significant.

It is equally significant that though the Dulhin went to Calcutta for obtaining medical advice on her ailment, no doctor of any prestige or renown was called in prior to her delivery. She was having blood discharges, which according to her mother's evidence, became more frequent as time went by. It may be noted here that in the list of documents which the Dulhin filed as the appellant's guardian are mentioned two certificates, one granted by a Miss S. Ghosh, M.B., F.R.C.S., Calcutta and the other by a lady doctor named Cox of Calcutta Campbell Medical School, both certificates being "for change of climate on account of illness of the Dulhin due to her giving birth to a child". It is strange that though no lady doctor of any importance was called before pregnancy or for the delivery, two lady doctors were called for the comparatively unimportant purpose of obtaining opinion as regards change of climate on account of illness due to the delivery. The names of these two lady doctors

appear in the list of witnesses, whom the defence desired to be examined on commission and it is stated in the defendant's petition asking for time for the production of these witnesses, that these two lady doctors used to attend the Dulhin.

It appears that there were two other doctors consulted; Babu Boral, M.B., and Dr. Diwan Bahadur. The record shows that though the Commissioner gave, from time to time, facilities for the production and examination of these witnesses, they were not ultimately examined; in some cases because the witness refused to accept notice; in others because they were not available on the day of the examination. The omission, in their Lordships' view, is not without significance. The only explanation given was that these doctors stipulated prohibitive fees for giving evidence, a plea which it is difficult to accept, when it is remembered that the Dulhin's friends generously pressed Dr. Hamilton Brown to accept a sum of 200 rupees in lieu of her usual fee of 32 rupees for two visits, and, as Dhavale J. observes in his judgment, leading counsel from Patna were engaged for the defence, which the learned Judge describes as "a notoriously expensive matter."

It is an extraordinary feature of this case that on all occasions when the stage was set by the authorities for obtaining unimpeachable proof of the pregnancy of the Dulhin, the defence failed to meet the test, by being guilty of a flaw here and an excuse there, which resulted in delaying, from time to time, the production of proof of sufficient potency to end the controversy finally. At Gaya, although the Rajmata had the opportunity, she did not allow Mona Bux to go in and identify the Dulhin. It was a simple affair. He was a boy of 14. His identification did not necessarily involve his presence on the occasion when the internal examination of the Dulhin took place. At Bamra, the Dulhin's refusal to be examined by Mrs. Mazumdar again had the same effect. At Calcutta, the same difficulty appears. The Dulhin and her friends refused to allow an independent medical practitioner to examine the Dulhin, though they were assured that the lady doctor was the best to be obtained in Calcutta, that her examination would cause no pain, and, if successful, the test would finally end the controversy.

Doubts thus arise at every stage, each by itself perhaps insignificant or explicable, but their cumulative effect is to produce the impression that at every determinative stage, the defence has evaded facing the truth.

(5) POST CALCUTTA INCIDENTS.

The several incidents which can be grouped under this category are equally suggestive. If defendant 9 was the son of the Dulhin, his birth should have been hailed with acclamation by the Rajmata and the other relations. He was a posthumous son, the scion of an aristocratic family and the sole heir and in that sense, its sole hope of succeed-

ing to a large estate, which was about to emerge from the last stages of official management. Failing him, the estate would reach the hands of rivals, who would be, under circumstances generally attending such affairs, bitterly hostile. Yet, as the evidence makes clear, there was hardly any rejoicing worthy of the occasion; or any adequate notice taken of the child by the nearest relations. Though the custom of sending presents to grandchildren is admitted, Dilraj Kumari, the maternal grandmother, sent no presents to the child and is unable to explain the omission. The usual rejoicings and celebrations on the birth of a son and heir did not take place. There were none in Calcutta. The chatti ceremony, which should have been performed there within the first week of the birth, was not celebrated. The pre-natal rites, ensuring the birth of a son to the pregnant woman, which are usual amongst such families, were not performed. At Chatterpur, a Jalsa took place, but no respectable men were invited, nor those relations who would ordinarily attend such a function. Deogan in Bamra received the news of the birth very quietly. No sweets or gifts were distributed, the boy received no presents. His paternal grandmother, the Rajmata, who took such a prominent part in the pregnancy stages of the story, suddenly cooled down in her ardour after the birth; she did not even visit Calcutta to see the newborn grandchild; in fact, she did not meet him for many months thereafter. The maternal grandmother Dilraj Kumari did not see the boy for a long period of five years.

Communication of the birth was made to the authorities by telegram, but no communications took place between the two grandmothers, exchanging greetings or congratulations on the birth. They exchanged letters on pregnancy, but none on the birth. The Dulhin, instead of going to the Rajmata with the newborn child, her solace in her old age, goes to Benares for no apparent reason. Her subsequent behaviour is still more inexplicable. With the help of her Bamra uncle, the Bara Kumar and on the advice of her cousin, the Thakore of Jharia and her sister's husband, Raj Kishor, who apparently watched her welfare, she entered into a compromise with her inveterate foe plaintiff 1, who according to her previous story, had persecuted her from place to place, from April to December, 1922. By that compromise she gave away completely the rights of her son and declared that plaintiff 1 was the proprietor of the entire estate and, as such, was put in possession of it—an admission completely destructive of her previous contentions. This she did for benefits, which were more illusory than real. She got a paltry amount for the expenses of the marriage of her minor daughter, a charge in any event leviable on the family property. The amount too was not to be paid immediately, but was only to be deposited within six years of the execution of the deed. There was also a minor payment of a sum of Rs.10,000 to meet the expenses of the suit under appeal—another charge on the family funds, if the litigation

was for the bona fide protection of the family estate. It is unnecessary to go into other details of this compromise deed, as they have been sufficiently commented on in the judgments of the lower courts. The only explanation offered is that the Dulhin was not a free agent in arriving at it, but succumbed to the duress of Mr. Mears, the Manager of the estate, who threatened her with imprisonment and criminal proceedings. It is difficult to accept this explanation, in the face of the fact that her own cousin and uncle were advising her.

Her subsequent behaviour is equally unaccountable. The Rajmata has complained that since the date of the compromise, the Dulhin has become lukewarm, if not hostile. She had been living with Raj Kishor at his residence, which for a widow of her age is undoubtedly unusual. The Rajmata tried to bring her to her residence, sent a servant, personally went to bring her, but was not allowed to meet her. The Dulhin is now living estranged from her mother-in-law and completely indifferent to the interests of her alleged son. The defence affords no satisfactory explanation of this volte face. That it was a complete change of front cannot be denied, for up to the year 1928 the Dulhin was extremely active in protecting the interests of her child. In 1924 she applied for a mutation of names in his favour and to be appointed his guardian ad litem in this suit. Later in 1925, she objected to the appointment of a receiver in terms which show that she was then very keenly alive to the rights and interests of her son. In 1925-6 she was actively concerned in having her son's horoscope cast and sent money for that purpose to an astrologer. After the compromise, she grew totally unmindful even of the existence of her son. In 1931 she wrote a letter, in which she sent compliments to a distant relation, but made no reference to her son.

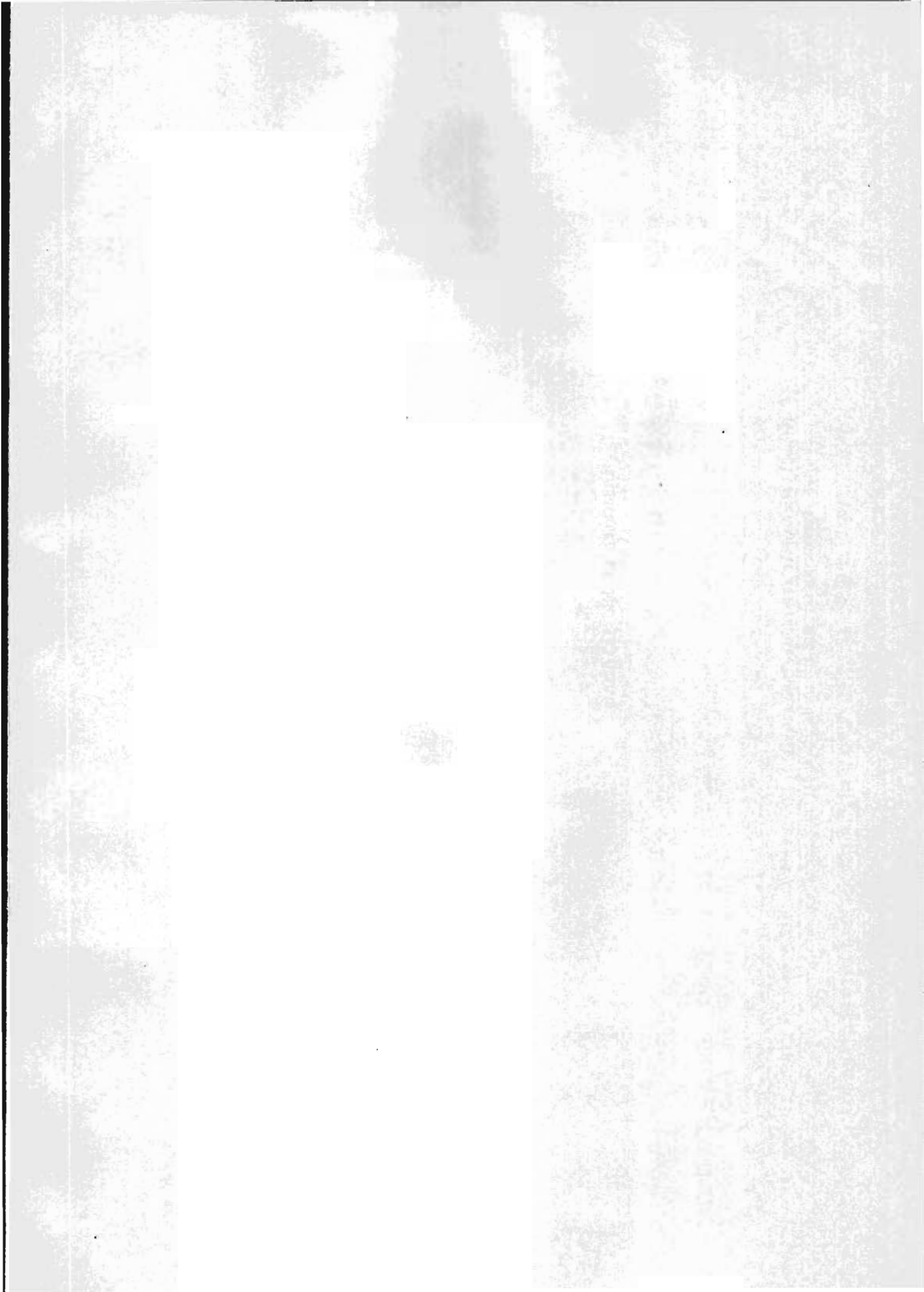
For all these reasons, their Lordships find it difficult to accept the defendant's version as proved and, they are compelled to accept the conclusion at which the majority judgment of the High Court has arrived.

In doing this, their Lordships feel constrained to observe, that they are fully aware of the fact that the evidence adduced by the plaintiff has not at all been helpful and that in parts it is not even truthful or convincing. He has not been able to substantiate the theories, which he took upon himself, in their Lordships opinion unnecessarily, the burden of proving, for instance, that a woman called Nathunia Kaharin impersonated the Dulhin at Gaya and another woman, the wife of one Lochan Bhuinya impersonated her at Calcutta and her child was shown to Dr. Hamilton-Brown and that on the subsequent death of that child at the age of 1½ years, the child of a third person, called Jamadur Rai has been put forward. These allegations have not been satisfactorily proved. Their Lordships are equally well aware that there are many difficulties, to some of which they have already referred, in accepting some

of the suggestions made on the plaintiff's side; but, as Dhavale, J. rightly observed in his judgment, it was for the defence to prove beyond all reasonable doubt that the appellant was the son of Surendra, born of the Dulhin at Calcutta on 8th December, 1922. It was not incumbent on the respondents to disprove the appellant's case and their failure to support their own theory does not prove the truth of his.

Their Lordships agree with the view of the majority judgment of the High Court and are of opinion that the appeal should be dismissed and the decree of the High Court affirmed. The appellant will pay the first respondent's costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council

NAND KISHWAR BUX ROY

vs.

GOPAL BUX RAI AND OTHERS

DELIVERED BY MR. JAYAKAR

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