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RÁJMAL MÁNIKCHAND v. HANMANT ANYÁBA.

JARDINE, J. :—This is a suit which we must treat as brought under section 32 of Act XIV of 1869 against the defendant, an officer of Government, in his official capacity. The District Judge held that the defendant was entitled to two months' notice under section 424 of the Code of Civil Procedure; and dismissed the suit, because it had been brought before the expiry of that period. The suit is one *ex contractu*; and no case has been cited to show that section 424 applies to such a suit, whereas *Sahebzadee Shahunshah Begum* v. *Fergusson* (1) decides to the contrary, and the opinion of Farran, J., in *Máneklál* v. *The Municipal Commissioner for the City of Bombay* (2) is in accordance with that decision.

On these authorities we must reverse the decree of the District Judge, and remand the cause for trial; the respondent to pay the costs of this appeal.

Order reversed and case remanded.

(1) I. L. R., 7 Cal., 409. (2) I. L. R., 19 Bom., 407.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

IN RE SHRI VISHWA'MBHAR PANDIT *ALIAS* NA'NA MAHA'RA'J.* 1895. August 28.

Privy Council—Appeal to Privy Council—Civil Procedure Code (Act XIV of 1882), Sec. 596—Substantial question of law—Practice—Procedure.

Per JARDINE, J. :—Where the High Court in appeal has confirmed the decree of the lower Court and has taken substantially the same view of the facts and where, upon the facts as found by both Courts, no question of law arises, leave to appeal to the Privy Council should be refused.

Per RÁNADE, J. :—There is a distinction between the confirmation of a decree and the affirmation of the decision and findings of the Court of first instance by the High Court. The substantial question of law referred to in section 596 of the Code of Civil Procedure (Act XIV of 1882) need not directly arise out of the concurrent findings of fact, but it is enough if it is involved in those findings, and can, if the appeal is allowed, be raised in the course of the argument.

APPLICATION for leave to appeal to the Privy Council from a a decree of the High Court.

* Civil Application, No. 155 of 1895.

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The plaintiff Shri Bábá Maháráj sued for a declaration that he was the adopted son of Shri Tátiá Maháráj, deceased, and as such entitled to inherit the whole of Shri Tátiá Maháráj's estate.

The defendant Shri Náná Maháráj pleaded that the plaintiff was not taken in adoption by Shri Tátiá Maháráj; that at the time of the alleged adoption Shri Tátiá Maháráj was incapable from illness of performing the ceremony of adoption; that the alleged adoption, even if proved, was illegal and invalid by reason of the fact that the plaintiff was given in adoption by his mother without the knowledge and consent of his father; and that the suit was barred by limitation.

The First Class Subordinate Judge of Poona, who tried the case, raised (*inter alia*) the following issues:—

(1) Whether the suit was barred by the law of limitation?

(2) Whether the plaintiff had been validly adopted? and

(3) Whether the defendant was estopped from disputing the adoption?

The Subordinate Judge held that the suit was not barred by limitation; that the plaintiff had been taken in adoption by Tátiá Maháráj; that Tátiá was not incapable from illness at the time of the adoption; that the plaintiff's mother gave the plaintiff in adoption with the knowledge and consent of his father; that the adoption was, therefore, valid; and that the defendant was estopped from disputing the adoption. He, therefore, passed a decree, declaring that the plaintiff was the adopted son of Tátiá Maháráj and as such was entitled to inherit his estate.

Against this decree the defendant appealed to the High Court.

The appeal was heard by Jardine and Ránade, JJ., who took substantially the same view of the facts as the Subordinate Judge. Jardine, J., however, did not express any opinion either on the question of limitation or on the question of estoppel; while Ránade, J., did not agree with the lower Court in regarding some of the documents put in evidence as suspicious.

On the whole the learned Judges confirmed the decree of the Subordinate Judge with costs.

Thereupon the defendant applied for leave to appeal to the Privy Council from the decree of the High Court, on the ground,

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among others, that the plaintiff's adoption was invalid under the Hindu law, his mother not having been authorized by his father to give him in adoption.

A rule *nisi* was granted calling upon the plaintiff to show cause why the defendant should not be granted leave to appeal to the Privy Council.

Macpherson, Acting Advocate General (with him *Ganpat Sadáshiv Ráo*) for the defendant in support of the rule :—The present case falls under the last paragraph of section 596 of the Code of Civil Procedure (Act XIV of 1882). The appeal involves a substantial question of law, *viz.*, whether the plaintiff's adoption, assuming it to be proved in fact, was valid in law. We say it is not valid, because it is not satisfactorily proved that the plaintiff's father authorized his mother to give him in adoption. The "substantial question of law" referred to in section 596 does not mean only a question of law arising out of the facts held to be proved and admitting them to be proved. All that the section requires is that a substantial question of law arises in the case, and that there is such a question to be argued before the Privy Council—*Moran* v. *Mittu*[1] and *Gopináth* v. *Goluck Chunder*[2]. This appeal does raise questions of law as well as questions of fact. We are, therefore, entitled to appeal to the Privy Council.

Branson (with him Ráo Sáhèb *Vásudev J. Kirtikar* and *P. P. Khare*) showed cause :—Both the Courts have found on the facts, and the Privy Council will not allow them now to be questioned. The facts being thus established, there is no question of law. It is only by disputing the facts, *viz.*, the mother's authority, that any question of law can arise—*Nárágunty Lutchmeedávámáh* v. *Vengáma Naidoo*[3] ; *Kuar Nirbhái Dás* v. *Ráni Kuar*[4] ; *Nilmoni Singh Deo Bahádur* v. *Kirti Chunder Chowdhry*[5] ; *Thompson* v. *Calcutta Tramways Company*[6] ; *Shri Dharnidhar Chintáman Dev* v. *Chintáman Bajáji Dev*[7] ; *In the goods of Premchand Moonshee* v. *Gopál Chandra Ghose*[8]

(1) I. L. R., 2 Cal., 232.
(2) I. L. R., 16 Cal., 292.
(3) 9 M. I. A., 66 at p. 87.
(4) I. L. R., 16 All., 271.
(5) I. L. R., 20 Cal., 847.
(6) I. L. R., 21 Cal., 523.
(7) P. J. for 1895, p. 31.
(8) I. L. R., 21 Cal., 484.

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Jardine, J.:—The learned Advocate General who supports the rule admits that the judgments recorded by Mr. Justice Ránade and myself take substantially the same view of the facts as the Subordinate Judge did, and that both of us concur with him in finding that Sundra Bái, the natural mother of the plaintiff, was, to use Mr. Justice Ránade's words, fully authorized by his natural father to give him in adoption. In paragraph 28 of my judgment I adopted the very words of the Subordinate Judge in finding that the natural father "Aba Maháráj was a consenting party to the giving of the plaintiff in adoption by his wife."

It is not disputed that, on such facts as the two Courts have found, the adoption is valid at Hindu law, nor that the facts as found are decisive of the real issue between the parties—*Rája Bardakant* v. *Bábu Chundra*[1]. Therefore, said the Advocate General, as the decision of the High Court concurred with the original decision, he had to show that the appeal involved a substantial question of law.

The Advocate General has urged us to adopt the interpretation of the last clause of section 596 of the Code of Civil Procedure, which with much doubt was expressed by the learned Judges in *Moran* v. *Mittu*[2] and *Ashghar* v. *Hyder*[3]. No case has been shown us in which any other High Court has considered that interpretation, nor any pronouncement of the Judicial Committee thereupon. I refrain from giving an opinion, as I think the present application should be refused, because the appeal does not "involve some substantial question of law."

We asked the Advocate General what there was in the appeal to which these words can apply, what was the substantial question of law to be debated before their Lordships of the Privy Council. The reply was that it was this—whether a Hindu wife can give her natural son in adoption without the express or implied consent of her living husband. This question is answered by the judgment of this Court in *Rangubái* v. *Bhágirthibái* [4] in the negative, following earlier cases. No authority to the contrary has been pointed out or suggested. The Advocate

(1) 12 M. I. A., 153.
(2) I. L. R., 2 Cal., 228.
(3) I. L. R., 16 Cal., 287.
(4) I. L. R., 2 Bom., 377.

General's client does not wish to question these decisions, and in fact relies upon the answer they give as unquestionable, substantially as a maxim. Even if there is a question of law, I think it is not a substantial one: and that we best give effect to the enactment which changed the earlier law—*Feda Hossein's Case* (1) by refusing leave to appeal.

RÁNADE, J.:—In the absence of any rulings of this Court to the contrary, I think the decisions of the High Court of Calcutta on section 596, Civil Procedure Code, should be allowed to govern a case like the present. That Court has decided that there is a distinction between the confirmation of a decree and the affirmation of the decision and findings of the Court of first instance by this Court—*Ashghar* v. *Hyder* (2), and further that the substantial question of law need not directly arise out of the concurrent findings of fact—*Moran* v. *Mittu* (3), *Munnálál* v. *Gajraj* (4), *Durga* v. *Jewáhir* (5), but that it is enough if it is involved in those findings, and can, if the appeal is allowed, be raised in the course of the argument. In the present case, though we confirmed the decree of the lower Court, one of the Judges did not decide the questions of limitation and estoppel on which findings were recorded by the Court of first instance, and the other Judge took a different view of some of the documents from that of the lower Court which had held them to be suspicious. In my opinion, the confirmation of a decree under such circumstances is not equivalent to an affirmation of the decision of the lower Court. Similarly, though the Advocate General did not lay much stress in his argument before us on any of the points of law, save the point which related to the competency of the natural mother of plaintiff to give her son in adoption in the absence of her husband, yet as the other points were raised in appeal before us, and might be argued before the Judicial Committee, I should hesitate before refusing to grant leave to the appellant to carry the case before a higher tribunal simply because, in my opinion, the evidence showed that the mother had authority from her husband to give her son in adoption, and that the

(1) I. L. R., 1 Cal., 431.
(2) I. L. R., 16 Cal., 287, 292.
(3) I. L. R., 2 Cal., 232.
(4) I. L. R., 17 Cal., 247.
(5) I. L. R., 18 Cal., 23.

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absence of the father at the time was, therefore, immaterial. Mr. Justice Jardine has, however, taken a different view, and I understand that this is not a matter which can properly be referred to a third Judge. The appellant, moreover, has the right to apply directly to the Judicial Committee, and obtain their special leave to appeal on good cause shown.

Under these circumstances, I feel that this is not an occasion where, in the exercise of a discretionary jurisdiction, I should press my views any further. I accordingly join with Mr. Justice Jardine in the final order of refusal.

ORIGINAL CIVIL.

Before Mr. Justice Parsons and Mr. Justice Strachey.

1896. *February* 7, 21.

HIS HIGHNESS SULTA'N NAWA'Z JUNG, PLAINTIFF, *v.* RUSTOMJI NA'NA'BHOY BYRA'MJI JIJIBHOY, DEFENDANT.*

Easement—Light and air—Injunction or damages—Specific Relief Act (I of 1877), Sec. 54, Cl. (b)—Prescription—Agreement to prevent acquisition of easement—Not a document creating, &c., right in immoveable property—Chance of acquiring easement not immoveable property—Registration.

The chance of acquiring a right to light and air is not immoveable property within the meaning of the Registration Act, nor can a pecuniary value be put upon it. A document, therefore, which limits or extinguishes the chance of acquiring such an easement does not require registration.

Dhunjibhoy v. *Lisboa*(1) and *Ghanashám* v. *Moroba*(2) followed and approved as to the circumstances in which the Court will grant an injunction where a right to light and air is infringed.

SUIT for injunction. The plaintiff complained that the defendant was building a new house to the south of his (the plaintiff's) house in Hornby Row, Bombay, which, when completed, would obstruct the light and air to the windows of the third and fourth storeys on the south side of his said house.

He alleged that the windows in question were ancient windows, and that he and his predecessor in title had enjoyed the right

*Suit No. 536 of 1894. Appeal No. 879.

(1) I. L. R., 13 Bom., 252. (2) I. L. R., 18 Bom., 474.