

(1911) 11 CAL CK 0017

Calcutta High Court

Case No: None

Bipin Bihari Das Bairagi

APPELLANT

Vs

Atul Krishna Das Bairagi and
Another

RESPONDENT

Date of Decision: Nov. 30, 1911

Citation: 15 Ind. Cas. 328a

Hon'ble Judges: Mookerjee, J; Carnduff, J

Bench: Division Bench

Judgement

1. This is an appeal on behalf of the plaintiff in a suit for declaration of title to, for recovery of possession and for partition of, property claimed by him as the property of his father inherited equally by himself along with his brothers, the two defendants. The defendants denied that the plaintiff was the legitimate son of their father. The Cardinal point in the case, therefore, was, whether or not the legitimacy of the plaintiff had been established. Upon this question, the Courts below have arrived at divergent decisions. The primary Court came to the conclusion that the legitimacy of the plaintiff was established while the learned District Judge was of opinion it had not been proved to his satisfaction.

2. On behalf of the plaintiff, it has been contended before us that the decision of the District Judge is open to attack inasmuch as he has not considered the question from the right point of view and has overlooked well-established principles of law applicable to cases of this description.

3. It may be conceded that at first sight the decision of the District Judge does appear to be unassailable in second appeal, as contended on behalf of the respondent. But upon a close examination, it appears that there is considerable force in the argument for the appellant. The Court of first instance in dealing with the question referred not merely to the direct evidence of marriage but also to circumstances from which the legitimacy of the plaintiff might be inferred. The Munsif referred to the fact that according to the evidence on the side of the

defendants themselves, their father and the mother of the plaintiff lived as husband and wife for a long series of years. He also relied on the fact that the defendants had treated the plaintiff as their legitimate brother, that the first defendant in particular, on the occasion of the marriage of the plaintiff in an admittedly Bairagi family, had acted as bara-karta, and that the marriage feast had taken place in his house. The first Court also laid stress on the fact that so far back as the 20th February 1393, the mother of the plaintiff asserted in a mortgage deed executed by her that she was the wife of the father of the defendants and the alleged husband attested the deed and identified her before the Registering Officer. This, in the Opinion of the Court, involved an admission by the father of the defendants that the mother of the plaintiff was his wife; at any rate, it implied an acquiescence in her assertion that she was his wife. In view of all these circumstances, the Court came to the conclusion that the plaintiff was legitimate. The learned District Judge has taken the "contrary view. He has not attached any weight to the circumstance that the father of the defendants and the mother of the plaintiff lived as husband and wife for many years. But, as was pointed out by their Lordships of the Judicial Committee in *Sastry v. Sembecutty* 6 A.C. 364 : 50 L.J.P.C. 28 : 44 L.T. 895, the law is jealous for the honour and reputation of the home and the family and it presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously. This presumption is made both for their own sake and for the sake of their children. It was further pointed out by the House of Lords, in the case of *Piers v. Piers* (1849) 2 H.L.C. 331 : 13 Jur. 569 81 R.R. 180, that this presumption of law was not lightly to be repelled, It was not to be broken in or shaken by mere balance of probability. The evidence for the purpose of repelling it, must be strong, distinct, satisfactory and conclusive. In our opinion, the judgment of the District Judge is open to successful attack on the ground that he has rested his conclusion upon a mere balance of probabilities. It is proved conclusively that the mother of the plaintiff and the father of the defendants lived as husband and wife for many years. And the plaintiff himself has been always recognised as their legitimate child. The presumption of law is that the parties were lawfully married and that presumption can be repelled only by "conclusive evidence", to use the language of Lord Lyndhurst in *Morris v. Davies* (1837) 5 C1. and Fin. 163 at p. 265 : 1 Jur. 911 : 3 Russ. 318 : 8 L.J.Ch. 120 : 47 R.R. 50. The presumption is not displaced merely because the direct evidence of marriage which took place many years ago is not satisfactory. *Imambandi v. Matasuddi* 13 Ind. Cas. 678 : 15 C.L.J. 621; *Mouji Lal v. Chandrabati Kumari* 38 C. 701 : 11 Ind. Cas. 502 : 14 C.L.J. 72 : 15 C.W.N. 790 : (1911) 2 M.W.N. 391 : 13 Bom.L.R. 534 : 10 M.L.T. 53 : 21 M.L.T. 933.

4. The result is that this appeal must be allowed, the decree of the District Judge set aside and the case remanded to him in order that he may consider the case from the point of view explained in this judgment. The costs of this appeal will abide the result