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necessarily or invariably be enforced in such manner as to encourage interference on the part of the Sessions Judge with orders passed by the District Magistrate in the exercise of his appellate jurisdiction. At any rate, I regard the circumstances above stated as affording in themselves a reasonable ground for making an exception to the general rule of practice in question. In the present case the application in revision was presented to myself personally and I admitted it. I hold that my order of admission, even though passed *ex parte*, was sufficient to take this case out of the operation of the rule of practice in question. The order of admission was an order under section 435, clause (1), of the Code of Criminal Procedure; it was within the discretion of this Court, and, once passed, it was not open to any party concerned to call it in question.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Walsh.

1919 *April*, 15.

DWARKA SINGH (DEFENDANT) v. RAMANAND UPADHIA AND OTHERS (PLAINTIFFS) AND BACHCHU SINGH AND OTHERS (DEFENDANTS).*

Act No. I of 1872 (Indian Evidence Act), sections 65,66,90—Secondary evidence of document—Original withheld by party who knew it would be required—Certified copy produced by plaintiff—Presumption as to ancient documents applied in case of a certified copy.

In a suit for redemption of a usufructuary mortgage the plaintiffs tendered in evidence a certified copy of the mortgage bond, which was executed in the year 1876. There was no evidence that they had called upon the defendants mortgagees to produce the original document.

Held (1) that from the nature of the case the defendants must have known that they would be required to produce the original mortgage, which presumably was in their possession, and therefore the certified copy was admissible, and (2) that the presumption allowed by section 90 of the Indian Evidence Act, 1872, could be applied when a certified copy, being admissible, was produced in evidence, in the same way as it could be applied to an original

*Second Appeal No. 419 of 1917, from a decree of Shekhar Nath Banerji, Subordinate Judge of Jaunpur, dated the 30th of January, 1917, modifying a decree of Farid-ud-din Ahmad Khan, Additional Munsif of Jaunpur, dated the 20th of July, 1916.

document. *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (1) followed. *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (2) and *Ponnambalath Parapravan* v. *Karoth Sankaran Nair* (3) referred to.

THE facts of the case are fully stated in the judgment of the Court.

Pandit *Radha Kant Malaviya*, for the appellant.

Dr. *S. M. Sulaiman* and Pandit *Braj Nath Vyas*, for the respondents.

MUHAMMAD RAFIQ, J.:—The two appeals Nos. 419 and 420 are connected and arise out of a suit brought by the plaintiffs respondents for redemption of a mortgage. They stated in their plaint that the mortgage was executed by one Musammat Phulbasi on the 3rd of June, 1876, in favour of Bhairon Singh, the predecessor in interest of the defendants. The mortgage was in lieu of Rs. 300 and was with possession. Musammat Phulbasi died leaving her surviving a son called Ram Sundar. He executed a sale deed in respect of the mortgaged property in favour of the plaintiffs. The latter served a notice on the defendants asking for redemption on the 27th of April, 1915, alleging that the mortgage had been satisfied by the appropriation of the timber on the property. The defendant declined to make over possession of the mortgaged property, and on the 18th of June, 1915, the suit out of which the two appeals have arisen was instituted by them for redemption. In addition to the recovery of the property without payment, the plaintiffs asked for Rs. 215 damages for mesne profits. The defendants resisted the claim on various pleas. They denied the mortgage of the 3rd of June, 1876, as also the allegation that Ram Sundar was the son of Musammat Phulbasi. They stated that the property in suit was their own and in any case they had been in adverse possession for more than 12 years. The original mortgage-deed was not produced in the case. The plaintiffs filed a certified copy of the deed, which was admitted by the court. The court held that as the original mortgage-deed must have been made over to Bhairon Singh, the mortgagee, and must have come, after his death, in the possession of the defendants, they should have

(1) (1900) I. L. R., 22 All., 294. (2) (1880) I. L. R., 5 Calc., 886.

(3) (1907) 12 Indian Cases, 458.

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produced it, and as they had failed to produce the original document, the plaintiffs were entitled to give secondary evidence by producing a certified copy of the original deed. The court further held that the presumption under section 90 of the Evidence Act could be raised in respect of a certified copy filed on behalf of the plaintiffs. The revenue entries from 1864 up to the present day were also filed in the case which show that the owner of the property was the husband of Musammat Phulbasi and after his death her name was entered as owner and subsequently as mortgagor. After her death the name of her son, Ram Sundar, was substituted and he was shown as the mortgagor. The names of Bhairon Singh and the defendants were shown in the revenue papers ever since 1876 as those of mortgagees. Taking the said entries into consideration and the presumption under section 90 of the Evidence Act the learned Munsif held the mortgage of 1876 proved. The other pleas in defence were also disallowed. The allegation of the plaintiffs with regard to the satisfaction of the mortgage was disbelieved. A decree was passed in favour of the plaintiffs-respondents for redemption of the property on the payment of Rs. 300. Under the said decree the plaintiffs were to bear their own costs as also the costs of the defendants. Both parties appealed to the lower court, the plaintiffs with regard to costs and the defendants with regard to the decree for redemption.

The lower appellate court dismissed the appeal of the defendants, maintaining the decree for redemption, and accepted the appeal of the plaintiffs partially, making each party to bear his own costs. The defendants preferred two appeals to this Court, namely Nos. 419 and 420. The two appeals came up before me on the 20th of January, 1919, when three objections were urged on behalf of the appellants against the decree of the lower court, namely, first that the mortgage of 1876 is not proved, *secondly* that the defendants have proved their adverse possession for more than 12 years prior to the institution of the suit, and *thirdly* that no tender having been made by the plaintiffs, their claim is not maintainable. In my judgment of the 20th of January, 1919, I have given reasons for the rejection

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of the 2nd, and 3rd objections. The first objection relating to the proof of the mortgage of 1876, raised a point of law about which I found a conflict of authority in this Court and therefore I referred the case to a larger Bench. The only point now before us is whether the mortgage which the plaintiffs seek to redeem has been proved according to law. The contention for the defendants appellants is that the plaintiffs have only filed a certified copy of the mortgage of the 3rd of June, 1876, and no presumption under section 90 can be raised in respect of it. The language of the section clearly shows that the section applies only to the case of an original document and not to a certified copy. On the other hand, the argument for the plaintiffs respondents is that the use by the Legislature of the words, "when any document is produced," does not limit the operation of the section to cases in which the document is actually produced in court. Secondary evidence of an ancient document is, therefore, admissible without proof of the execution of the original when a case is made out under section 65 of the Evidence Act. In support of his argument the learned counsel for the respondents relies upon the following cases:—*Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (1), *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (2), and *Ponnambalath Paraparavan* v. *Karoth Sankaran Nair* (3).

The reply for the appellants is that these cases were wrongly decided and that the provisions of section 90 were not carefully considered. Reliance is placed by the appellants on a passage in the judgment of a Bench of this Court in first appeal No. 13 of 1913, decided on the 6th of July, 1914. The passage in question is as follows:—"Section 90 of the Evidence Act only applies when the document is produced and the presumptions therein mentioned are presumptions in favour of a document which is actually produced. Even then the court is not bound to presume, although it is entitled to do so if it thinks fit. There is no presumption in favour of a document, the copy of which is produced in evidence." On a reference to the facts of that case it appears that no question of presumption under section 90

(1) (1880) I. L. R., 5 Calc., 886. (2) (1900) I. L. R., 22 All., 294.

(3) (1907) 12 Indian Cases, 453.

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arose, inasmuch as the loss of the original mortgage-deed had been satisfactorily proved. The observations about the application of section 90 to a certified copy were merely an expression of opinion which need not have been made as far as the decision of that case was concerned. The cases relied upon by the plaintiffs respondents were not brought to the notice of the learned Judges who decided it. I agree with Mr. Justice WILSON, in his observations in the case of *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (1). The language of section 90 does not limit or confine the application of the section to cases where the original document is actually produced in court. This Court also took the same view in the case of *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (2), on the construction of the section contended for by the appellants. It would open a door to fraud by enabling a mortgagee to withhold the mortgage deed and thus defeat the claim for redemption. I think that the lower courts were right in applying section 90 to the certified copy of the mortgage of 1876 filed by the plaintiffs. There is one more point to be considered in connection with the objection of the appellants. The learned counsel has contended that no notice for the production of the original was served upon his clients, and omission to give such a notice is fatal to the case of the plaintiffs, and that they were not entitled to give secondary evidence unless and until they had served a notice upon the defendants to produce the original. I do not think that there is any force in this contention. According to section 66 of the Evidence Act, secondary evidence of the contents of the documents referred to in section 65, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, (or to his attorney or pleader), such notice to produce it as is prescribed by law, except in the six cases mentioned in the section. One of the exceptions is :—" when, from the nature of the case, the adverse party must know that he will be required to produce it." In the present case the defendants must have known that the mortgage deed in their possession would be required in evidence in the case. They failed to produce it. The plaintiffs were,

(1) (1880) I. L. R., 5 Calc., 886 (2) (1900) I. L. R., 22 All., 294.

therefore, entitled to give secondary evidence of the deed without giving any notice to the defendants or their pleader, calling upon them to produce the original. I would, therefore, hold that there is no force in the appeal and that the appeal should fail.

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WALSH, J. :—On the question of law referred to this Court by my brother I agree that the presumption permitted by section 90 of the due execution and attestation of a document which is shown to be 30 years old may be made by the court where that document cannot be produced but a certified copy of it is forthcoming.

In this case the defendant, the suit being one for redemption, was an adverse party who must have known that he would be required to produce the original of the mortgage. Notice to produce the document, therefore, was excused by section 66(*a*). The loss of the original or its wilful non-production by the defendant, it matters not which, therefore, made a certified copy admissible under section 65. That certified copy was admissible to prove the original, in other words, to prove what the original, if produced, would have proved. I feel bound to say that the language of the section seems to me to permit by its express terms the presumption which has been applied in this case only to an original which is produced, and I find myself unable to accept the explanation which is given of the word "produce" as not meaning production in court, because in my opinion the section is only dealing with the function of a court and no other sort of production in a section of the Evidence Act could be contemplated, and the argument for the appellant in this case is that the document is not produced. I prefer, while agreeing entirely with the result, to base my opinion upon a well-known rule of equity by which the courts have always acted by analogy to a statute which is not expressly applicable. We have to apply the rule of equity and good conscience where an express provision does not happen to have been made and by analogy in the case of the production of a certified copy, as the document would have proved itself if produced, so I think it proves itself by the proper proof and production of secondary evidence which the law allows to be substituted for the original in certain conditions. If this is not in itself sufficient,

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I think it is one of those cases which was probably contemplated by the general power of presumption given by section 114 of the Evidence Act. By that section the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business. Section 90 is really only one illustration of that general presumption. The law says, and rightly says, owing to the long period of time which has expired, that when a document 30 years old is produced it is to be presumed that it was properly executed and attested. That is nothing more than having regard to the common course of natural events, human conduct and public and private business. The probability is that it was. It may of course be expressly proved by the other side that it was not, but the party relying upon the document is not to be punished by its inability to prove the affirmative. It seems to me that in applying the analogy of section 90, which expressly provides for the production of the original, to the production of a properly established certified copy, the court is merely exercising powers given to it under section 114. In any case I think there is clear authority on the subject which ought to be followed in this Court. The point was decided by a single Judge in 1880 in the case of *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (1). That decision was followed by a two Judge decision of this Court in 1900, reported in the case of *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (2), which we ought to follow. A two-Judge Madras Bench took the same view in 1907 in the case of *Ponnambalath Parapravan* v. *Karoth Sankaran Nair* (3). The only suggestion of an authority to the contrary are some *obiter dicta* by the first court in 1914. A perusal of the record of that case shows clearly that these *dicta*, which occur at the end of the judgment, were unnecessary for the decision. As my brother has pointed out, the case was disposed of at an earlier stage by a decision that the loss of the document was not established. The case has not been reported. The judgment shows clearly that the authorities to which we have referred were not mentioned or considered by

(1) (1880) I. L. R., 5 Calc., 886. (2) (1900) I. L. R., 22 All., 294.

(3) (1907) 12 Indian Cases, 453.

the Court. I think it very unlikely if the Court's attention had been drawn to these authorities, that they would have expressed the opinion which they did, at any rate, without considerable argument. It is a point, as has been said, not free from difficulty and one which could not be disposed of by a few cursory observations. I think the dictum relied upon is not an authority at all.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

*EMPEROR *v.* HAR NARAIN.

1919 *April*, 12.

Act No. XLV of 1860 *(Indian Penal Code), section* 430—*Mischief—Act No. VIII of* 1873 *(Northern India Canal and Drainage Act), section* 70.

Where the foundation of the charge against an accused person is that he cut the bank of a canal for the purpose of unlawfully obtaining water for his own field, in order to sustain a conviction under section 430 of the Indian Penal Code it is necessary for the prosecution to show that the act of the accused in fact caused, or, but for prompt intervention, would have caused diminution in the ordinary supply of water for agricultural purposes. If this cannot be shown, the accused should be convicted under section 70 of the Northern India Canal and Drainage Act, 1873. *Taj-ud-din* v. *Emperor* (1) followed.

THIS was an application in revision from an appellate order of the First Additional Sessions Judge of Aligarh.

The facts of the case appear from the following order of the lower court :—

The appellants in this case are two, Har Narain and Chajju. They have been convicted of an offence under section 430 of the Indian Penal Code. It is said that on the night between the 24th and 25th of November, 1918, both the appellants were found cutting the bank of a distributary of the canal and taking water to their fields. To prove the case for the prosecution, four witnesses have been examined, two being officers of the Canal

* Criminal Revision No. 101 of 1919, from an order of Lal Gopal Mukerji, First Additional Sessions Judge of Aligarh, dated the 9th of February, 1919.

(1) (1908) 5 A. L. J., 159.