

Evidence Act does not supersede this rule of law. Any co-owner may lay claim to an absentee's share after twelve years—see Strange's Hindu Law, Vol I, p. 117. Section 26 of Regulation II of 1827 lays down the law to be applied in such cases—*Ganesh Parashráam v. Rágho Vishnu*⁽¹⁾.

There was no appearance for the other party.

SARGENT, C. J.:—We do not think the decree of the Court below can be supported on the ground stated by the Assistant Judge. The plaintiff can only establish a claim to a moiety of Bháskar's share in the rent as heir of Bháskar, and it was as such that it was dealt with by the Subordinate Judge at the trial. Bháskar had been admittedly absent for more than seven years, and by section 108 of the Evidence Act his death might legally be presumed. We agree with Mr. Justice Spankie in *Parmeshar Rai v. Bisheshar Singh*⁽²⁾ that the question whether a person is to be presumed to be dead, is one of evidence, and not a part of the substantive law of inheritance.

We, therefore, confirm the decree of the lower Appellate Court.

Decree confirmed.

(1) Printed Judgments for 1879, p. 18.

(2) I. L. R., 1 All., 53.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

GORAKH BABA'JI AND OTHERS, (ORIGINAL PLAINTIFFS), APPLICANTS, &
VITHAL NA'RA'YAN JOSHI, (ORIGINAL DEFENDANT), OPPONENT.*

*Civil Procedure Code (Act XIV of 1882), Sec. 622—Revision—Illegality—
Judge's duty to decide secundum allegata et probata.*

The plaintiffs sued upon two bonds executed by the defendant in their father's favour, one for Rs. 200 and the other for Rs. 99-15 annas.

The defendant in his written statement, as well as in his deposition, admitted execution of the bonds in question, but pleaded non-receipt of consideration.

The Subordinate Judge held that the bond for Rs. 200 was not proved, but awarded the claim upon the other bond.

* Application under Extraordinary Jurisdiction, No. 28 of 1886.

1886.

DHONDO
BHUKAJI
G. GANESH
BHUKAJI.

1887.
January 17.

1887:

GORAKH
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JOSHI.

On appeal, one of the issues raised by the Assistant Judge was—are the bonds in suit proved? He held that the plaintiffs had failed to prove execution of the bonds, and dismissed the claim *in toto*.

On an application to the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882),

Held, reversing the decision of the lower Court, that the defendant having admitted execution of the bonds in question, the Assistant Judge acted illegally in the exercise of his jurisdiction in raising the question of the execution.

The first rule of adjudication is that a Judge shall decide *secundum allegata et probata*. The only question that could be tried in the present case was non-receipt of consideration.

THIS was an application, under section 622 of the Civil Procedure Code (Act XIV of 1882), against the decision of G. McCorkell, Assistant Judge of Ratnágiri, in Appeal No. 92 of 1885.

The plaintiffs brought two suits upon two bonds executed by the defendant in their father's favour, one for Rs. 200 and the other for Rs. 99-15-0, dated, respectively, 2nd and 9th July 1881.

The defendant admitted execution of both the bonds, but pleaded want of consideration. He alleged that he had deposited the bonds with the plaintiffs' father, on the understanding that he was to get them attested on payment of the consideration set forth in the bonds. This, he said, was never done. He, therefore, denied his liability under the bonds in question.

The Subordinate Judge held that the bond for Rs. 200 was not proved, but awarded the plaintiffs' claim on the other bond.

On appeal, the Assistant Judge raised the following issues:—

1. Are the bonds in the suits duly proved?
2. Is the consideration duly proved?

He held that the plaintiffs had failed to prove execution of both the bonds in question, and, therefore, dismissed the plaintiffs' claim.

Against this decision the plaintiffs made an application to the High Court, under section 622 of the Civil Procedure Code (Act XIV of 1882), upon the following grounds:—

1. That the lower Court was wrong in throwing the burden of proving execution upon the plaintiffs.

2. That the defendant having admitted execution of the said bonds, it lay upon him to prove non-receipt of consideration.

3. That the lower Courts misconstrued the defendant's deposition, in holding that it did not contain his admission of the execution of the bonds.

A rule nisi was granted by Birdwood and Jardine, JJ., on the 1st March, 1886.

Rāv Sáheb Vāsudev Jagannáth Kirtikar showed cause:—This is not a case for the exercise of the extraordinary jurisdiction of this Court. The principles upon which this jurisdiction is exercised are laid down in the Full Bench case of *Shiva Nátháji v. Jomá*(¹). Section 622 of the Civil Procedure Code was not intended to give a second appeal from the decision of a lower Appellate Court. There may be an error in law in its decision, but that is no ground for interference under that section. In the present case there is no irregularity of procedure, neither excess nor declining of jurisdiction.

Pándurang Balibhadra (with him *Ganpat Saddshiv Ráo*) *contra*:—The present case is one of illegality in the exercise of jurisdiction. The defendant admitted execution of the bonds. Therefore no question could arise as to execution. And yet the lower Court made that the main issue in the case, and cast the *onus* of proving, what did not require any proof, upon the plaintiff. This was a clear illegality in dealing with the merits of the case. In such a case the High Court will interfere, as laid down in Rule 2 in *Shiva Nátháji's case*(²); *Badami Kuar v. Dinu Rai*(³); *Dhan Singh v. Basant Singh*(⁴).

WEST, J.:—This is not a case of the improper exercise or declining of jurisdiction. Nor is it a case of material irregularity within the meaning of section 622 of the Code of Civil Procedure. The Assistant Judge has not, in dealing with the case, fallen into any error of procedure such as to place the question for adjudication before him in a defective or perverted manner. But having proceeded aright to the investigation of the case, he

(1) I. L. R., 7 Bom., 341.

(3) I. L. R., 8 All., 111.

(2) I. L. R., 7 Bom., 341.

(4) I. L. R., 8 All., 519.

1887.

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has, we think, in disposing of it, exercised the jurisdiction, which he undoubtedly had, in an illegal manner. The first rule of adjudication is that a judge shall decide *secundum allegata et probata*—The “*Alice*” v. The “*Rosita*”⁽¹⁾. In this case, the defendant admitted having executed the promissory note in question in this sense that he signed it and delivered it to the plaintiff, though, as he says, on the understanding that the attestations were to be added, and the document made use of as a security only after the consideration money was paid to the defendant, which, he says, never took place. The admission of the defendant's signature and delivery of the document was confirmed by the defendant in his deposition, yet the Assistant Judge has found that the execution of the document is not proved. He says he cannot find an admission of execution in the defendant's statement. This is distinctly in contradiction to the written statement and the deposition. On the plaint and the written statement, no question of the execution in the ordinary sense could be raised, as that was not disputed. The allegation of delivery under special circumstances and that of non-receipt of consideration were questions in controversy, and could be tried and decided, as they should now be. The judgment of the District Court is reversed, and the cause is remitted for disposal of the appeal on the merits with reference to the foregoing observations. Costs of this application to be borne by the opponent.

Decree reversed and case remanded.

(1) L. R., 2 P. C., 214.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Birdwood.

*IN RE ANANT RA'MCHANDRA LOTLIKAR.**

1886

November 16.

Criminal Procedure Code (Act X of 1882), Sec. 195—Sanction to prosecute—“Subordinate Court,” what is a—Sanction to prosecute refused by Subordinate Judge in suit over Rs. 5,000—Jurisdiction of District Court to grant sanction in cases to which appeal lies to High Court from Subordinate Judge.

In matters relating to the grant of sanction to prosecute under section 195 of the Criminal Procedure Code (Act X of 1882), a Court is regarded as “subordi-

* Criminal Review, No. 288 of 1886.