Privy Council Appeal No. 54 of 1920.

Syed Habibur Rahman Chowdhury and another - - - *Appellants*

v.

Syed Altaf Ali Chowdhury and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH, 1921.

Present at the Hearing:

LORD BUCKMASTER.
LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

In this suit the plaintiff and appellant, Habibur Rahman Chowdhury, claims a declaration that he is the legitimate son of the late Nawab of Bogra, who died intestate on the 2nd July, 1915. The suit is opposed by the late Nawab's grandson, who is the son of a legitimate daughter, and by two nephews, the sons of an elder brother. The plaintiff is admittedly the natural son of the late Nawab, his mother having been a Jewess, Mozelle Cohen, who became a Mohammedan and cohabited with the Nawab. He was born in 1893. The Nawab had a daughter by the same lady in 1891. The Nawab's legitimate wife, the grandmother of the first defendant, died in 1890. The plaintiff based his claim on two grounds. He averred first that Mozelle was married to the Nawab. He further averred that on many

occasions the Nawab had acknowledged him as his legitimate son. The defendants aver that no marriage ever took place. They also deny that any proper acknowledgment of legitimacy was made.

The case went to trial before Greaves J., and oral evidence was led and documentary evidence produced on both sides. Greaves J. held that no marriage was proved, but that, on the contrary, it was proved that Mozelle Cohen was no better than a prostitute and that no marriage ever did take place. He held that the Nawab did acknowledge the plaintiff as his legitimate son, but he held that in law, as the fact of no marriage was conclusively established, such acknowledgment would not confer the status of legitimacy. He therefore dismissed the suit.

Appeal was taken by the plaintiff. In the Court of Appeal the Chief Justice agreed with Greaves J. that the marriage was in fact disproved. Differing from Greaves J., he held that there was no proper acknowledgment of legitimacy, but, upon the assumption that there was, he agreed with Greaves J. on the law that such an acknowledgment, in the face of the disproof of the marriage, was of no avail.

Woodroffe J. thought that there was no acknowledgment of legitimacy and no affirmative proof of marriage, and therefore the plaintiff failed, but he did not go the length of holding that there had been disproof of marriage.

Chitty J. held that the marriage was disproved. That being so, he did not feel called upon to decide with certainty as to whether there was a good acknowledgment of legitimacy or not, though he indicated that the bias of his opinion was that there was not.

The plaintiff is thus faced by two adverse concurrent findings of fact to the effect that the existence of a marriage is disproved. As, however, the junior counsel for the plaintiff urged that this was not so, it is well to make it clear as to what constitute concurrent findings.

The first issue as settled by the trial judge was, " Was Mozelle Cohen married to Sobhan " (the Nawab) ? His finding as to this was :—

> " I hold that upon the evidence the long connection of Sobhan and Mozelle was inconsistent with the relation of husband and wife, and that Mozelle is, upon the evidence, proved to be merely his concubine, and that Mozelle Cohen was not married to the deceased Nawab."

The Chief Justice said :—

> " I think the learned judge was right in holding that Mozelle was never married to the late Nawab Sobhan ; to put it in other words, in my judgment it has been proved that Mozelle was never married to the late Nawab."

and Chitty J. said :—

> " I do not believe that any marriage between Abdus Sobhan and Mozelle Cohen ever took place ; in other words, I find the marriage disproved.

These two learned judges form a majority of the Court of Appeal. That makes a concurrent finding, and it is not vitiated

Privy Council Appeal No. 130 *of* 1916.
Bengal Appeal No. 36 *of* 1913.

Lakshmidar Mahanti, since deceased (now represented by Kshetrabashi Mahanti) - - - - - - - *Appellant*

v.

Ratnakar Mahapatra and others - - - - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MARCH, 1921.

Present at the Hearing :

LORD DUNEDIN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

On the 12th January, 1907, a person got a decree for arrears in respect of rents of lands in Orissa. In respect of that decree, the lands were sold on the 27th June, 1907, and on the 27th September, 1907, the father of the appellant, whom he now represents, was declared the purchaser. Within thirty days thereafter, the judgment debtor deposited the full sum and costs, and accordingly on the 23rd December, 1907, the sale was set aside under the terms of Section 174 of the Bengal Tenancy Act of 1885. Against that setting aside an appeal was taken to the Collector, who reversed the judgment of the Deputy Collector and confirmed the sale. An appeal from his decision was taken to the Commissioner, who, on the 15th July, 1908, upheld the decision of the Collector, and on the 16th February,

1909, a sale certificate was granted. On the 26th May, 1909, the present suit was raised in the Civil Court by the judgment debtor, and the Subordinate Judge, taking the same view as the Commissioner had taken, by his decree dismissed the suit. An appeal was taken to the Calcutta High Court, and the Calcutta High Court dealt with it as follows :—

> "The point as to whether Section 174 of the Bengal Tenancy Act applies to sale of a holding in Orissa is concluded by authority in the case of *Barkal Parida* v. *Jogendra Nath Sen* (16 Calcutta Weekly Notes, page 311), decided in this Court."

and they accordingly reversed the decree of the Subordinate Judge. An appeal has now been taken to His Majesty in Council against the decree of the High Court. It is therefore practically an appeal against the judgment in the case just cited. The whole point is this : The Bengal Tenancy Act as originally passed by Section 1 (3) did not apply to the Division of Orissa ; but by Section 2 (2), it was contemplated that it might be eventually extended to Orissa, and it is there enacted :—

> "When this Act is extended to the Division of Orissa or any part thereof, such of those enactments as are in force in that Division, or part, or, where a portion only of this Act is so extended, so much of them as is consistent with that portion, shall be repealed in that Division or part."

Besides that there is a general repealing section. In this section Act VIII of 1865 is not included among the Acts repealed. The Bengal Tenancy Act was extended to Orissa by order published in the Calcutta Gazette on 9th January, 1907.

Section 174 of that Act deals with applications to set aside a sale. It says :—

> "Where a tenure or holding is sold for an arrear of rent due thereon, then at any time within thirty days from the date of sale, the judgment debtor may apply to have the sale set aside, on his depositing in Court . . the amount recoverable under the decree "

and so on. Then it provides that there shall be an order setting aside the sale. It is quite obvious that those words apply to the facts in this case, because the amount was deposited within thirty days of the sale. The sale being in June, 1907, was after the extension to Orissa of the Bengal Tenancy Act. Accordingly the whole argument really turns on this : that Section 174 can only apply to suits that originate in the Civil Court, and cannot apply to suits that originate in the Collector's Court under the law as it stood in Orissa before this section was introduced. Under the law as it stood in Orissa, under Act VIII of 1865—the sections need not be gone through, because the result of them can be given quite shortly—the period is eight days for setting aside a sale like this instead of thirty.

The matter was dealt with by the Calcutta High Court in the judgment already cited. They say at page 312 of XVI Calcutta Weekly Notes :—

> "It has been argued that if the intention of the Legislature was that the extension of any portion of the Bengal Tenancy Act would by implica-

> tion operate as a repeal of the provisions of Act VIII of 1865, mention would have been made of the latter Act in the first Schedule. In our opinion there is no force in this contention."

Then they go on to say it would be meaningless to hold that Section 174 of the Bengal Tenancy Act has been extended to the Division of Orissa, but that it has no application to a sale held there under that Act. Their Lordships think that is plain common sense, and that to hold that Section 174 did not apply would really be to render the legislation meaningless.

They will therefore humbly advise His Majesty to dismiss the present appeal with costs; but they add that, inasmuch as it has been represented to them that the purchase money has not been returned, nothing that they are here saying must be understood as in any way preventing an application to the proper Court in India for the return of the purchase money.

In the Privy Council.

LAKSHMIDAR MAHANTI, SINCE DECEASED (NOW REPRESENTED BY KSHETRA-BASHI MAHANTI)

v.

RATNAKAR MAHAPATRA AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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