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I, therefore, agree with my learned colleague in thinking that the findings of the Judge do not cover the case. He has not found that according to the Muhammadan Law the object of the *wakf* was not religious or charitable; what he has found is that the objects are not charitable and religious, according to the ordinary use of the words. This, I think, is not sufficient.

I, therefore, hold that the decree of the lower Appellate Court should be set aside, and that of the Court of first instance restored with costs.

Appeal allowed.

C. D. P.

PRIVY COUNCIL.

*P.C.** 1892. *Feb.* 5. *March* 5.

HARRIPRIA DEBI (DEFENDANT) *v.* RUKMINI DEBI (PLAINTIFF).

[On appeal from the High Court at Calcutta.]

Secondary evidence of the contents of a document—Evidence Act (I of 1872), s. 65—Necessity of accounting for non-production of original document.

Whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage.

In a suit alleging want of authority to adopt, the defence rested on the case that an anumati patro had been given by the defendant's deceased husband, but failed to show that there had been a sufficient search for, and to establish the loss of, the original document, so as to render secondary evidence of its contents admissible.

APPEAL from a decree (21st February 1889) of the High Court, affirming a decree (29th March 1888) of the Subordinate Judge of Midnapore.

This suit was brought by the respondent for a declaration that an adoption, by the first defendant, Harripria, of the second defendant, Jogeshnarain Pati, an infant, whom she represented,

* *Present:* LORDS HOBHOUSE, MACNAGHTEN, MORRIS, and HANNEN, and SIR R. COUCH.

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was invalid. Harripria was the widow of Raja Koer Narain Roy, who died on the 5th of January 1871 (12th Pous 1278); and the adoption, which purported to be made on the 23rd April 1882, was alleged by the plaintiff, the late Raja's daughter, to have been unauthorized. Harripria's case, however, was that the Raja had on the day before his death executed an anumati patro. In her written statement she said:—"Although the defendant is not able now to get the said anumati patro, it will be very well proved by the copy book which was at the time kept in the sherista and by many other proofs."

The defendant filed a copy of a list of documents presented to a Court "on behalf of Srimati Rani Harripria Debi, intervenor." The list was dated the 20th February 1871, and one of the items was, "Anumati patro, deed of permission executed by Raja Koer Narain Roy in favour of Rani Harripria, dated the 27th Pous 1278." Against this entry was written, "I take back this document, Biswa Nath, 5th May." Biswa Nath died in 1883.

The Subordinate Judge having declined to admit what purported to be a copy of the anumati patro, on the ground that proper search for, and loss of, the original had not been proved, a divisional Bench of the High Court (PIGOT and BEVERLEY, JJ.) dismissing an appeal said:—"Now, the circumstances of the case are, that the Raja having died in 1871, and it having been alleged, soon after his death, that an authority to adopt had been given by him to his wife by an attested instrument, and the allegation of the existence of such an authority having been made a foundation for her application for a certificate in respect of his estate, and used both in the Court below and in this Court as a ground justifying the granting to her of that certificate, we find that, for eleven years afterwards, that authority to adopt is not acted upon; and we find that that document is not produced in Court at the hearing of this case, and that no satisfactory evidence of the execution of it or of the contents of it, is produced. Assuming, for a moment, that the absence of the document itself was so accounted for as to justify the admission of secondary evidence,—that is to say, passing over and treating as a technicality the sound rule of law which excludes evidence of the contents of a document not itself brought forward or accounted

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for,—the secondary evidence which is on the record as to the contents of the document, is such as to be wholly unworthy of serious attention. It is stated to have been an authority to adopt, and practically that is all the evidence upon the subject. None of the witnesses to the document, nor the person who engrossed it, Soonder Narain, nor any person who heard it read, nor any person who read it, gives evidence on the subject. So that quite apart from the fact that there is no evidence to account satisfactorily for the absence of the document itself, there is no proof, in the case before us, of the contents of it, or that the document said to have been signed by the Raja was really such as it is represented to have been.

"Then, upon the evidence we should have some hesitation in holding that the Raja was in such a state of health as to make it probable that he did execute such a document on the day on which he is said to have executed it.

"We, therefore, quite agree with the Subordinate Judge in holding that there is no reason whatever, in the case before us, to believe that the Raja ever did authorize in the manner set up by the defendant the adoption by her of a son to him.

"It is said that the plaintiff, in bringing forward her case, ought to have proved that the Raja had died without having given authority to adopt. We have not to consider, however, what the condition of the case might have been had the plaintiff simply tendered evidence such as she gave, and the defendant simply submitted that that was insufficient to justify a decree in favour of the plaintiff. That is not the case before us. The case before us is, that the defendant goes into evidence and seeks to establish a particular authority to adopt; and we think we are bound to come to a conclusion in this appeal upon the evidence tendered by the parties. Upon that evidence we think that the decree of the Court below was right upon the facts."

Mr. *R. V. Doyne* and Mr. *W. A. Hunter*, for the appellant, argued that sufficient proof of search for the missing power was given to lay the grounds for the admission of secondary evidence of its contents. The evidence offered would have established that the late Raja did give authority to the appellant to adopt a son

to him. It was enough for the defendant to show that a real and *bona fide* search had taken place.

Mr. *J. D. Mayne* and Mr. *J. H. A. Branson*, for the respondent, argued that no such ground had been laid, and that the document tendered had not been proved to be a copy of the original.

Mr. *R. V. Doyne* replied.

Reference was made to Act I of 1872, section 65.

Afterwards on 5th March, their Lordships' judgment was delivered by—

LORD HOBHOUSE.—On the 5th January 1871 Raja Koer Narain Roy died without male issue, leaving a widow, the appellant Harripria, who is defendant in this suit, and two daughters, one of whom is Rukmini, the respondent and plaintiff in the suit. Harripria therefore is his heir, and the two daughters are the reversionary heirs-apparent.

On the 23rd April 1882 the defendant adopted a son to her husband, alleging that she had authority to do so by virtue of an anumati patro, or power, executed by the Raja on the 4th January 1871.

In March 1887 the plaintiff brought this suit, alleging that the defendant had no authority to adopt, and praying for a declaration that the adoption made by her is contrary to law and invalid. Setting aside an objection for want of parties which was rightly decided in the plaintiff's favour, the defence rested on the ground that the Raja gave a lawful authority to make the adoption which was made. That has been decided against the defendant, on the ground that her proof is defective.

The original document said to have been executed by the Raja is not forthcoming. The defendant sought to prove that it had been lost, and tendered what she alleged to be a copy. The Subordinate Judge considered that there had not been any such amount of search for the original as would justify the Court in admitting a copy, and therefore, there being no evidence of the power, he gave the plaintiff a decree.

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The defendant appealed. The rejected document was added to the record, where it stands as Exhibit 9. The High Court held that the evidence did not show that it was a copy of any document to which the witnesses deposed as having been executed by the Raja: and on that ground, and also because they agreed with the Subordinate Judge that there had been no sufficient proof of search for or loss of the original, they dismissed the appeal. The present appeal is from that decree.

There is some evidence that the day before his death the Raja signed and gave to Harripria an anumati patro to take a son in adoption. After his death a cousin named Gojendra applied to the Civil Court for an administration certificate, and the defendant resisted that application. In that proceeding a document, of which Exhibit 9 is alleged to be a copy, was filed by Biswa Nath, the defendant's general mokhtar, on the 20th February 1871, and was taken back again by him on the 5th May 1871. It is stated that he promised to return it to the defendant's office, but never did so. He died in March 1883. After that the search was made, the sufficiency of which is in dispute.

The evidence to prove a sufficient search has been subjected to a very careful and minute criticism at the Bar. Their Lordships will make only one remark on it. The point is one which is proper to be decided by the Judge of First Instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a very clear case of miscarriage. But the evidence here is very far indeed from raising a case for overruling the Subordinate Judge, even if his judgment had not been supported as it has been by the Appellate Court.

That would be sufficient to dispose of the appeal on the first point, but the evidence on the second point is such as to lead their Lordships to express a clear opinion that the High Court have decided it rightly. The original document in question was not registered, and, though filed in the certificate case, it was not proved. Exhibit 9 purports to be the copy of a document filed on the 23rd January 1871, and to be issued on the 24th February 1871, with the signatures of Khetter Mohun Jana, and of Mohendra Nath Ghose, the Sheristadar of the Midnapore Court, and it bears the seal of that Court. This is the whole evidence to

prove it, and in effect the defendant claims that the document shall furnish its own proof. No evidence is produced to show how, by whom, or at whose instance the copy was made, or how it came to be in the defendant's hands; and what is more important, no evidence to show that any one compared it with the original. The only witness who speaks to the execution of the power is Dhurjati, who was the Raja's record-keeper in 1871. He says that Madhub, the Raja's dewan, had prepared a draft; that, at the request of the Raja, he read it out in the presence of many witnesses; that it was then copied fair by Soonder Narain, the Raja's seha-nuvis, writing from Madhub's dictation, was witnessed, and kept by the Raja. Of the contents he only tells us that it was a power for the Rani to adopt a son, and that his daughters were to receive Rs. 32 per day for maintenance, a provision which does appear in Exhibit 9. He mentions eight attesting witnesses. Of these witnesses three are dead, but the other five would appear to have been living when the evidence was taken. One of them is Soonder Narain, the scribe who wrote the fair copy, another is Raghabanund, the father of the defendant, another is a brother of the defendant's co-wife, by name Trilochun, in whose presence she states that the Raja gave the power into her hands. Not one of the attesting witnesses is called. So that there is not an attempt to identify Exhibit 9 as being a copy of that document which Dhurjati tells us the Raja executed formally; and there is therefore no evidence at all beyond his vague statement, from which a Court of Justice can gather its contents.

The suit wholly fails, and the appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty accordingly.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Neish* and *Howell.*

Solicitors for the respondent: Messrs. *Barrow* and *Rogers.*