1922

PARAS RAM SINGH. v. PANDOHI.

due from their three bighas. From this aspect, too, the result of conceding to the plaintiffs' argument would be a suit for contribution by the plaintiffs against the owners of the remaining portion of the mortgaged property. So that, in any case, the plaintiffs would not benefit from the suit. The decree proposed by my learned brother fully meets the justice of the case and gives effect to the equities between the parties and at the same time prevents uselessmultiplicity of proceedings.

BY THE COURT.—The order of the Court is that this appeal is allowed, the defendant being given time to the 9th of June, 1922, to redeem the plaintiffs' mortgages on payment of the sum due on their mortgages on that date. In case of their failure to do so, this appeal will stand dismissed. Under the circumstances of this particular case, we direct that the parties do bear their own costs of this litigation.

Appeal allowed.

1922
March, 3

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAO NARSINGH RAO (PLAINTIFF) *v.* BETI MAHA LAKSHMI BAI AND OTHERS (DEFENDANTS).*

Act No. I of 1872 (*Indian Evidence Act*), *section* 112—*Presumption—Burden of proof.*

Plaintiff sued for the recovery of a large amount of property, the basis of his claim being that he was the son of a certain lady, but he failed to prove the parentage alleged, or even that his alleged mother had given birth to any child on or about the date specified as that of his birth. The defendants on the other hand failed to prove the case that they set up, which was that the plaintiff was of an entirely different parentage.

Held that the failure of the defendants to prove their case affirmatively did not entitle the plaintiff to the benefit of the presumption laid down in section 112 of the Indian Evidence Act, 1872.

Narendra Nath Pahari v. *Ram Gobind Pahari* (1) and *Tirlok Nath Shukul* v. *Lachmin Kunwari* (2) distinguished.

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

Mr. *Nihal Chand* and Munshi *Sheo Prasad Sinha*, for the appellant.

Pandit *Ladli Prasad Zutshi*, and Dr. *Kailas Nath Katju*, for the respondents.

---

* Privy Council Appeal, No. 48 of 1922

(1) (1901) I. L. R., 29 Calc., 111. (2) (1903) I. L. R., 25 All., 403.

MEARS, C. J., and BANERJI, J.:—This is an application by Rao Narsingh Rao for leave to appeal to His Majesty in Council.

The case is a very important one and the position of the applicant is such as to enlist the sympathy of every one acquainted with his history.

Rao Narsing Rao commenced an action against one Rani Kishori on the allegation that he was entitled to property of the value of upwards of fifty lakhs because he was the son of Rao Balwant Singh and Musammat Dunaju. Rao Balwant Singh and Musammat Dunaju were husband and wife. His allegation that he was the son of Musammat Dunaju was the main essential fact to be proved. The Rani Kishori denied it and set up that Rao Narsingh Rao was in fact the son of one Shekhar Singh. In the lower court and here Rao Narsingh Rao failed to prove that Musammat Dunaju was his mother, and there are thus two concurrent findings against him.

We have listened very carefully to Mr. *Nihal Chand's* arguments with complete readiness to grant the application if that could consistently and properly be done.

Mr. *Nihal Chand* argues that the Court ought to have applied the provisions of section 112 of the Evidence Act and he formulates his case in this way. He says that when the defendants had failed to establish the case which they set up that Rao Narsingh Rao was the son of Shekhar Singh, thereupon there arose a conclusive presumption that Rao Narsingh Rao was the son of Musammat Dunaju by her husband Rao Balwant Singh. We have pointed out elsewhere that the defendants were under no obligation to prove the paternity of Rao Narsingh Rao. It was for him to prove that he was the son of Musammat Dunaju.

He has cited to us the cases of *Narendra Nath Pahari* v. *Ram Gobind Pahari* (1) and *Tirlok Nath Shukul* v. *Lachmin Kunwari* (2). It will be noticed that in both those cases the Privy Council found as a fact that the lady had in fact given birth to a child and then on proof that the other requirements of the section were complied with, the conclusive presumption arose.

Had Rao Narsingh Rao been able to prove that Musammat Dunaju had on the 2nd of March, 1894, given birth to a child,

(1) (1901) I. L. R. 29 Calc., 111. (2) (1903) I. L. R., 25 All., 408.

1922

RAO NARSINGH RAO v. BETI MAHA LAKSHMI BAI.

practically all his difficulties would have disappeared, as it would, in our opinion, in the circumstances have been proper to conclude that he was in fact the child and that Rao Balwant Singh was the father. Section 112 could only have been relied upon by him after proof of the giving of birth to a child by Musammat Dunaju.

The weight of evidence was against the alleged childbearing by Musammat Dunaju, and being of opinion that section 112 has no application, we are compelled to decide that the applicant has failed to show that there is any substantial question of law in the proposed appeal and, therefore, reject the application as not fulfilling the requirements of section 110 of the Code of Civil Procedure.

Application rejected.

ORIGINAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1922
March, 9.

SUSHIL CHANDRA DAS AND COMPANY (APPLICANT) *v.* SUKHAMAL, BANSIDHAR (OBJECTORS).*

Arbitration—Construction of document—Contract—Acceptance subject to condition subsequent—Form of indent used by members of the Delhi Piece Goods Association.

Held on a construction of a clause contained in a letter of acceptance, to the effect that the "acceptance is subject to revision and *confirmation* by mail if required", in connection with a form of indent for goods to be imported from England, devised by the Delhi Piece Goods Association and in common use in Northern India—which contained the stipulation, "It is distinctly understood between the sellers and the buyers in India that offers, if accepted by telegram, are subject to revision and confirmation by mail only if any mistake has been made in the telegram"—that the clause did not stand in the way of there being a complete and binding contract between the buyer and the seller, but merely meant that the contract was subject to the possible discovery that an event had occurred which was not within the control of either party, namely, an error on the part of the telegraph department.

Held also that another clause of the same indent form to the effect that *in the event of the purchaser failing* to take up the seller's invoice as a draft to be accepted on presentation and paid at maturity, the importers are authorized to sell the goods by public auction after due notice and to claim for the difference between the selling price and the contract price, did not

* Original Suits Nos. 1 and 2 of 1921.