

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

1908
April 24.

NANNHI JAN (DEFENDANT) v. BHURI (PLAINTIFF) AND KARAM ALI KHAN (DEFENDANT). *

Civil Procedure Code, section 283—Suit for declaration of title by person whose objections to execution have been disallowed—Burden of proof.

Held that a party intervening in the execution department, and failing in his objections to an attachment, and consequently being obliged to bring a suit under section 283 of the Code of Civil Procedure, must give *prima facie* evidence to establish the genuineness of the document upon which he relies. *Tulshi Rai v. Ram Das* (1), *Afzal Begam v. Muhammad Obaidat-ullah Khan* (2), *Ram Nath v. Bindraban* (3) and *Govind Atmaram v. Santai* (4) followed. *Suba Bibi v. Balgobind Das* (5) discussed.

THE facts out of which this appeal arises are as follows. One Karam Ali Khan had two wives, namely, Musammat Bhuri and Musammat Naunhi Jan. Musammat Nannhi Jan on the 4th of August 1905 instituted a suit against her husband for the recovery of her dower, and on the 24th of November 1905 obtained a decree. On the 2nd of August 1905, that is, two days before the institution of Nannhi Jan's suit, Karam Ali Khan transferred to his wife Musammat Bhuri certain property, ostensibly in satisfaction of a portion of her dower debt. Musammat Nannhi Jan proceeded to execute her decree and attached the property which was transferred to Musammat Bhuri. Thereupon Musammat Bhuri filed an objection, but her objection was disallowed, and thereupon she instituted the suit out of which this appeal has arisen under section 283 of the Code of Civil Procedure.

The first Court (Subordinate Judge of Meerut) dismissed the suit, but upon appeal the District Judge reversed the decision of the Court below and decreed the plaintiff's claim.

The defendant thereupon appealed to the High Court.

Babu Jogindro Nath Chaudhri and Maulvi Ghulam Mujtaba, for the appellant.

Maulvi Muhammad Ishag, for the respondents.

* Second Appeal No. 567 of 1907, from a decree of L. Stuart, District Judge of Meerut, dated the 23rd of March 1907, reversing a decree of H. David, Subordinate Judge of Meerut, dated the 17th of September 1906.

(1) Weekly Notes, 1887, p. 71. (3) (1896) I. L. R., 18 All., 369.
(2) Weekly Notes, 1899, p. 220. (4) (1887) I. L. R., 12 Bom., 270.
(5) (1886) I. L. R., 8 All., 178.

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STANLEY, C.J., and KARAMAT HUSEIN, J.—This appeal arises under the following circumstances. The defendant Karam Ali Khan had two wives, namely, Musammat Bhuri and Musammat Nannhi Jan. Musammat Nannhi Jan on the 4th August 1905 instituted a suit against her husband for the recovery of her dower, and on the 24th of November 1905 obtained a decree. On the 2nd of August 1905, that is, two days before the institution of Nannhi Jan's suit, Karam Ali Khan transferred to his wife Musammat Bhuri certain property ostensibly in satisfaction of a portion of her dower debt. Musammat Nannhi Jan proceeded to execute her decree and attached the property which was transferred to Musammat Bhuri. Thereupon Musammat Bhuri filed an objection, but her objection was disallowed, and thereupon she instituted the suit out of which this appeal has arisen under section 283 of the Code of Civil Procedure.

The first Court dismissed the suit, but upon appeal the learned District Judge reversed the decision of the Court below and decreed the plaintiff's claim.

The main question which has been discussed before us is whether or not the learned District Judge rightly laid the burden of proof on the defendant Musammat Nannhi Jan. According to his judgment he found, in agreement with the Court below, that the oral evidence was valueless, and held that the decision of the case turned on the amount of value to be placed upon the deed of sale in favour of Musammat Bhuri. Then he says:—“The burden of proof was upon the defendant respondent Musammat Nannhi Jan to prove that the deed had been executed fictitiously and collusively. She did absolutely nothing to satisfy this burden.” And later on he observes:—“Musammat Nannhi Jan having absolutely failed to discharge the burden of proof on her to show that the sale deed was executed fraudulently, fictitiously and collusively, I find that the deed of sale in question is a genuine document.” It is contended that the learned District Judge regarded the case from an entirely wrong standpoint and that the trial of the case was wholly unsatisfactory. The important fact to bear in mind is that Musammat Bhuri filed an objection to the attachment and to the sale of the property which had been transferred to her and that her objection had been

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disallowed. In consequence of this it was necessary for her to institute the suit. It appears to us to be well settled, so far at all events as this Court is concerned, that a plaintiff coming into Court under such circumstances is bound to lay before the Court some evidence to satisfy the Court that the document under which she claims represents a *bond fide* and genuine transaction, and that the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. The learned District Judge appears to us to have laid the burden of proof upon the wrong party. In the case of *Tulshi Rai v. Ram Das* (1) Straight and Tyrrell, JJ., held that under similar circumstances the burden rested upon the plaintiffs who were impeaching the disallowance of their objection filed in the execution department to establish by clear and satisfactory proof that the property attached was their property at the date of the attachment and not the property of the judgment-debtor. This decision was followed in *Ajzal Begam v. Muhammad Obaidat-ullah Khan* (2) and also in the case of *Ram Nath v. Bindraban* (3). It also has the support of the case of *Govind Atmaram v. Santai* (4), which is a case on all fours with the case before us. In that case Sargent, C.J. observes :—" The defendant had obtained an order maintaining his attachment, and it was incumbent upon the plaintiff who impugns that order* by the present suit to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase money and that she had been since in possession." These cases establish the proposition that a party intervening, as the plaintiff did in this case, in the execution department and failing in his objections to an attachment and consequently being obliged to bring a suit under section 283 must give *prima facie* evidence to establish the genuineness of the document upon which he relies. One case was quoted to us in which a different view was taken. That was the case of *Suba Bibi v. Bulgobind Das* (5). In that case Straight and Brodhurst, JJ., laid the burden upon the defendant. This decision loses weight from the fact that in the later case Straight, J.,

(1) Weekly Notes, 1887, p. 71. (3) (1896) I. L. R., 18 All., 369.

(2) Weekly Notes, 1899, p. 220. (4) (1887) I. L. R., 12 Bom., 270.

(5) (1886) I. L. R., 8 All., 178.

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resiled from the position which he took up in it and took part in the decision of the case of *Ram Nath v. Bindraban*, which we have cited. Now the learned District Judge has considered the evidence from an entirely wrong standpoint, and it is impossible for us to accept his conclusion on the question whether the sale to the plaintiff was a real transaction or not, in view of the course adopted at the trial. We therefore, as was done in *Govind Atmaram v. Santai*, set aside the decree and remand the case to the lower appellate Court for re-trial. We accordingly remand the case with directions that it be replaced in the file of pending appeals in its proper number and be disposed of on the merits, regard being had to the directions which we have given above. The costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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April 30.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

SULTAN BEGAM AND OTHERS (DEFENDANTS) v. DEBI PRASAD (PLAINTIFF).*
Act No. IV of 1893 (Partition Act), section 4—Act No. IV of 1882 (Transfer of Property Act), section 44—“Undivided family”—Section 4 of Partition Act applicable to Muhammadans.

Held that Muhammadans are not excluded from the benefit of section 4 of the Partition Act, Act No. IV of 1893. *Kalka Parshad v. Bankey Lal* (1) approved. *Amme Raham v. Zia Ahmad* (2) referred to. *Hashmat Ali v. Muhammad Umar* (3) overruled.

THIS case was referred by the Chief Justice to a Bench of three Judges for the decision of a point of law arising therein. The facts of the case and the nature of the legal question to be decided appear from the following order of the Bench before which the appeal came on for hearing :—

STANLEY, C.J., and BURKITT, J.—The only question now remaining for determination in this appeal is one as to the true construction of section 4 of the Partition Act, IV of 1893. The suit is one for partition of property situate in Cawnpore, which consists of an enclosed area on which stands an Imambara and

* First Appeal No. 92 of 1906 from a decree of Prag Das, Subordinate Judge of Cawnpore, dated the 2nd of January 1906.

(1) (1906) 9 Oudh Cases, 168. (2) (1890) I. L. R. 13 All., 282.
(3) (1907) I. L. R. 29 All., 308.