1900

BECHA v. MOTHINA.

to have taken, and to hold it, subject to her maintenance. We find that the Calcutta High Court in *Devi Persad* v. *Gunwanti Koer* (1), in a case similar to this, held that where the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's life-time, enforced partition of that property, the plaintiff was entitled to maintenance, as the Hindu law provides that a surviving co-parcener should maintain the widow of a deceased co-parcener. The learned vakil for the appellant abandoned any claim for maintenance to be charged upon the *birt jajmani* as one that could not be sustained. We decree the appeal so far as to set aside the decree of the lower appellate Court, and give the appellant a decree ordering the respondents to pay her Rs 5 per mensem during her life-time, and directing that this monthly allowance be a charge against the ancestral property, the house property set forth in the plaint of Debi Dat omitting the *birt jajmani*. The decree will further direct that the appellant be put in possession for purposes of residence of house No. 259 in mohalla Bahadur Ganj.

The respondents will pay the appellant's costs in proportion to appellant's success in all Courts. The Registrar will calculate the amount of Court fees which would have been paid by the appellant if she had not been permitted to sue as a pauper, and such amount will be the first charge upon the subject-matter of the suit.

Decree modified.

1900.
November 15.

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

SHEONARAIN (APPELLANT) *v.* CHUNNI LAL AND OTHERS (RESPONDENTS).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 92, 93—*Mortgage —Redemption—Application for enlargement of time—Application to be made to the Court of first instance, not to the appellate Court.*

Where a decree for redemption under section 92 of the Transfer of Property Act, 1882, has been made by an appellate Court, an application under the last paragraph of section 93 must be made, not to that Court, but to the Court of first instance. *Venkata Krishna Ayyar* v. *Thiagaraya Chetti*, (2) followed *Oudh Behari Lal* v. *Nageshar Lal*, (3) referred to.

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* Application in First Appeal No. 160 of 1896.

(1) (1895) I. L. R., 22 Calc., 410. (2) (1899) I. L. R., 23 Mad., 521.
(3) (1890) I. L. R., 13 All., 278.

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THE facts of this case sufficiently appear from the order of the court.

Babu *Satish Chandar Banerji*, for the applicant.

Babu *Jogindro Nath Chaudhri*, for the opposite parties.

STRACHEY, C.J. and BANERJI, J.—This is an application under the last paragraph of section 93 of the Transfer of Property Act, 1882, for postponement of the day fixed by a decree in a redemption suit passed by this Court in appeal under section 92 for payment of the amount due to the defendants on their prior mortgage. By its decree this Court extended the time fixed by the Court of first instance for payment until the 9th of August of this year. On the 8th of August this application was presented on behalf of the plaintiff for further postponement of the time on grounds which it is not necessary to state. A preliminary objection has been taken to the application that it ought to have been made to the Court of first instance as the Court which would have executed the decree and ought not to be made to this Court. We think that this objection must prevail. The question is whether, where a decree for redemption under section 92 has been made by an Appellate Court, an application under the last paragraph of section 93 should be made to that Court, or to the Court of first instance? That depends upon which of these Courts is "the Court" within the meaning of that paragraph. We think that the words "the Court" in the last paragraph of section 93 must be construed in the same sense as the words "the Court" in the second, third and fourth paragraphs of the same section. It has been held by the High Court of Madras in *Venkata Krishna Ayyar* v. *Thiagaraya Chetti* (1) that "the Court" referred to in the fourth paragraph of section 93 means, in a case such as that before us, not the Appellate Court that made the decree for redemption, but the Court of first instance. We agree with the observations of the learned Judges of the Madras High Court, whose conclusion, as they pointed out, is in accordance with the view adopted by the Full Bench of this Court in *Oudh Behari Lal* v. *Nageshar Lal* (2). If then "the Court" spoken of in paragraph 4 of section 93 to which an application for an order for sale should be made, is the Court of first instance and not the

(1) (1899) I. L. R., 23 Mad., 521. (2) (1890) I. L. R., 13 All., 278.

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Appellate Court, we think it follows that the Court mentioned in the last paragraph is the same Court, and that therefore the application for enlargement of the time fixed by the decree for payment should have been made to that Court and not to this. On this preliminary ground, therefore, without expressing any opinion as to the merits of the application, the application must be dismissed with costs.

Application dismissed.

1900
November 16.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* RAM SEWAK AND ANOTHER.*

Act No. I of 1872 *(Indian Evidence Act), section* 118—*Evidence—Competency of witness of tender years.*

In this case a Sessions Judge purposely refrained from examining a small boy, who must, under the circumstances, have been an eye-witness to a murder. On appeal the High Court observed:—"In our opinion the learned Judge, specially considering the importance of the witness, ought not to have refrained from examining him, unless, under the words of section 118 of the Indian Evidence Act, he considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years."

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *R. Malcolmson*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

KNOX and AIKMAN, JJ.—This case has been submitted by the Sessions Court of Benares for confirmation of sentences of death passed on Ram Sewak and Bhagwan Das. Both the convicts have appealed, and their appeals are before us. The learned Sessions Judge of Benares in his judgment has set out a past history of the relations between the parties which we need not reproduce. In brief, it amounted to this, that the deceased Sheonandan, who had begun by lending a small sum of money to Ram Sewak, appellant, had in due time sued out the bond for more than double the original debt. He had then proceeded to take out execution of the decree which he obtained against Ram Sewak

* Criminal Appeal No. 1068 of 1900.