

1885 No doubt the result, as stated by the Assistant Commissioner, is practically to render this part of the Code a dead letter. But such is the interpretation of the law."

ASKAR MEA
SARDAR
MEAS.

The Court (PRIGOT and O'KINEALY, JJ.) delivered the following judgment:—

We think the Magistrate is right in the reference made; and direct that the order be set aside.

We do so on the ground that, in this case, a *bond fide* question seems to exist, as to whether there ever was a public road in the place in question. When such a question arises it is one for the Civil Courts, as the case of *Basaruddin Bhavia v. Bahar Ali* (1) decides.

The enquiry contemplated by those sections of the Criminal Procedure Code is an enquiry into the existence or non-existence of the obstruction complained of—not an enquiry into disputed questions of title.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

GONESH CHANDRA PAL (DEFENDANT No. 1) v. SHODA NUND SURMA AND ANOTHER (PLAINTIFFS). *

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June 9.

Regulation XVII of 1806, s. 8—Foreclosure, Right of—Demand from mortgagor.

Under the terms of Regulation XVII of 1806, a demand from the mortgagor or his representative is a condition precedent to the right to take foreclosure proceedings.

THIS was a suit for possession of certain landed property on the allegation that it had been foreclosed under the provisions of Regulation XVII of 1806. The Munsiff held that the foreclosure proceedings were void, because (1) there was no evidence given before the District Judge of service of notice on the mortgagor, and (2) there was no evidence of a demand having been made from the mortgagor prior to the institution of the foreclosure proceedings.

* Appeal from Appellate Decree No. 733 of 1884, against the decree of Baboo Ram Coomar Pal, Rai Bahadur, Subordinate Judge of Sylhet, dated the 29th of January 1884, reversing the decree of Baboo Shyam Kishore Sen, Rai Bahadur, Munsiff of that District, dated the 18th of August 1883.

(1) I. L. R., 11 Calo., 8.

Behari Lall v. Beni Lall (1). He, however, treated the case as one for foreclosure and possession under the Transfer of Property Act, and allowed six months' time to the mortgagor to redeem the property.

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The lower Appellate Court, without going into the question of demand, held that the fact of the notice having been returned as duly served, was all that was necessary in the foreclosure proceedings, and inasmuch as it was sufficiently proved in the present suit that the notice had been "*bond fide* and legally served," the Subordinate Judge decreed the plaintiffs' claim.

The principal defendant appealed to the High Court.

Baboo *Joygobind Shome*, for the appellant.

Baboo *Turuk Nath Dutt*, for the respondent.

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

Two points have been argued before us: *first*, it was contended that the Subordinate Judge was wrong in holding that the conditions of the law as to foreclosure had been sufficiently complied with so far as notice was concerned.

It has been found by both Courts that notice was issued and duly served. But it is said that that is not enough; that there ought to have been some inquiry before the Court, through which the foreclosure notice was served, as to the sufficiency of the service of notice, and some record of its finding: whereas no evidence of the service of notice was tendered before that Court, and the case was "struck off," as it is described. We think that the lower Appellate Court was right in the view taken by it.

But another point was raised and that is this, that under the Regulation it is necessary, in order to lay a foundation for the foreclosure proceedings, that demand shall have been made from the mortgagor or his representative. The words of the Regulation are, "he shall (after demanding payment from the borrower or his representative) apply for that purpose."

It has been held by the Allahabad High Court—and we think correctly—in the case of *Behari Lall v. Beni Lall* (1),

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

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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).^{*}

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

^{*} Appeal from Appellate Decree No. 1181 of 1884, against the decree of Baboo Beni Madhub Mitter, First Subordinate Judge of Backergunge, dated the 14th of April 1884, affirming the decree of Baboo Chunder Nath Ghose, Third Munsiff of Burreisal, dated the 27th of December 1882.