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tation Act must be construed with reference to s. 368 of the present Civil Procedure Code. Reading s. 368 with s. 582 of the Code, it is clear that the word *defendant* in s. 368 includes a *respondent*, and art. 171B of the Limitation Act is applicable to the case of a defendant, and it follows that that article applies to the present case.

No application having been made within the time allowed by art. 171B, the appeal must abate under the last clause of s. 368, read with ss. 582 and 590 of the Civil Procedure Code, with costs.

OLDFIELD, J.—I concur, although with some hesitation, in holding that this appeal must abate, as no one has been brought on the record to represent the deceased respondent within the term of limitation. Dismissed with costs.

*Appeal dismissed.*

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*April* 1.

*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

RAM PRASAD AND OTHERS (DEFENDANTS) *v.* RAGHUNANDAN PRASAD (PLAINTIFF.)*

*Act I of* 1872 (*Evidence Act*), *ss.* 63 (*c*), 114, *illustration* (*g*)—*Secondary evidence—Copy of a copy—Suit for redemption of mortgage—Burden of proof—Withholding evidence.*

A deed executed in 1812 became the subject of litigation resulting, on the 17th May 1813, in a decree the effect of which was to create a usufructuary mortgage of rights and interests in two villages. In 1871, the purchaser of a portion of the mortgagor's rights, alleging that the mortgage-debt had been liquidated from the usufruct, sued to recover possession of the property. The mortgagees resisted the claim for possession, on the grounds that, prior to the execution of the deed in 1812, the mortgagor's ancestor had granted to their own ancestor a *gawanda-dari* right, under which a fixed *jama* of Rs. 121 was payable by them in respect of the lands in the village, that what was mortgaged was not the lands, but only the right to receive the fixed *jama*, and that the fact that the mortgage money had been liquidated from the *jama* did not entitle the plaintiff to oust them from possession. It appeared that the alleged *gawanda-pattar*, the original mortgage deed, and the decree of the 17th May 1813, were at one time in the defendants' possession, but the defendants alleged that all three documents were destroyed by fire in 1872. The plaintiff sought to support his case by putting in a copy on plain paper purporting to have been transcribed from a certified copy of the decree of the 17th May 1813.

*Held*, with reference to the provisions of s. 63 of the Evidence Act (I of 1872), that, there being no evidence proving that the copy produced by the plaintiff had been compared with the original decree, the copy was not admissible in

* First Appeal No. 18 of 1883, from a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Ghazipur, dated the 22nd December 1882.

evidence, inasmuch as it could not be regarded either as primary or as secondary evidence of the contents of the original decree.

*Held* also, that the destruction or loss of the three documents alleged by the defendants to have been destroyed not being proved, their non-production placed them under the recognized prohibitions of the law of evidence, and subjected them to the presumption recognized by illustration (*g*), s. 114 of the Evidence Act, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

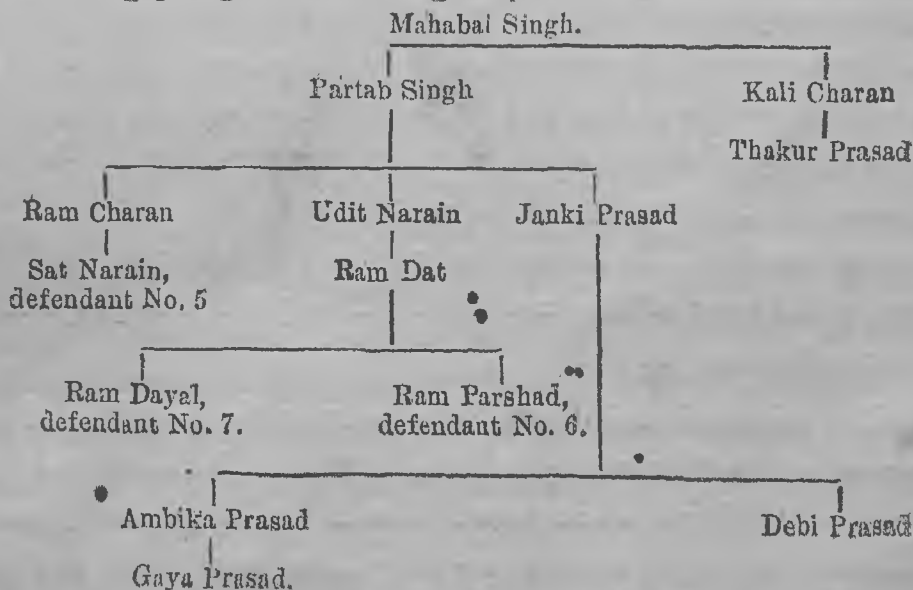
*Held* also, that inasmuch as the plaintiff was no party to the alleged *gawanda-pattar*, nor to the mortgage of 1812, nor to the litigation which resulted in the decree of the 17th May 1813, and could not therefore be taken to be in a position to produce these documents or to prove their contents by secondary evidence; and inasmuch as the circumstances established a *prima facie* case in his favour, the burden of proof in regard to the existence of the alleged *gawanda-dari* tenure lay upon the defendants, who, whilst in a position which would involve their being in possession of the documents above-mentioned, and whilst admitting such possession up to the year 1872, had failed to prove either their destruction or their contents by secondary evidence such as could be relied on. *Rajah Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Mahmood, J.

Mr. *T. Conlan* and Mr. *G. T. Spankie*, for the appellants.

Mr. *W. M. Colvin*, Mr. *G. E. A. Ross*, and Munshi *Hanuman Prasad*, for the respondent.

MAHMOOD, J.—The facts of the case, as far as they are necessary for the disposal of this appeal, may be recapitulated here, and the following pedigree throws light upon them :—

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In each of the two villages Mangalpur and Saidpur, Mahabal Singh owned an eight annas share, known as Patti Mahabal Singh. It is admitted in this case that, on or about the 4th April, 1812, Mahabal Singh executed a deed which became the subject of litigation. resulting in a decree dated the 17th May, 1813, the effect of which was to create a usufructuary mortgage of the rights and interests of Mahabal Singh in the two villages above-named, in lieu of a sum which is stated by the defendants to have amounted to Rs. 4,684. Another fact admitted in the case is, that under the terms of the mortgage so created the mortgage would expire in 1278 fasli, 1871 *A. D.*, the usufruct of the interval of fifty-eight years being regarded as liquidating the mortgage without the necessity of taking any accounts at the time of redemption.

Upon the death of Mahabal Singh, his rights and interests devolved in equal shares upon his two sons Kali Charan and Partab Singh, and their rights having been at various times sold, under circumstances stated in paragraph 4 of the plaint, the plaintiff has acquired a six annas eight pies share in mauza Mangalpur, and a two annas eight pies share in mauza Saidpur, and his name has been recorded in the Government revenue papers as proprietor of these shares. The rest of the mortgagor's rights in these properties belong to the persons who have been impleaded in this suit as *pro formâ* defendants.

Upon this state of things, the plaintiff instituted this suit, praying for possession of the entire eight annas share in Mangalpur and the entire eight annas share in Saidpur, on the ground that he was entitled to such a remedy by virtue of being a joint holder of the equity of redemption in the mortgaged property. The plaint set forth that, under the terms of the mortgage, the money due thereon was liquidated from the usufruct by the very fact of the lapse of the term of the mortgage. The plaint also prays for recovery of mesne profits.

The principal defendants, who occupy the position of mortgagees, resisted the suit upon the ground that, before the mortgage by Mahabal Singh, his ancestor, Babu Abhai Singh, had granted a *gawunda-dari* right to their ancestors, that under that settlement a fixed *jama* of Rs. 121 was payable by them "with respect to all

the zamindari dues, cultivatory lands, *sayer*, uplands and low-lands, water and forest produce, ponds, tanks, fruitful and unfruitful trees, of an eight annas share in each of the villages Mangalpur and Saidpur." They further pleaded that under the terms of the mortgage, what was mortgaged was not the lands of these villages, but only the right of Mahabal Singh to receive the fixed *jama* of Rs. 121, and that the condition in the mortgage was "that the sum of Rs 71 out of Rs. 121, the amount of *jama* fixed as the right of of Mahabal Singh, should be annually set off against the principal mortgage-money, and Rs. 50, the Government revenue, should be paid to the proprietor; and that, after the expiration of 1278 fasli, Rs. 121 should be paid to the proprietor of the property as before." Upon this ground, the defendants contended that "the fact that the mortgage-money has been liquidated from the *jama* fixed does not entitle the plaintiff to effect redemption of the mortgage by removal of the defendants' possession." They further went on to say that "the deed *gawanda-pattar* granted by Mahabal Singh's ancestor to the ancestor of the defendants before the British reign, was kept in a bundle of papers in the defendant Ram Prasad's house, which was destroyed by fire, and the file and bundle of papers were also burnt along with all the goods kept in the house." It may be noted here that the fire to which this allegation relates is stated in the evidence to have occurred about the year 1872.

The only other pleas in defence which need be noticed here are, that the plaintiff as owner only of a portion of the property is not entitled to claim possession of the entire property in the suit; and the other plea, after questioning the amount of mesne profits claimed by the plaintiff, goes on to say that "the entire amount of the profits of mauza Saidpur and Mangalpur comes to Rs. 242, half of which, Rs. 121, is paid to the proprietors of Patti Mahabal Singh, that the plaintiff himself has refused to take the amount which he is entitled to, according to proportion, on account of the share purchased by him."

Among the *pro formâ* defendants, Sat Narain (defendant No. 5), Ram Parsan (defendant No. 6), and Ram Dayal (defendant No. 7), defended the suit upon allegations supporting the case set up by the principal defendants; whilst Ram Khilawan (defendant No. 8)

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raised the plea that he was improperly impleaded in the suit, and the remaining defendant (No. 4), Nand Kumar Singh, did not appear to defend the suit at all.

The lower Court held that the defendants had failed to prove their allegation that they held any *gaw anda-dari* right in the property; that the plaintiff had succeeded in proving that the mortgage of 1812-13 did not relate only to the *malikana* right as stated by the defendants, but to the full proprietary right in the lands of the villages which represented the share of Mahabal Singh; that the mortgage having been liquidated by the lapse of the year 1278 fasli, the plaintiff was entitled to proprietary possession by redemption of the share belonging to him, together with mesne profits of such share; that he was also entitled to obtain possession as mortgagee of the shares of Ram Khilawan and Nand Kumar who had not resisted the suit, but that he was not entitled to claim possession of the shares of Sat Narain, Ram Parsan, and Ram Dayal, who had contested the plaintiffs by supporting the case set up by the principal defendants-mortgagees. To the extent of the shares of the last named three persons, the suit was therefore dismissed, and the question of determining the amount of mesne profits was left by the Court for decision in execution of the decree.

From the decree so passed by the lower Court, only the principal defendants-mortgagees have preferred this appeal, and the argument of the learned counsel for the appellants raises only one main question for determination, namely, whether the defendants-appellants possessed any *gawanda-dari* rights in these villages at the time of the mortgage; in other words, did Mahabal Singh under that mortgage place them in possession of the village lands, &c., or only mortgage his right to receive the fixed *jama* of Rs. 121 under the conditions stated by the defendants? There is therefore only one issue for determination in this appeal, and its decision relates only to the weight of evidence in the case, and raises no main question of law.

Before proceeding further, I wish to decide a question upon which much argument has been addressed to us on either side. One of the most important pieces of evidence produced by the plaintiff to support his case was a copy on plain paper, purporting

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to have been transcribed from a certified copy of the decree of the 17th May, 1813. The document was admitted by the lower Court in evidence on the ground that, the original decree having been destroyed, the plaintiff had made fruitless attempts to obtain a certified copy, that the defendants were in all probability in possession of a certified copy of the decree, but did not produce it as it would not support their case. The learned counsel for the appellants contended that the copy was produced under suspicious circumstances and could not be relied upon, whilst Mr. Colvin on behalf of the respondent supported the admissibility of the document upon the ground that the evidence upon the record proved that the copy produced in evidence was transcribed from a certified copy, and could therefore be regarded as secondary evidence of the contents of the original decree. I am of opinion that the argument urged on behalf of the appellant on this point has force. Whatever the law may have been upon the subject before the passing of the Indian Evidence Act (I of 1872), the rules contained in that enactment must now be strictly observed. S. 61 of the Act lays down that "the contents of documents may be proved either by primary or by secondary evidence," and I understand the rule to mean that there is no other method allowed by law for proving the contents of documents. S. 62 defines the meaning of primary evidence; s. 63 describes what constitutes secondary evidence within the meaning of the Act; and cl. (*c*) of the section lays down in express language that "a copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but a copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original." There is no evidence in this case, even if the whole deposition of the plaintiff's witness Anup Narain be accepted, which proves that the copy of the decree now produced in evidence was compared with the original decree, and I therefore hold that it was not admissible in evidence, because it could not be regarded either as primary or secondary evidence of the contents of the original decree. The contents of the copy must therefore be kept out of mind in determining this appeal.

The question then is, on whom lay the burden of proof in this case in regard to the existence of the *gawanda-dari* tenure alleged

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by the defendants-appellants? But before determining this question, especially with reference to the expression as used in evidence, it seems to me necessary to ascertain the exact nature of the tenure known as *gawanda* in the district in which the property in suit is situate. In the *North-Western Provinces Gazetteer*, vol. XIII, p. 63, under the heading of cultivatory tenures, the following account is given of *gawanda-dari* :—" A tenure peculiar to the eastern portion of the district is the *ganwadh* (of uncertain derivation—a corruption, perhaps, of *ganw-wara*). The normal form of this tenure is the grant at a fixed rent of a whole village, or definite tract within a village, to a community of Brahmans. Where this can be inferred to have existed at the permanent settlement, the tenure is proprietary; in other cases, the precise definition and legal quality are rather doubtful. *Ganwadhs* may originate by grant as above mentioned, by purchase, or even by mere usurpation on the part of the village headmen. In the last case it is confused with, and generally indistinguishable from, the *tika istimrari* or 'perpetual lease,' another not unfrequent tenure in which a whole village or definite part of it is leased to the *mukaddam* or headman at a fixed rent. In the case of *ganwadhas* and *tikas*, the *status* of the under-tenants that pay rent to the *ganwadhars* and *tikadars* is somewhat obscure, and has to be determined, when dispute arises, by the investigation of each particular instance. For it may happen that the under-tenant is a mere tenant-at-will, incapable by law of acquiring occupancy-right by lapse of time, or he may be a fixed rate tenant whose holding dates before the *ganwadh* or *tika*, or may have acquired occupancy-right under a *ganwadhar* whose own tenure is recognised as proprietary." The tenure thus described seems to have existed in *Sheopertab Narain Singh* v. *Hurshunker Pershad Singh* (1), as well as in *Likhun Pathuk* v. *Roop Lal* (2), in both of which cases the nature of the tenure was referred to. In the present case, however, the nature of the *gawanda-dari* right claimed by the defendants-appellants is specifically described by themselves in para. 3 of their written statement; they admit distinctly that the full proprietorship of the villages, including the right to actual possession of the lands, &c., did at one time vest in Babu Abhai Singh, ancestor of Mahabal Singh, and that the *gawanda-dari*

(1) N.-W. P. H. C. Rep., 1873, p. 40. (2) N.-W. P. H. C. Rep., 1871, p. 48.

tenure was created by the former by grant of a deed of *gawanda-pattar* to the defendant's ancestors, and that the *gawanda-pattar* was in their possession up to the year 1872, when a fire in the defendant Ram Prasad's house destroyed the document. The original mortgage-deed and the decree of the 17th May, 1813, would have been equally important pieces of documentary evidence in the present case, and it was alleged that they were in possession of the defendants-appellants, who, without denying that the documents were at one time in their possession, stated (in para. 5 of their written statement) that they were burnt along with the *gawanda-dari pattar* in the fire to which reference has already been made. Under these circumstances, the occurrence of the fire and the burning of the bundle of papers said to have contained these three important documents, constitute an important subsidiary point for arriving at any conclusion upon the merits of the case. The evidence upon the point, however, is either hearsay or unsatisfactory. There may possibly have been a fire in the defendant Ram Prasad's house, but it is certainly not proved that the *gawanda-pattar*, the mortgage-deed, or the decree of the 17th May, 1813, were burnt in that fire. On the other hand, the application made by the defendants, dated 7th July, 1868 (paper No. 174 on the record), in a former litigation contains such specific reference to the decree that I agree with the learned Subordinate Judge in holding that it must at that time have been in their possession. The destruction or loss of these three important documents not having been proved, their non-production by the defendants places them under the recognized prohibitions of the law of evidence, and subjects them to the presumption recognized by illustration (*g*), s. 114 of the Evidence Act, "that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it." It appears from an attested copy (paper No. 135 on the record) that the plaintiff's ancestor made an application on the 13th August, 1872, to the proper authorities for obtaining a duly attested copy of the decree of the 17th May, 1813, but the application could not be granted, because the original decree no longer existed among the official records. It is clear that, neither the plaintiff nor his ancestor having been a party to the litigation of 1813, they could not be expected to have obtained a certified

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copy of the decree, and it is equally clear that under the circumstances of the case the non-production by the defendants of the alleged *gawanda-dari pattar*, and of the mortgage-deed, and the decree, leaves the plaintiff in a more or less helpless position in contesting the case set up by the defendants as to their *gawanda-dari* right. The case therefore upon this point falls within the purview of the rule laid down by the Lords of the Privy Council in *Rajah Kishen Dutt Ram Pandey* v. *Narendar Bahadoor Singh* (1), which was a suit for redemption, and in which, the mortgage-deed not being forthcoming, there was a contention between the mortgagor and the mortgagee as to the exact terms of the mortgage. Their Lordships observed :—"It appears to their Lordships that in such a case as the present it lies upon the plaintiff to substantiate his case by some evidence—by some *primâ facie* evidence at least. But in this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence, and although the burden of proof *primâ facie* in this case, in their Lordships view, is upon the plaintiffs, still they think the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be, *primâ facie* at all events, more in his power to give accurate evidence of its contents. ......... The plaintiff, by the hypothesis, would not have seen the document, or probably have had access to it from the time of its execution, which in this case was the year 1840 ; whereas the defendant would be assumed to have it and to be able to produce it, to show why he could not, and to give some evidence of its contents if it were lost."

I have quoted these observations at such length because they seem to me to be especially applicable to the circumstances of the present case, which indeed in some points furnishes even stronger grounds for applying the rule than the case before their Lordships of the Privy Council. Here the plaintiff, who is simply a purchaser of a portion of the right of Mahabal Singh, was no party to the alleged *gawanda pattar ;* he was no party to the mortgage of 1812, nor to the litigation which resulted in the

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decree of the 17th May, 1813. He cannot, therefore, be taken to be in a position to produce those documents or to prove their contents by secondary evidence. The defendants, on the other hand, whilst in a position which would involve their being in possession of the documents, and whilst admitting that they were in possession of them up to the year 1872, have failed to prove either their destruction or their contents by secondary evidence, such as can be relied upon. The plaintiff, on the other hand, has, in my opinion, shown a very good *primâ facie* case which the defendants have not been able to rebut.

This leads me to the consideration of the various points in the evidence; but before doing so I wish to notice an argument which has been addressed to us with especial cogency by Mr. Colvin on behalf of the plaintiff-respondent. The main feature of the defendant's case is, that the mortgage of 1812-13 was executed in lieu of a sum amounting to no less than Rs. 4,684; that it was a *patwari* mortgage for a definite term of fifty-eight years; that is, the mortgage would, by the very lapse of its term, be liquidated from the usufruct of the mortgaged property, or rather from the fixed annual *malikana jama* of Rs. 121, which the defendants represent to have been the limit of the rights of Mahabal Singh which he gave in mortgage as security for repayment of the debt. Further, the defendants' case is, that out of this sum of Rs. 121, Rs. 50 were to go towards payment of the Government revenue and only Rs. 71 were to be appropriated by the defendants-mortgagees towards payment of principal and interest due on the mortgage. Now, Mr. Colvin has effectively shown that such a hypothesis is rebutted by purely arithmetical calculation. It must be remembered that, according to the defendants' case, not the zamindari rights in the lands, &c., of the village, but only the fixed sum of Rs. 71, the annual *malikana jama*, was given as the sole security for repayment of the mortgage-debt. Now this annual sum of Rs. 71, if multiplied into fifty-eight, which is the number of years constituting the term of the *patwari* mortgage, would yield only a sum of Rs. 4,118, which falls short even of the alleged principal sum of the mortgage by no less than Rs. 566. A mortgage of such a nature is not intelligible in the ordinary course of human affairs, and the result of Mr. Colvin's argument by

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arithmetical calculation shows the absurdity of the defendants' case, in proportion to the rate of interest which may be assumed as having been agreed upon between the mortgagor and the mortgagee. The rate of interest, if assumed at 12 per cent. per annum, would yield more than Rs. 500 per annum, and even if 6 per cent. per annum is assumed to be the rate, the annual interest alone would be more than Rs. 250 per annum. This circumstance alone seems to me to raise a strong presumption in favour of the plaintiff's allegation that the mortgage by Mahabal was a mortgage not of his alleged *malikana jama*, which, according to the defendants' case, was a fixed sum under the *gawanda pattar*, incapable of increase, but the subject of the mortgage was the zamindari rights in the lands of the village, which might well, by increase of cultivated area or otherwise, have been regarded as likely to yield sufficient usufruct to satisfy not only the principal, but also the interest due on the mortgage. It may here be added in connection with this point that the defendants in this very case pleaded that the profits of the mortgaged property were less than those stated by the plaintiff.

In the face of such circumstances, which establish a strong *primâ facie* case in favour of the plaintiff-respondent, it was incumbent upon the defendants-appellants to have produced the strongest possible evidence to substantiate their case. They failed, as I have already said, to produce the best documentary evidence which would conclude in their favour the point in contention between the parties. And with the presumptions against them, which their course of action in the suit involves, I have to consider whether the evidence produced by them substantiates their case. (The learned Judge then proceeded to consider this evidence, and, being of opinion that it did not substantiate the defendants' case, came to the conclusion that the appeal should be dismissed.)

BRODHURST, J.—I concur with my learned colleague. The appeal is dismissed with costs.

*Appeal dismissed.*