

## Surendra Mohan Das Bhoumick and Another Vs The State of West Bengal and Others

**Court:** Calcutta High Court

**Date of Decision:** July 21, 1978

**Acts Referred:** Evidence Act, 1872 – Section 102

**Citation:** AIR 1979 Cal 3 : 83 CWN 18

**Hon'ble Judges:** R. Bhattacharya, J; Monoj Kumar Mukherjee, J

**Bench:** Division Bench

**Advocate:** Gouri Shankar Dey, for the Appellant; Joy Gopal Ghosh and Nure Alam Choudhury, for the Respondent

**Final Decision:** Dismissed

### Judgement

B. Bhattacharya, J.

This appeal is by the plaintiffs who were successful in the trial court but the decree they obtained was set aside in the appeal taken by the contesting defendants in the lower court.

2. In this second appeal the main question which arises for determination is whether Lalit, one of the defendants, is the legitimate son born of the

wedlock between Dhirmohan, the father of the plaintiffs and Parulbala, the mother of Lalit who is also the defendant in this case.

3. The suit was filed by the plaintiffs on certain allegations. It is stated that the plaintiffs' father Dhirmohan Das Bhowmick was a man having

considerable properties. One Rohini Kanta Das, the husband of the defendant No. 3 Parulbala Dasi, was a Kabiraj and he used to come from

East Pakistan and stay occasionally at the house of the plaintiffs' father before the partition of India. After the partition, Rohini Kanta finally

migrated with his family and took shelter in the outer house of the plaintiffs' father in 1356 B. S. Thereafter in 1359 B. S. Parulbala drove out

Rohini Kanta. Rohini Kanta left the place and never came back. Parulbala was a woman of loose morals and the plaintiffs' father drove her out

and she took shelter in the Akhara of some Bairagis where she gave birth to an illegitimate child who is the defendant No. 2 Lalit. According to the

allegations of the plaintiffs, Parulbala used to mix with persons of bad character and as a result of that association Lalit was born. It has been

further alleged that Parulbala after the death of the plaintiffs' father, without the knowledge of the plaintiffs, got mutations in the department of the

Revenue Officer in favour of herself and the defendant No. 2, her son, alleging that she was the lawful widow of Dhirmohan and that Lalit was his

son. According to the plaintiffs, Dhirmohan had no connection with Parulbala and Lalit was not his son. On these main allegations the plaintiffs

wanted to have a declaration of their title to some of the properties which have been recorded in the name of Parulbala and Lalit,

4. A joint written statement was filed by Parulbala on behalf of herself and her son Lalit, the defendant No. 2. In substance their defence is that

after the death of Rohini Kanta Dhirmohan married Parulbala in the year 1359 B.S. and she lived with Dhirmohan as husband and wife since then.

Lalit, the defendant No. 2, was the legitimate son born of the wedlock. She claimed to be the heir of Dhirmohan along with her son Lalit by

Dhirmohan. Several issues were framed and the most important issue was whether the defendant No. 3 Parulbala was lawfully married with

Dhirmohan and whether the defendant No. 2 Lalit was the legitimate son of Dhirmohan as alleged by Parul. The trial court, on consideration of the

evidence on record, held that there was no sufficient evidence to prove the marriage between Dhirmohan and Parulbala and according to it

defendant No. 2 was not the legitimate son of Dhirmohan. In the appeal taken by the defendants Nos. 2 & 3 before the lower appellate court it

was held, after additional evidence had been taken on the prayer of the appellants, that Lalit was the legitimate son of Dhirmohan as evidenced by

acknowledgement by Dhirmohan. Before the lower appellate court additional evidence was taken on the ground that the trial court without giving

sufficient and reasonable opportunity to the defendants refused the prayer of the defendants to examine some witnesses to prove several

documents. Those documents are, in particular, the admission register of La-lit and an application form for admission of Lalit in School. After the

taking of the additional evidence, the appellate court held that the application for admission as also the admission register contained the signature of

Dhirmohan. There was also the evidence of the Head Master who proved these documents that Lalit was the son of Dhirmohan. On the finding as

stated, the appellate court set aside the judgment and the decree of the trial court and dismissed the suit on the finding that the defendants Nos. 2

and 3 were the son and wife respectively of Dhirmohan.

5. Mr. Gouri Shankar Dey appears on behalf of the plaintiff-appellants before us and Mr. Joy Gopal Ghosh represents Parulbala and Lalit, the

defendant-respondents.

6. Before us Mr. Dey has contended that the learned appellate court below wrongly decided on the evidence on record that Parulbala was the

wife of Dhirmohan and that Lalit was his son. He has further contended in this connection that the learned District Judge ought not to have allowed

additional evidence and that even if there was marriage, when Rohini Kanta was alive at the relevant time, such marriage was illegal and ineffective.

Mr. Ghosh has, however, opposed the contentions.

7. In order to support the contentions raised, Mr. Dey wanted us to reappraise the evidence. In this second appeal we cannot do that unless the

judgment is perverse or the judgment is based upon evidence admitted illegally or the finding is without evidence or there has been wrong

construction of documents or misreading of evidence. We have been taken through the judgments of both the Courts below. We have found that

the learned District Judge was satisfied that although the defendants wanted to have the Admission Register and the Admission Form signed by

Dhirmohan in evidence, the prayer for time to examine the Head Master was refused. In the judgment we also find that the learned District Judge

was of the view that for proper decision and correct judgment it was necessary for him to get the Admission Register and the Admission Form

sought to be proved by the defendants themselves. In these circumstances at the appellate stage the headmaster of the school was summoned to

prove the Admission Register and the application for admission of Lalit into the school. The application form has been marked Ext. M and the

Admission Register as Ext. N. The certificate granted by the headmaster has also been exhibited but when the headmaster himself gave evidence

this certificate has no value and we place no importance to that. Regarding these two documents and the evidence of the headmaster, the argument

of Mr. Dey is that the documents and the evidence of the headmaster are not trustworthy and the documents have been concocted. There has

been no allegation against the headmaster; at least we do not find any such allegation in the form of suggestion or otherwise. The headmaster's

evidence is that the admission form and the admission register were signed by Dhirmohan Das Bhowmick in his presence. The two documents

described Lalit, defendant No. 2 as the son of Dhirmohan. Although the signature was proved by the headmaster as the handwriting of Dhirmohan,

there was no cross-examination suggesting that those signatures did not belong to Dhirmohan or that he did not sign in presence of the headmaster.

The headmaster stated that Lalit was the son of Dhirmohan. Again that part of evidence has not been challenged during cross-examination from the

side of the plaintiffs. The learned District Judge relied upon the evidence of the headmaster and the said two documents marked Exts. M and N.

8. It appears that the witnesses examined on the side of the plaintiff denied just like a parrot that there was no marriage between Dhirmohan and

Parulbala. Some witnesses have been examined on the side of the defendants to prove that there was marriage between Dihrmohan and Parulbala.

Parulbala herself has stated that after the death of Rohini Kanta, Dhirmohan married her and, as a result thereof, she gave birth to Lalit. In this

connection we have noted that the plaintiffs have admitted that Lalit is the son of Parulbala but the allegation, as we have already indicated, was

that the boy was the result of free mixing of Parulbala with some other persons. It is to be noted also that in the plaint it is stated that Rohini Kanta

was driven away by Parulbala and that there was no trace of Rohini Kanta. One of the plaintiffs has been examined and it is clear that he does not

know if Rohini Kanta died at all or not. Against that story the positive evidence on the side of the defendants is that Rohini Kanta died and died at

Atharnala and the month is Poush. On this evidence there can be no doubt, therefore, that in fact Rohini Kanta died. There is no material to dispute

that fact In support of the birth of Lalit the certified copy of the birth register has been marked and that has been marked Ext. H. This is a

contemporaneous document. This shows that a son of Dhirmohan of Chhota Atiabari was born. The evidence is that Dhirmohan married thrice and

his last wife died about 30 years back. He was widower after the death of the last wife. It is not the case of the plaintiffs that Dhirmohan had any

other wife at or about the time when the son was born according to birth register. The birth register substantially supports that Parulbala gave birth

to a son and that son belonged to Dhirmohan. Of course, we are to see whether this birth register is corroborated by other circumstances. Ext. E is

a voters" list prepared in 1359 B.S. That was the year in which Parulbala was married to Dhirmohan according to the evidence adduced by

Parulbala herself. The voters" list of the previous election has been marked Exhibit on the side of the plaintiffs. Of course, that indicates that

Parulbala was the wife of Rohini Kanta. When Ext. E supports the story of the defendants that Parul Bala was married with Dhirmohan in 1359

B.S., it shows that after the marriage the parties were eager not to conceal the marriage but the marriage was made quite public and declared in

society. We have already noted that it is not a case of the plaintiffs that Dhirmohan had any connection with Parulbala, Rather the plaintiffs" case is

that Dhirmohan had no connection with Parulbala because she was a woman of loose morals and she had been driven away. But the evidence

shows that all the time Parulbala had been living with Lalit at Akra house belonging to Dhirmohan. That disproves the case of the plaintiff that

Dhirmohan had driven away Parulbala; on the other hand it supports the case of the defendants that she was living with the child in the house of

Dhirmohan. The fact of acknowledgement of Dhirmohan appearing in the admission register of the school and the admission application was not

before the trial court and as such the trial court could not have important and material evidence to come to a correct decision. The Appellate Court

thought it necessary for the expediency of justice that these two documents should be proved and practically speaking, of all the pieces of evidence

these two documents -- the admission register and the application form, have become the most important and necessary evidence.

9. Mr. Dey has, however, contended that mere acknowledgment of Lalit as the son by Dhirmohan does not prove the marriage between

Dhirmohan and Parulbala and, therefore, according to Mr. Dey even if Lalit was son of Dhirmohan by Parulbala, he must have been illegitimate

due to the absence of marriage and consequently Lalit and Parulbala will not be entitled to get any property of Dhirmohan as his heirs. The

acknowledgment in the present case goes a long way to prove the defendants' case, particularly when it is accompanied by the conduct of the

parties and several facts and circumstances. The conspicuous circumstances in this case are many. First of all, the plaintiffs have admitted in the

plaint and in evidence that Lalit was the son of Parulbala. The plaintiffs do not know if Rohini Kanta is dead in spite of evidence of the defendants

that Rohini Kanta died in Poush, 1357 B. S. The evidence of Parulbala is that Dhirmohan married her in 1359 B. S. and some of her witnesses

stated that there was such marriage. We get the certified copy of the birth register (Ext. H) which states that a son was born to Dhirmohan of

Chota Atiabari on 4-3-1956, The evidence is that the defendants have been living in Akra belonging to Dhirmohan. Ext. E, the voters' list says that

Parulbala is the wife of Dhirmohan, which was prepared in or about the year 1359 B.S. Ext. M is the application form showing that Dhirmohan

himself signed it stating that Lalit was his son. In the admission register (Ext. N) we find that Dhirmohan signed the register where Lalit was

described as his son. The headmaster of the school has clearly stated that Lalit is the son of Dhirmohan and that Lalit has been reading in his school

for several years. This evidence of the headmaster has not been challenged in cross-examination by the plaintiffs. Clearly, we get that openly and

publicly Dhirmohan declared that Lalit was his son and he took active steps for bringing up Lalit in society. All these facts prove that after the death

of Rohini Kanta, Dhirmohan the widower had a son Lalit (defendant No. 2) by Parulbala who was living at his house namely in Akra with his son

duly acknowledged and regarded Lalit as his son in the society. From the facts and acknowledgment of the son in the society unreservedly and on

the publication of the voters' list showing Parulbala as his wife and also the conduct of both Dhirmohan and Parulbala, we can have easily an

inference drawn and it may ordinarily and reasonably be presumed that Lalit was born of a lawful wedlock between Dhirmohan and Parulbala. If a

child is in possession of filiation acknowledged by the parents and has repute in the society, legitimacy should be presumed and if anybody

challenges such legitimacy of the child, the onus is upon him to prove that the child is illegitimate. In this connection some decisions may be referred

to in support of this proposition.

10. In the case of Dularey Singh v. Suraj Balli Singh reported in 43 Ind Cas 478 : (AIR 1918 Oudh 103) we get similar principle. In that case

paternity of the first plaintiff was admitted. The defendant admitted that he was the son of one Jawahir Singh. It was held :

That being so, the presumption would be that he is Jawahir Singh's legitimate son; and if the case for the defendant was that he was not a

legitimate son but the son born of a Kachhi mistress, then I hold that it lay upon the defendant to establish this point".

This was a decision of Oudh Judicial Commissioner's Court. We have got another decision, of a Division Bench of the Madras High Court in the

case of Sri Rajah Ravu Sri Krishna Rao Alias Sri Rajah Ravu Venkatakumara Mahipathi Krishna Surya Rao Bahadur Garu Vs. Raja Saheb

Meharban Dostan Sri Rajah Ravu Venkatakumara Mahipathi Surya Rao Bahadur Garu, Sardar Rajahmundry Sircar and Rajah of Pittapur and

Others, . According to that decision when anybody's parentage is acknowledged by the parents themselves and that he has been acknowledged

as such by the parents and by repute and have it for a long period and anybody wants to challenge the parentage, the onus is upon the latter to

disprove the parentage by clear, stronger and more reliable evidence. In connection with the discussion to come to that principle the Court relied

upon the principle laid down by the House of Lords in the famous Douglas Peerage case reported in Notable British trials, Scotch series, Douglas

cause on p. 152 that-

Where a child establishes the possession of filiation, which is the acknowledgment of the parents, and habit and repute, everything must be

presumed in his favour, and he cannot be dispossessed of that estate except upon clear, strong and decisive evidence,

11. We will now refer to a decision of the Privy Council in the case of Mohabbat Ali Khan v. Mahomed Ibrahim Khan reported in 56 Ind App

201 : (AIR 1929 PC 135). There the question whether Khushdil Khan and Musammat Babo were married was held to be one of fact. But there

an important part of the case attempted to be made by the respondents was that such a marriage was legally impossible, because at the time of the

marriage and the birth of the appellant, the lady was already married to another person. The question arose whether there was any Nika ceremony.

It was found that it was possible to criticise with much effect such oral evidence about the marriage but the Board fortunately found that the case

did not stand upon that alone. There was the question of acknowledgment because Khushdil, the father, acknowledged Mohabbat Ali Khan the

plaintiff, as his son and it was held that in circumstances which were clearly equivalent to an affirmation, he was a legitimate son. That case was one

of acknowledgment by the father, an acknowledgment which involves the assertion that he, the father Khushdil, was married to Musammat Babo,

the appellant's mother. According to the Board such acknowledgment undoubtedly raises a presumption in favour of the marriage and of the

legitimacy. This is a case, however, between the parties who are Mohammedans but on the question of acknowledgment the Privy Council has

dealt with the matter in a general way and laid down the principle as a general proposition. The general proposition laid down is that if a claimant's

son has in his favour a good acknowledgment of legitimacy, the marriage of the parents would be held proved and his legitimacy would remain

established unless the marriage is disproved. Once the son establishes the acknowledgment, the onus is on those who deny a marriage to negative

it in fact.

12. Next we get another case decided by the Lahore High Court reported in AIR 1933 Lah 520. There the parties were Hindus and in that case

the plaintiff brought the suit challenging paternity of the defendant. There one Nathe Singh after absence for a long period returned to his village

with a boy and acknowledged that boy, defendant Sadhu as his son and treated him as such so long as he lived. It was held that when Nathe Singh

told village people that Sadhu was his son and when he treated him as his son Sadhu's legitimacy was accepted. In this case also the learned Judge

relied upon the principles laid down in the cases of Mahabbat Ali Khan and Krishna Rao already discussed above.

13. In the instant case besides the acknowledgment of Lalit by Dhirmohan as his son and the conduct of both Dhirmohan and Parulbala, there is

the evidence of marriage by some of the defendants' witnesses. In this case, besides the evidence of acknowledgment, we have in addition, some

evidence of marriage between Dhirmohan and Parulbala. No doubt it has been proved that Lalit, son of Dhirmohan and Parulbala was born after

their lawful marriage. The learned District Judge has discussed the relevant evidence and facts and circumstances and he has come to a correct

decision. In these circumstances we find no substance in the argument of Mr. Dey in support of the appeal.

14. The appeal, therefore, fails and the same is hereby dismissed without costs.

Monoj Kumar Mukherjee, J.

15. I agree.