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which has afterwards been cancelled, cannot order restitution of the property which has been wrongfully taken and any mesne profits which may have been derived from it in the meantime.

Speaking for myself I do not think that this restitution is a proceeding which comes within the meaning of s. 244 of the Code of Civil Procedure, but I think it is an inherent right in the Court itself to prevent its proceedings being made any cause of injustice or oppression to any one, and therefore it seems to me that that inherent right does exist, and that the Court has a power under that inherent right to order restitution of the thing which has been improperly taken, and as a part of that power it must have the right and the power to order restitution of everything which has been improperly taken. If they have that power they have the power not only to order restitution of the property itself but restitution of any proceeds which have been improperly taken during the time that it was in the possession of the person who was not entitled to it. These proceeds which have been received are the mesne profits of the property; and, therefore, it seems to me, it being admitted that there is a power in the Courts to order restitution of the property, it must follow that they have the power to order restitution of the mesne profits, and therefore the order of the Court below, directing the restitution of the property and the return of the mesne profits, was perfectly correct. The appeal must, therefore, be dismissed with costs.

T. A. P.

Appeal dismissed.

PRIVY COUNCIL.

P. C.* 1887 *February* 15 *and* 16.

KRISHNA KISHORI CHAODHRANI AND ANOTHER (DEFENDANTS) *v.* KISHORI LAL ROY (PLAINTIFF).

[On appeal from the High Court at Calcutta.]

Evidence Act (I of 1872), *ss.* 65 *and* 74—*Secondary evidence of contents of document.*

Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in

* *Present:* LORD WATSON, LORD FITZGERALD, SIR B. PEACOCK and SIR R. COUCH.

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such manner as to bring it within one or other of the cases provided for in s. 65 of the Evidence Act, I of 1872 (1).

An *anumatipatra* is not a public document within the meaning of s. 74, nor, if it were, would its being on the record constitute a copy certified as required by s. 76.

APPEAL from a decree (16th April, 1884) of the High Court, reversing a decree (20th June, 1881) of the Subordinate Judge of Rajshahye.

The suit out of which this appeal arose related to the estate of Anand Sunder Mozumdar, deceased, on 11th February, 1876.

Chandramoni, wife of Goluck Nath Roy, who died in 1840, survived her husband 28 years. She had two daughters, one of whom, Ujalmoni, was alleged by the plaintiff to have adopted him in 1851 under power from her husband, then deceased. The other daughter was married to Sham Sunder Mozumdar, and was the mother of Anand Sunder Mozumdar, deceased, who was, in his lifetime, married to Krishna Kishori, the defendant.

The plaintiff sued (5th March, 1880) as adopted son of Ujalmoni to obtain possession, with mesne profits, of one moiety of all the estates, which on Goluck Nath's death had come to his sonless widow Chandramoni, to which moiety he, the plaintiff, claimed to have become entitled on the death of Chandramoni on 4th April, 1868, at which time Anand Sunder had taken wrongful possession.

The questions now raised related to the genuineness and effect of an alleged *anumatipatra*, said to have been executed by Goluck Nath on 17th Magh 1246 (January, 1840), containing a power to Chandramoni to adopt. As to this the High Court (MCDONELL and FIELD, JJ.), reversing the decision of the first Court, thus stated their opinion:—

"The conclusions, therefore, at which we arrive may briefly be summed up as follows: We think that there was undoubtedly an *anumatipatra* executed by Goluck Nath Roy; but we are of opinion that the non-production of this original document has not been sufficiently accounted for so as to render secondary evidence of its contents admissible. We are of opinion that the

(1) See *Bhubaneswari Debi* v. *Harisaran Surma Moitra*, I. L. R., 6 Calc., 721.

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copy produced to prove the original has not been shown to be a true copy, and we think that grave suspicion must attach to its genuineness. It must be borne in mind that Sham Sunder is shown to have had a large share in the effectual management of the property during Chandramoni's lifetime, and the testamentary provisions in the copy of the *anumatipatra* now set up are calculated exclusively to benefit his son. Even if we assume the copy to have been rightly admitted and to be good evidence of the original, we think, for reasons already given, that Anand Sunder Mozumdar can take no interest under this *anumatipatra* either by descent or by purchase.

"The result is that the decree of the Subordinate Judge must be reversed, and that the plaintiff must have a decree for a moiety of the property left by Goluck Nath Roy."

For the appellant Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne*, contended that the Court of first instance had rightly found that the original *anumatipatra* had been accounted for so as to let in secondary evidence of its contents.

Counsel having also been heard on the whole case, Mr. *J. D. Mayne* (with whom was Mr. *J. Rigby, Q.C.*) was not called upon.

SIR B. PEACOCK delivered their Lordships' judgment:—

The question upon which this case must be determined is whether there was proof of the document alleged to have been executed by Goluck Nath Roy in the year 1840.

The plaintiff claims to be entitled to half the estate which belonged to Goluck Nath. Goluck Nath died, leaving only a widow and two daughters. The plaintiff is the only son of one of those daughters, and would be, if there were no will disentitling him to the property, entitled to the half share which he seeks to recover in the action. But the defendant in the action sets up that, in a power to adopt which Goluck Nath executed in the year 1840, he devised, in the event of no adoption being made, the half share, which would otherwise go to the plaintiff, to the other daughter and her son. After giving his widow power to adopt, he says: "God forbid if, without any son being begotten of my loins, I should die, and you also should suddenly die without having made"—the literal translation is "having delayed to make"—"an adoption, then my younger daughter

Roopmunjari, and her son, that is my grandson by my daughter's side, shall become entitled to, and shall exclusively possess, all my above-mentioned zemindaries," &c. The question is, has it been proved that those words are contained in a document executed by Goluck Nath.

It is said that the original document was filed in the Collector's office when the widow, after the death of Goluck Nath, applied for mutation of names. It was unnecessary for the Collector, in deciding whether the name was to be changed from that of the deceased husband to that of the widow, to enquire into any subject except whether the widow was entitled to have her name substituted for that of her deceased husband. It was no part of his duty to enquire who, on the death of the widow, would be the reversionary heirs ; and it is to be remarked that when she put in her petition to the Collector for the mutation of names, although she said that her husband had given her power to adopt, she did not go on to say that in that document he had devised over the estate to the second daughter and her son in the event of her not adopting. The Collector, also, in adjudicating that the widow's name was to be substituted for that of her husband, does not allude to that portion of the document. He merely declared that it has been shown to him ; that the widow represents her husband ; and that her name should be entered in the Collectorate in place of that of her husband.

It is stated that Goluck Nath, after he had executed the document, notified to the Judge that he had given his widow power to adopt. Those proceedings are before the Court ; but there is nothing in them to show that, when he spoke of having given his widow power to adopt, he ever mentioned the fact of his having devised over the estate to his second daughter and her son in the event of the widow's not adopting.

The original document is not produced, but the parties have endeavoured to give secondary evidence of it, and in order to let in secondary evidence they endeavoured to show that the document was burnt in a fire. The learned Judge of the first Court, in dealing with this subject, does not go so minutely into the question as the High Court have done. He says: "The *anumati-*

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patra will relied upon by the defendants is dated" so and so, "but the original deed was burnt up by setting fire in the cutcha cutchery bungalow of the deceased Chandramoni, and its loss was satisfactorily accounted for by the depositions of the defendant's witnesses." That is all he says upon the subject. The High Court in dealing with that question go more minutely into it. They say: "We have considered the evidence as to the loss of this document, and it by no means satisfies us. When the copy was filed in 1868 this account was not given of the loss of the original, and we think that, if this were a true account, the fact of the loss by burning would have been stated at that time. At page 15 of the Paper Book, in Appeal No. 260, there is a judgment in a suit, No. 31 of 1870, which contains a statement as to the loss of the document, and this was relied upon to show that a different account was given on this occasion. We think we cannot accept the recital of facts in the judgment as evidence of a different account having been given on a previous occasion; but we are of opinion that we may properly make the observation that the account of the loss by burning, now given, was not given in 1860." But further there is a very important remark which may be made in addition to that of the High Court. In the record to which they refer it is said: "The plaintiff has failed to produce the original will or *anumatipatra:* he has only produced a copy of an *anumatipatra* of 17th Magh 1246, as executed by Goluck Nath Roy, in favor of Chandramoni, and the plaintiff's witnesses Nos. 2 and 3 have stated that the plaintiff searched for, but could not find, the original *anumatipatra.*" Now, if he knew that it was burnt, how could he produce witnesses to say that he had searched for it? He not only does not give the same account, but he gives an entirely different account. He says now that it was burnt. He said in a proceeding subsequent to the alleged date of the burning that he searched for the document but he has not been able to find it.

The High Court then go on: "Upon the evidence we think that the account now given is not entitled to credit, and we feel bound to say that the defendant has not proved the loss

of the original so as to entitle him to give secondary evidence of its contents."

Their Lordships are of opinion that the High Court came to a correct conclusion upon that point, and that being so, the loss or destruction of the document not having been proved, secondary evidence was not admissible under cl. (*c*), s. 65, of the Indian Evidence Act. There are however cases under that Act in which secondary evidence is admissible even though the original is in existence. One of the cases is under s. 65, letter (*e*): "When the original is a public document within the meaning of s. 74." And another under letter (*f*): "When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence." But in either of those cases "a certified copy of the document, but no other kind of secondary evidence, is admissible." If then the *anumatipatra* was a public document within the meaning of s. 74 of the Act, which in their Lordships' opinion it was not, no secondary evidence would have been admissible except a certified copy. Where is the certified copy? The document which is set out at page 118 of the Record is not a certified copy. There is no certificate of any public officer that it is a true copy of a document contained in the office. *See* s. 76.

Then, again, it is said that the Judge, on the trial, sent for the proceedings before the Collector's Court, and that they were sent up to him; and at page 218 of his Record we find that there is what is said to be an authenticated copy of the document in the proceedings. But that document was not a certified copy, and there is no evidence whatever to show that it had ever been examined by any witness with the original document, which was said to have been at one time in the Collector's office.

Their Lordships, therefore, are of opinion that there was no sufficient evidence of the loss or destruction of the original, and no sufficient secondary evidence, within the meaning of the Evidence Act.

Even if parol evidence were admissible as secondary evidence, their Lordships cannot rely upon such evidence as was given in 1881 with reference to the contents of a document which had

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been executed forty years previously. The only witness who was an attesting witness says that he recollects a document being executed, but he cannot say whether it contained the words which amount to a devise over to the daughter and her son. There is no evidence on the part of the attesting witness that the document did contain a devise, and there is only the evidence of witnesses who can hardly be supposed to have known at the time, or even if they did know at the time, to have recollected the contents of a document by which it is contended that the estate of this gentleman was alienated from him by the will of his grandfather.

Then, again, it was stated that, at the time of the making of the will, the second daughter's son was born, and that the child was in the lap of the mother when her father gave the power to his widow to adopt, and also devised his estate to the daughter and her son in case the widow should not adopt. From the contents of the document it appears that the testator was not speaking of a son to be born, but of a son who was then actually in existence. From the evidence which was given it appears to be clear that at the time Goluck Nath executed this document, giving his widow power to adopt the child, Anand Sunder was not in existence. The High Court have very carefully gone into the evidence upon that subject, and they have shown conclusively that the child was not in existence at the time when the document is alleged to have been executed.

Looking, then, to all the evidence in the case, their Lordships are of opinion that the High Court, who gave a very carefully considered judgment and weighed the evidence with great care, came to a right conclusion upon the evidence, that the will was not executed by Goluck Nath, and consequently that the plaintiff is entitled to recover his half share, and that the judgment of the High Court ought to be affirmed.

Their Lordships will, therefore, humbly recommend Her Majesty to affirm the judgment of the High Court, and the appellant must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *Sanderson & Holland.*

C. B.