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that demand is a condition precedent to the right to take foreclosure proceedings.

In the present case the Munsiff found that there was no demand. The lower Appellate Court does not dissent from that finding and does not notice the point. But it is clear that no demand was alleged, nor was any issue raised about it. It is admitted that there is no evidence of any demand, and as pointed out by the Munsiff it is practically impossible, having regard to the peculiar circumstances of the case, that there could have been any demand. And in the grounds of appeal to the lower Appellate Court not a trace of it is shewn. We think it unnecessary, therefore, to send the matter back to the lower Appellate Court to determine whether there was a demand. It is clear that no demand was made. On this ground, therefore, the decree of the lower Appellate Court will be reversed and the plaintiffs' suit dismissed with costs in all the Courts.

*Suit dismissed.*

*Before Mr. Justice Norris and Mr. Justice Ghose.*

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August 11.

BRINDABUN CHANDRA KURMOKAR (PLAINTIFF) v. OHUNDRA  
KURMOKAR, GUARDIAN OF THE MINOR JUGGAT LAKHI, AND ANOTHER  
(DEFENDANTS).<sup>\*</sup>

*Hindu Law, Marriage—Restitution of conjugal rights—Consent of lawful guardian—Presumption of validity of marriage—Non-performance of ceremonies.*

The ceremony of *Nandimukh* or *Bridhi-shradh* is not an essential of Hindu marriage, nor would the want of consent by the lawful guardian necessarily invalidate such marriage.

In a suit for restitution of conjugal rights the fact of the celebration of marriage having been established, the presumption, in the absence of anything to the contrary, is that all the necessary ceremonies have been complied with.

THIS was a suit by a Hindu for restitution of conjugal rights in respect of his minor wife. The mother of the girl, it would appear, had, on the death of her husband, gone away to live with

<sup>\*</sup> Appeal from Appellate Decree No. 1181 of 1884, against the decree of Baboo Beni Madhub Mitter, First Subordinate Judge of Backorgunge, dated the 14th of April 1884, affirming the decree of Baboo Chunder Nath Ghose, Third Munsiff of Burreisal, dated the 27th of December 1882.

her brother, and soon after presented an application to the Judge of the district for the lawful custody of her infant daughter, and an injunction to restrain her husband's relations from disposing of the child in marriage. Pending the application the girl was made over to the mother, with an order that, until final disposal, the girl should not be bestowed in marriage. Eventually the girl was ordered to be restored to her paternal uncle, and while steps were being taken for the execution of the order, she was given away in marriage to the plaintiff by the mother. The paternal uncle, however, obtained the custody of the girl and hence the suit.

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The Munsiff held that the marriage was fraudulent, that the ceremony of *Nandimukh* had been omitted, and there was no evidence of the taking of the seven steps, which is the most material of all the nuptial rites, and consequently dismissed the suit.

The Subordinate Judge, on the other hand, found that the marriage was real, that the bride was given away by the mother, and nuptial rites performed by the priest, but adopting the view of the Munsiff on the other grounds affirmed the decision.

The plaintiff appealed to the High Court.

*Mr. Roy*, and *Baboo Durga Mohan Das*, for the appellants.

*Baboo Grish Chunder Chowdhry*, for the respondents.

The judgment of the Court (NORRIS and GHOSE, JJ.) was as follows:—

This was a suit for restitution of conjugal rights, and the only question we have to determine is, whether the marriage set up by the plaintiff is valid according to Hindu law.

The Court of first instance dismissed the suit, being of opinion that there was no real marriage, and that it was not valid according to Hindu law.

The Sub-Judge in appeal has confirmed the decree of the Munsiff, though upon somewhat different grounds. He holds, as we understand his judgment, that the marriage was real, the gift of the bride was made by the mother, and the nuptial rites were recited by the priest, but he is, notwithstanding, of opinion that

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the marriage is not valid; *first*, because the *Nandimuleh* or *Bridhi-shradh* was not performed at the house of the bride, and, *second*, because "there is no evidence on the record to prove that the bride was made to walk seven steps."

There was a further question raised in the lower Courts between the parties which was whether the marriage was valid, the girl having been given away by her mother without the consent of her uncle. But the Courts held that, although the uncle was the preferential guardian of the minor for the purpose of marriage, yet the mere fact of his consent having not been obtained would not invalidate the marriage, if it was otherwise legally contracted and performed.

We may dispose of this part of the case by stating that we agree with the lower Courts in the view adopted by them. There can be no doubt that the uncle of the girl had a right in preference to the mother, under the Hindu laws, to give the girl away in marriage, but the mother, the natural guardian, having given her away, and the marriage having not been procured by fraud or force, the doctrine of *factum valet* would apply, provided, of course, the marriage was performed with all the necessary ceremonies—a matter which we shall presently determine—*Modhoo-soodun Mookerjee v. Jadub Chunder Bonerjee* (1).

We now come to deal with the two grounds which have been relied upon by the Sub-Judge in holding that the marriage was not valid.

As regards the first of those two grounds, we may say that, although the *Bridhi-shradh* is invariably performed on the occasion of a marriage and such other occasions of rejoicing, with a view that the departed ancestors might partake in *spirit* of the rejoicing and render the ceremony auspicious by their blessing, it (the *shradh*) is not regarded by the Hindu laws such an essential ceremony, as the non-performance of it renders marriage invalid.

As regards the other ground, we are of opinion that it being found by the Sub-Judge that there was a marriage, that the mother made a gift of the bride, and that the nuptial rites were recited by the priest, he ought to have presumed, in the absence of anything to the contrary, that the marriage was good in law,

and that all the necessary ceremonies were performed—*Inderan Valengy Pooly Taver v. Rama Sawmy Pandia Talaver* (1) and Taylor on Evidence, Vol. I, p. 176, fifth edition of 1868.

No doubt, as the lower Appellate Court observes, that the taking of seven steps by the bride is the most material of all the nuptial rites, for the marriage becomes complete and irrevocable on the completion of the seventh step. But we are of opinion that upon the facts found by the Sub-Judge, he ought to have presumed that the seven steps were taken and completed by the bride and that the marriage was a valid one.

We are, therefore, of opinion that there was a marriage as provided by Hindu law between the plaintiff and the minor Juggat Lakhi, and that the plaintiff is entitled to the restitution of conjugal rights as prayed for.

We accordingly direct that the decrees of both the lower Courts be set aside, and the appeal be decreed, but under the circumstances of the case we are of opinion that each party should bear his own costs in all the Courts.

*Appeal allowed.*

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### PRIVY COUNCIL.

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SRI KISHEN AND OTHERS (DEFENDANTS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF.)

P. C.\*  
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June 16,  
17, 18.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*Guarantee, Contract of—Construction of contract guaranteeing conduct of person employed as agent of the guarantor—Liability for loss resulting from such agent's misconduct towards his employer.*

Upon the construction of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor, *Held*, that the loss, to be recoverable in a suit against the guarantor, must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement. The khezanchi of a District Treasury guaranteed the Government against loss arising from the misconduct of the stamp darogah,

\* *Present*: SIR B PRACOCK, SIR R. P. COLLIER, SIR R. COUGH, AND SIR A. HOBHOUSE.

(1) 13 Moore's I. A., 141; 3 B. L. R., P. C., 1.