

the appellant when the decree-holder seeks to execute the decree which he has purchased from Ranjit Khan.

For the reasons given above, we dismiss this appeal with costs.

Appeal dismissed.

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RAM
CHARAN
SARU
v.
JAMINA
PRASAD

APPELLATE CIVIL

*Before Mr. Justice E. M. Nanavutty and Mr. Justice
G. H. Thomas*

RAM NATH AND ANOTHER (PLAINTIFFS APPELLANTS) v. DES-
RAJ SINGH AND OTHERS (DEFENDANTS RESPONDENTS)*

1934
November,
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Legitimacy—Presumption of legitimacy, when arises—Burden of proof, when shifted on the person alleging illegitimacy.

The legal presumption of the legitimacy of a person arises only if it is proved that his mother was lawfully married to his father and the burden of proof then shifts on the person alleging illegitimacy to prove that fact. If the person alleging legitimacy fails to prove it, he cannot rely upon the presumption and cannot throw the burden of proof of illegitimacy on the person alleging it. *Aparbal Singh v. Narpat Singh*, distinguished

Mr. H. D. Chandra, for the appellants.

Messrs. *Ram Bharose Lal and Suraj Sahai*, for the respondents.

NANAVUTTY and THOMAS, JJ.:—This is a plaintiffs' appeal against an appellate judgment and decree of the Court of the learned District Judge of Fyzabad upholding the judgment and decree of the Court of the Additional Subordinate Judge of Fyzabad dismissing the plaintiffs' suit.

The facts out of which this appeal arises are briefly as follows:

Plaintiff No. 1, Ram Nath Dube, alleged that the property specified in list A attached with the plaint was

*Second Civil Appeal No. 233 of 1933, against the decree of K. N. Wanchoo, Esq., I.C.S., District Judge of Fyzabad, dated the 10th of May, 1933, confirming the decree of Babu Shiva Charan, Additional Subordinate Judge of Fyzabad, dated the 29th of July, 1932.

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ancestral property, that it belonged to his grandfather Bachchu Ram Dube, and that on the death of his grandfather it was inherited by his father Amar Nath Dube, that his father Amar Nath Dube died about 7 years ago and that he, plaintiff No. 1, was the only son and heir of Amar Nath Dube, and that defendants had taken unlawful possession of the property in suit. Plaintiff No. 2, Pahlad Misir, is financier who has been impleaded because plaintiff No. 1 has sold a part of the property in suit to him.

Upon the pleas raised by the parties the learned Additional Subordinate Judge framed the following issues:—

(1) Was Bachchu Ram the father of Amar Nath?

(2) Is plaintiff No. 1 the son and sole heir of Amar Nath?

(3) Whether Bachchu Ram and Amar Nath owned and possessed the properties in suit as alleged by the plaintiffs?

(4) Is the sale-deed (exhibit 1) genuine and valid? If so, its effect?

(5) (a) Was Badri Prasad the ostensible owner of item No. 1 of List A as alleged by the defendants Nos. 1 and 2, and are the defendants 1 to 4 *bona fide* transferees for valuable consideration and in good faith and after taking reasonable care?

(b) If so, its effect?

(6) Is the Court fee paid insufficient?

(7) To what relief and against whom are plaintiffs entitled?

The learned Additional Subordinate Judge decided Issues 1 and 3 in favour of the plaintiffs. He decided Issue No. 2 against the plaintiffs and held that Ram Nath, plaintiff No. 1, was not the son and sole heir of Amar Nath. He decided Issue No. 4 in favour of the plaintiffs and on Issues 5(a) and (b) he held that defendants 1 to 4 were *bona fide* transferees for valuable

consideration and purchased the property in good faith and after taking reasonable care. He decided Issue No. 6 in favour of the plaintiff. His finding on Issue No. 7 was that the plaintiffs were entitled to no relief and he accordingly dismissed the suit with costs. In appeal the learned District Judge upheld the findings of the trial Court and accordingly dismissed the plaintiffs' appeal. The plaintiffs have now come here in second appeal.

The principal point that was argued before us was that the learned District Judge was wrong in upholding the findings of the trial Court that plaintiff No. 1, Ram Nath, was not the legitimate son and heir of Amar Nath. That finding in our opinion is a pure finding of fact and cannot be challenged before us in second appeal. In order to influence us in reversing the finding of the learned Additional Subordinate Judge the learned Counsel for the appellant has filed an application (Civil Miscellaneous Application No. 670 of 1933) praying that additional documentary evidence be accepted under order XLI, rule 27 of the Code of Civil Procedure. This additional documentary evidence purports to be a true copy of a certificate produced from the office of the Municipal Board of Fyzabad, which shows that one Musammat Gurdei, daughter or wife of Amar Nath Brahman died on the 11th of October, 1913. This documentary evidence in our opinion does not in any way strengthen the contention urged on behalf of the appellants that Ram Nath was the legitimate son of Amar Nath. There is no oral evidence on the record to show that Musammat Gurdei was the lawfully married wife of Amar Nath. The oral evidence on the record shows that the wife of Amar Nath died in 1916, or thereabouts and if that oral testimony of the witnesses examined by the plaintiffs is to be believed then this documentary evidence which is now sought to be filed becomes irrelevant because it shows that Musammat Gurdei mentioned therein died in 1913. We are there-

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fore not prepared to allow the appellants to produce this additional evidence under order XLI, rule 27, of the Code of Civil Procedure, and we accordingly reject Civil Miscellaneous Application No. 670 of 1933.

*Nannoolty
 and Thomas,
 JJ.*

The learned Counsel for the appellants has strenuously argued that as the defendants had admitted that plaintiff No. 1, Ram Nath, was the son of Amar Nath the burden of proving that he was illegitimate lay heavily upon them and in support of this contention he relied upon a ruling reported in *Aparbal Singh v. Narpat Singh* (1), in which Mr. Justice LINDSAY held that it was for the defendants, if they set up a case of illegitimacy, to prove that the plaintiffs are illegitimate, for the legal presumption being in favour of legitimacy and marriage, the burden of illegitimacy lies on the person interested in making out the illegitimacy. This proposition of law is no doubt true, but in the present case the plaintiffs have failed to prove to the satisfaction of the two lower courts that Musammat Gurdei was the lawfully married wife of Amar Nath. It was only if the lower courts accepted that contention of the plaintiffs that the legal presumption could be raised in favour of plaintiff No. 1, and the burden of proof would then shift to the defendants to show that Ram Nath was the illegitimate son of Amar Nath. In the present case the defendants have proved to the satisfaction of both the lower courts that Ram Nath was the illegitimate son of Amar Nath by a *dhobin* woman named Musammat Sheoraji. That being the case it is not open to this Court in second appeal to reverse that finding of fact.

It is not necessary for us to discuss the plea based upon section 41 of the Transfer of Property Act as, in our opinion, this appeal is concluded by the finding of fact of both the lower courts that the plaintiff No. 1, Ram Nath, is the illegitimate son of Amar Nath by his mistress Sheoraji.

(1) (1915) 1 O.L.J., 89.

This concludes the appeal. For the reasons given above we dismiss this appeal, with costs.

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Appeal dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

SAJJAD HUSAIN (ACCUSED APPLICANT) v. KING-EMPEROR
THROUGH LAUTAN (COMPLAINANT-OPPOSITE PARTY)*

1934
November,
19.

Criminal Procedure Code (Act V of 1898), sections 476 and 476A—Notice, if necessary in proceedings under section 476—Preliminary enquiry, whether to be in the presence of accused—Appellate court's power to order complaint being filed under section 476A—Delay in starting proceedings under section 476, effect of.

In proceedings under section 476 it is not obligatory on the Court to issue notice before taking action under that section but in most cases it would be desirable that such notice should be given in order to give the accused an opportunity to offer any explanation which he might be in a position to give. The preliminary inquiry provided for in that section or the extent of it has been left entirely to the discretion of the Court. It is not essential that the preliminary inquiry, if any, must be made in the presence of the accused or after giving notice to him. *Thakur Dass v. King-Emperor* (1), referred to.

An appellate court in the exercise of its power as superior Court under section 476A has authority to direct a complaint being made in respect of an offence committed in the course of proceedings in a Court subordinate to it.

No hard and fast rule can be laid down that in all cases an order for prosecution under section 476 must be set aside on the ground of delay. *Begu Singh v. Emperor* (2), and *Rahimad-ulla v. Emperor* (3), referred to.

Mr. K. P. Misra, for the applicant.

The Assistant Government Advocate (Mr. H. K. Ghose), for the Crown.

*Section 115 Application No. 78 of 1934, against the order of M. Mohamad Abdul Haq, District Judge of Gonda, dated the 9th of May, 1934.

(1) (1913) 17 O.C., 25.

(2) (1907) I.L.R., 34 Cal., 551.

(3) (1908) I.L.R., 31 Mad., 140.