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It has been further argued that as the previous application to which I have referred was dismissed by the Munsif under section 158 of the Civil Procedure Code, and that decision was not appealed from, the decree-holder can make no further application. Admitting for the sake of argument, and only for the sake of argument, that the order rejecting the previous application was made under section 158, still it is quite clear that the relief asked for in that application was different from what is asked for here, and consequently the decree-holders are not debarred from making the present application.

The result is that the decisions of the lower Courts must be set aside and the appeal allowed with costs.

Appeal allowed.

T. A. P.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

1893 *June* 25.

RAM CHANDRA DUTT AND ANOTHER (DEFENDANTS) *v.* JOGESWAR NARAIN DEO (PLAINTIFF).*

Evidence Act I of 1872, *s.* 32, *cl.* 5—*Statement of deceased relatives—Hearsay Evidence—Birth, date of.*

For the purpose of the decision of a question of limitation, it was necessary to prove the date of the plaintiff's birth. The plaintiff and one of his witnesses each spoke to statements made to them by relatives of the plaintiff who were since deceased, relating to the date of the plaintiff's birth, *Held* that such statements were admissible in evidence under s. 32, cl. 5 of the Evidence Act.

Haines v. *Guthrie* (1) not followed.

THE plaintiff sued for construction of a will and a declaration that the defendant Rani Doorga Coomari had no power to alienate certain properties except to the extent of her maintenance, and asked for possession of those properties or a portion of them against the defendants, the Dutts, who held them in *putni* from Rani Doorga Coomari.

* Appeal from Original Decree No. 23 of 1892, from the decision of Baboo Jagabandhu Gangooly, the Subordinate Judge of Midnapore, dated the 1st October 1891.

(1) L. R., 13 Q. B. D., 818.

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The Dutt defendants objected that the suit was barred by limitation, as not having been instituted within 3 years after the plaintiff had obtained majority, the cause of action having accrued during his minority, more than 12 years before suit.

On the trial of an issue as to whether the suit was barred by limitation, it became necessary for the plaintiff to prove the date of his birth; and the plaintiff gave his evidence on this point, and proved statements made to him by deceased relatives as to the date of his birth.

Another witness for the plaintiff proved statements made by deceased relatives of the plaintiff on the same point made during the negotiations for the plaintiff's marriage.

The Subordinate Judge admitted this evidence and decided the question of majority in favour of the plaintiff, but dismissed the case on the question of the construction of the will.

The plaintiff appealed to the High Court, and on the hearing the respondents again raised the objection of limitation and contended that this evidence was not admissible, and without it there was not sufficient to prove the age of the plaintiff.

The question of the admissibility of the statements made by deceased relatives is the only one material to this report.

Mr. *T. A. Apcar* (with him Baboo *Nilmadeb Sen* and Baboo *Sarat Chunder Dutt*) for the appellants relied on *Haines* v. *Guthrie* (1) and *Bipin Behary Daw* v. *Sreedam Chunder Dey* (2), and contended that illustration (*l*) to section 32 of the Evidence Act is not law, as it goes beyond the section.

Sir *Griffith Evans* (with him Baboo *Aushutosh Dhur* and Baboo *Rajendro Nath Bose*) for the respondent.—I admit that recent cases in England have settled the law against the admissibility of this evidence. But the Law of Evidence in India is contained in Act I of 1872. Prior to 1872 the law could not be said to be definitely settled in England, although there was a tendency to confine the statements of deceased relations as to relationship to what were termed "pedigree cases" (*i.e.*, cases where such statements were used for genealogical purposes), and it was a moot point whether evidence as to age and place of birth was admissible even

(1) L. R., 13 Q. B. D., 818. (2) I. L. R., 13 Calc., 42.

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in such cases. The Indian Evidence Act has not adopted that limitation. A statement which "relates to the existence of any relationship by blood," *etc.*, is admissible (if admissible at all) in all cases where it is relevant—*see* section 32; and illustration (*l*) shows that a statement by a deceased father announcing the birth of his son *A* on a given day is a statement relating to the existence of relationship by blood, and also that it is admissible whenever the question to be decided is, what was the date of *A's* birth.

It is not strange that there should be this difference between the Indian Act and the English cases; for the framers of the Indian Act proceeded on broad principles and were not hampered by the authority of decisions, and in admitting the evidence of persons other than relations they have gone beyond the English decisions.

Although the Indian Act is based on the English law of Evidence, it has not servilely followed the English cases, but has in more than one instance departed from them, and swept away unnecessarily nice distinctions, resting more on authority than principle. I submit the evidence is admissible in India, and that the words "relates to the existence of relationship" in section 32 are wide enough to cover even statements as to the commencement of relationship in point of time, and as to the locality when it commenced or existed, so that illustration (*l*) does not go beyond the words of the section, but is properly an illustration of its meaning. The case of *Bipin Behary Daw* v. *Sreedam Chunder Dey* (1) has been overruled by the unreported case of *Dhanmull* v. *Ram Chunder Ghose* (2) decided by Petheram, C.J., and Pigot, J., in original appeal No. 23 of 1890, on the 15th September 1890, and is a direct authority on the point.

In *Dhanmull* v. *Ram Chunder Ghose*, one of the questions was as to whether the plaintiff was a minor when he signed a certain deed: and as evidence of age, a plaint in a former suit verified by a deceased member of the family was tendered in evidence and admitted. In the argument *Haines* v. *Guthrie* and *Bipin Behary Daw* v. *Sreedam Chunder Dey* were cited. On this point, Petheram, C.J., said: "But besides all this, the plaint in the suit of 1879 was put in; that plaint was signed by Nursing Chunder Bose, the maternal

(1) I. L. R., 13 Calc., 42. (2) Unreported.

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grandfather of the defendant, a person who is since dead, and it is contended on behalf of the defendant that statements in it, as to the order in which Shumbhoonath's sons were born, and as to the dates of their births, are evidence under section 32, sub-section 5 of the Evidence Act, and that, if so, they are conclusive. It was contended on the part of the plaintiff, on the authority of the English cases, that as the question at issue in this case did not relate to the existence of any relationship by blood, marriage, or adoption, the section did not apply, and the statements were excluded by the ordinary rules of evidence. I think that on this point the law in India under the Evidence Act is different from the law of England, and that the effect of the section is to make a statement made by such a person relating to the existence of such relationship admissible to prove the facts contained in the statement on any issue, and that the plaint was admissible to prove the order in which the sons of Shumbhoonath were born, and their ages." In that view Pigot, J., concurred. The question is therefore concluded by authority.

Mr. *Apcar* in reply.

The judgment of the Court (O'KINEALY, J., and AMEER ALI, JJ.), so far as is necessary for this report, was as follows:—

The plaintiff asserts that he was born on the 10th March 1867, corresponding to the 27th of Falgun 1274 B.S. This suit was filed on the 7th March 1891, and as he would have three years to bring it after he had obtained his majority, he was according to his own showing within time. The defendants on the other hand assert that the plaintiff was not born in 1274, but in 1272, and that consequently his suit was out of time. Both the parties fix the time of birth with reference to a famine which took place in that part of the country in 1273. In the discussion which arose on the point of limitation, it was strongly urged for the appellant that the statements of deceased persons in regard to the date of the plaintiff's birth were not admissible as evidence under section 32 of the Indian Evidence Act; and in support of that contention the case of *Haines* v. *Guthrie* (1) was referred to. It was further asserted that the law of England in this respect is the same as the law of India, but in dealing with the point

(1) L. R., 13 Q. B. D., 818.

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we must bear in mind that when the Evidence Act was passed in this country, this question of hearsay evidence was not then so definitely settled as it is now. Some of the text-books supported the contention, that hearsay evidence was admissible to prove the date of birth, and looking at illustrations (*k* to *m*) of section 32, we think that view was adopted by the Legislature, and that such a statement is admissible in evidence.

T. A. P.

Before Mr. Justice Prinsep, Mr. Justice Pigot, and Mr. Justice Trevelyan.

1893 *May* 11.

MOHENDRO CHANDRA GANGULI (PLAINTIFF) *v.* ASHUTOSH GANGULI AND ANOTHER (DEFENDANTS).*

Costs—Costs of preliminary issue in partition suit—Stamp in partition suit.

The plaintiff brought a suit to have 99 items of property partitioned. The plaint bore a court-fee stamp of Rs. 10. The defendants admitted that three of the properties were ancestral and joint, but as to the other items the 2nd defendant stated that they were the self-acquired property of her deceased husband, and contended that the plaint was insufficiently stamped, as the object of the suit was to obtain a declaration of title and possession of properties in which the plaintiff had no interest. An issue was raised on this point, and on this issue the Subordinate Judge allowed the objection and rejected the plaint. On appeal, *Held* by PETHERAM, C.J., and NORRIS, J., that the plaint was sufficiently stamped. The only relief prayed for was partition, and for the purposes of the stamp the cause of action which is stated in the plaint, and that only, must be looked at.

The members of the appeal Bench, however, differed in opinion as regards the question of costs, PETHERAM, C.J., being of opinion that the costs of the appeal should be treated in the same way as the rest of the costs in the case, and be divided between the parties to the partition; and NORRIS, J., holding that the respondent having failed on appeal ought to pay the costs; and on this question an appeal was preferred under the Letters Patent, cl. 15.

Held by PRINSEP and TREVELYAN, JJ.—The costs of the appeals were severable from the general costs of the suit, and therefore, though the suit

* Letters Patent appeal No. 1 of 1893, in appeal from Original Decree No. 60 of 1892, against the decree of Baboo Purno Chunder Shome, Subordinate Judge of 24-Parganas, dated 22nd December 1891.