1902 JULY.

APPELLATE CIVIL.

29 C. 738.

the brother of the grandfather of the deceased comes within the term "distant kindred."

ABDUL SERANG, petitioner, appealed to the High Court.

This appeal arose out of an application for Letters of Administration of the property of one Mussamat Khur Banu Bibi, deceased. The petitioner alleged that the said Khur Banu Bibi died on the 15th October 1900, leaving certain moveable properties; that his mother was the granddaughter of the brother of the grandfather of the deceased, who had no other relation besides the petitioner. The petition was opposed by Mussamats Wahedunnisa Bibi and Putee Bibi, who did not admit that Abdul [739] Serang was a relation of the deceased, and also contended that granting that relationship to be true, he was not an heir according to Mahomedan law. The District Judge of the 24-Parganas, Mr. F. E. Pargiter, having held that the petitioner was not one of the distant kindred, rejected his application.

Moulvi *Shamsul Huda* for the appellant.

Moulvi *Mahomed Tahir* for the respondent.

HILL AND BRETT, JJ. We think the learned District Judge has fallen into the error, which more than one writer on Mahomedan law have referred to in their works, of supposing that the "distant kindred" are restricted to the four classes, who are usually enumerated as primarily standing in that relation to the deceased. We find, however, in Mr. Rumsey's work on the Mahomedan Law of Inheritance, which is a work of some authority, as well as in Baillie, which is also authoritative, that the right of inheriting extends to the whole kindred of the deceased, and that it is an error to suppose that the right is limited to certain degrees or classes of relations. This observation Mr. Rumsey makes in a note to a passage on page 12 of his work, where he defines the "distant kindred" as including all relations, who are neither sharers nor residuaries. The appellant is not only a relation, but is a near relation of the deceased; and, in our opinion, he comes within the definition which we have just referred to and which Mr. Rumsey derives from an authoritative Mahomedan source.

That being so, the order appealed against must be set aside and the case remanded to the Court below for trial on its merits.

Costs will abide the result.

Appeal allowed. Case remanded.

29 C. 740.

[740] *Before Mr. Justice Prinsep and Mr. Justice Hill.*

GOVINDA HAZRA *v.* PROTAP NARAIN MUKHOPADHYA.*

[23rd June, 1902.]

Evidence Act (I of 1872), s. 90—Ancient document, presumption as to—Genuineness of signature in issue—Presumption not excluded, but has to be rebutted.

It is in the discretion of a Court whether it will raise the presumption in favour of a document for which s. 90 of the Evidence Act provides, but this discretion is not to be exercised arbitrarily: it must be governed by principles, which are consonant with law and justice. And while on the one hand great

* Appeal from Appellate Decree No. 485 of 1899, against the decree of H. E. Ranson, Esq., District Judge of Midnapur, dated the 25th of November 1898, affirming the decree of Babu Mohendra Nath Dutt, Munsif of Ghatal, dated the 8th of December 1897.

1902
JUNE 28.

APPELLATE CIVIL.

29 C. 740.

care is requisite in applying the presumption, on the other hand it is clear that very great injustice may be perpetrated, if an ancient document coming from proper custody is refuted by a Court capriciously or for inadequate reasons.

When the genuineness of a document purporting to be an ancient document is put in issue, it appears to have been sometimes thought that any presumption in its favour is thereby excluded, but this would deprive the party producing it of the benefit of the presumption precisely in the circumstances in which he most stands in need of its aid. The presumption merely takes the place of the evidence which would, where a modern document is concerned, be necessary for the purpose of proving due execution, and it must be met and rebutted in the same way as direct evidence of execution in the case of a modern document.

Mussamut Phool Bibee v. *Goor Surun Doss* (1), *Roikunt Nath Kundu* v. *Lukhun Majhi* (2), *Hari Chinaman Dikshit* v. *Moro Lakshman* (3), *Trailokia Nath Nundi* v. *Shuono Chungoni* (4), referred to.

THE defendants, Govinda Hazra and others, appealed.

The plaintiff sued for a declaration of title to five plots of land in the occupation of the defendants 1, 2 and 3, who were agricultural tenants and referred to at the hearing as the Hazras. The defendants 4, 5 and 6, referred to as the Pals, claimed to be *mukuraridars* holding land under a permanent lease within the [741] limits of the plaintiff's zemindaris, but were not recognized as such by the plaintiff. The defence set up by both sets of defendants was as follows:—That plots 1, 2, and 3 were comprised in the *mukurari* lease of the Pals, to whom the Hazras had been paying rent for many years; that plot 4 was *lakhiraj* and acquired by purchase by the Hazras in 1216 B.S., and that plot 5 was not in their possession. In support of the *mukurari* lease set up by the defendants, they produced as evidence two documents, one being a *potta*, dated 1159 B.S., and the other an *amalnama*, dated 1211 B.S., confirming the former, alleged to have been granted by a former proprietor in favour of the defendants 4, 5 and 6.

The Munsiff of Ghatal gave a decree in favour of the plaintiff for plots 1, 2 and 3 with a declaration of his title to the same, and a decree for possession of plot 5, while he disallowed his claim to plot 4. The defendants appealed to the District Judge of Midnapur, and the plaintiff preferred a cross-appeal in respect of plot 4. The District Judge reversed the judgment of the Munsiff, dismissing the plaintiff's claim in respect of plots 1, 2 and 3 and decreeing possession of plot 5, but dismissed the plaintiff's cross-appeal.

The plaintiff then applied for a review of judgment on the ground that he had discovered a judgment of the year 1876 of the District Judge of Midnapur, in which the *potta* and the *amalnama*, on which the defendants relied, were declared to be spurious. The review was admitted, and the appeal came on for hearing once more before another District Judge, who decreed the plaintiff's claim in full and also the cross-appeal which, however, had not been comprised in the review. With regard to the two documents, he observed as follows:—

"There has been produced a document stated to be a *potta* of the year 1159 B.S., and another document stated to be an *amalnama* of the year 1211 B.S., which is said to be in confirmation of the said *potta*. There is, however, no signature of any executant on either of these documents. They both bear seal impressions only, and as to these seals there is no evidence whatever. Even had there been any signatures before the documents could be accepted as proof of title, there must be further evidence in the case of each that the alleged executant was entitled to grant such a

(1) (1872) 18 W. R. 485.
(2) (1881) 9 C. L. R. 425.
(3) (1886) I. L. R. 11 Bom. 89.
(4) (1885) I. L. R. 11 Cal. 539.

document. Thus the value of these documents as evidence is *nil*, even supposing that they have been produced from proper custody."

1902 JUNE 23

APPELLATE CIVIL.

29 C. 740

[742] Mr. *Donogh* (Babu *Hari Charan Sarkhel* with him) for the appellants. The plaintiff seeks to get rid of the *mukurari* lease set up by the defendants, and claims rent direct; but he produces no evidence to support his claim except some *jama-vasilbaki* papers, which at best are only corroborative evidence and of no value by themselves. The Judge has overlooked the fact that the onus was on the plaintiff to prove his case. The documents set up by the defendants, viz., the *potta* and the *amalnama*, are respectively 150 and 100 years old. They are produced from proper custody—that of the lessees themselves. Moreover, they were produced by them as evidence in a Court more than 20 years ago, which gives them publicity. The fact that they bear seals and not signatures is only what one would expect to find in the case of such old documents, and it is consonant with their genuineness rather than otherwise. The Court could not reasonably expect proof of the executant's title in the case of such ancient documents, especially when it was never denied. It should have raised the presumptions mentioned in s. 90 of the Evidence Act. The defendants, moreover, have proved payment of rent to the *mukuraridars*, and the Judge's finding to the contrary is wrong. This would give rise to a possessory title by adverse possession for over twelve years.

Babu *Jnanendra Nath Bose* (Dr. *Ashutosh Mukerji* with him) for the respondent. The documents in question bear on the face of them the evidence of spuriousness. The seal impressions are unintelligible and cannot be deciphered. There is no evidence as to who the executant was or whether he had authority to grant a lease. If the seal indicates the year of execution that of itself points to forgery. The absence of a signature favours the same conclusion. The Court is not bound to draw a presumption in favour of a document more than thirty years old. The section only says "may presume." The documents were rightly rejected. When the Judge says there is no evidence of payment of rent to the defendants Nos. 4 to 6, he means no reliable evidence.

Mr. *Donogh* in reply.

[743] PRINSEP J. The plaintiff sued the Hazra defendants for arrears of rent due for 2 bighas 8 cottahs from 1299 to Assar 1302, but with the permission of the Court he withdrew his suit because the defendants stated that they held the lands partly as tenants of the Pal defendants, *mukuraridars*, and partly (one plot) as rent-free. He has now sued all these persons for a declaration that those lands are his *mal* lands, and that the Pals have no *mukurari* right or title. He also asks for the money sued for as rent in the former suit and *mesne* profits up to the date of recovery of possession. The same defence is made by the Hazras and the Pal defendants. The Hazras deny that they are the tenants of the plaintiff, and that they have ever paid rent to him or his predecessors. The Pals state that they hold plot No. 4 as rent-free and the other lands as *mukuraridars* under the plaintiff, and they also state that the Hazra defendants are their tenants. In proof of their title as *mukuraridars* the Pals produced some old papers, and relied on the fact that those were produced in 1876 in a suit for rent brought against them by the patnidar. The District Judge on appeal dismissed that suit on the ground that the plaintiff was not entitled to sue for rent on his specific share, and also because the evidence of one of the plaintiff's co-sharers

satisfied him that the entire rent had been paid to the landlords jointly. In respect of these old papers the District Judge expressed dissent from the Court of first instance, which had pronounced them to be genuine because they bore old dates, but he held that it was unnecessary, to adjudicate upon them.

With the exception of plot No. 4, the lands are admittedly the *mal* lands of the plaintiff. The matter really in issue is the title set up by the Pal defendants. In this respect we have the fact that these defendants do not say that they have ever paid rent to the plaintiff, and the Munsiff has found that it is not proved that the Hazra defendants have ever paid rent or given a potta as alleged to the Pal defendants. The Munsiff found that the *mukurari* title had not been proved, and he accordingly held that the plaintiffs were entitled to a fair and equitable rent from the Hazra defendants. The plaintiff's claim in respect of plot No. 4 was dismissed.

[744] The District Judge on appeal gave the plaintiff a decree in full. He held that as the lands, except plot No. 4, were *mal* and the Hazra defendants were in possession, it was for them to show that they were not liable for rent to the plaintiff, and he then proceeded to deal with the papers produced to prove a *mukurari* title with the Pal defendants. Those were a *potta* bearing date 1159 and an *amalnama* confirming the *potta* bearing date 1211. He observes that neither of these papers bears the signature of the executant; that they bear seals as to which there is no evidence: and he adds that before the documents could be accepted as proof of title, there must be further evidence in the case of each, that the alleged executant was entitled to grant such a document. The District Judge also throws doubt whether the documents were produced from proper custody, as to which I would only point out that the custody of the Pal defendants is what is explained to be proper custody by the explanation to s. 90 of the Evidence Act. The District Judge has not properly dealt with those documents as proof of title. S. 90 of the Evidence Act declares that, where any document purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the persons, by whom it purports to be executed and attested. Now these documents were produced in Court in 1876: that is, about 22 years before this suit, and they bear dates much beyond thirty years, and therefore the law declares that the District Judge *may* presume certain facts from them, that is to say, he may regard such facts as proved, unless and until they are disproved, or he may call for proof of them (see definition of "may presume," s. 4, Evidence Act). The District Judge has, in my opinion, rejected these documents without proper consideration, and in this view the case must be remanded for reconsideration. No doubt these papers do not bear the signature of the executants; but they set out their names, and they bear seals purporting to be those of the executants or grantors, and **[745]** the absence of signature would be amply supplied by seals shown to the satisfaction of the District Judge to be those of the grantors. The mere possession or production of documents conferring a *mukurari* title, if they do amount to this, unless supported by some corroborative

1902 JUNE 23.

APPELLATE CIVIL.

29 C. 740.

evidence of action taken under it, would be of little, if any, weight—*Mussammat Phool Bibee* v. *Goor Surun Doss* (1) and *Roikunt Nath Kundu* v. *Lukhun Majhi* (2). The degree of credit to be given to these old documents would depend on the circumstances elicited by the evidence derived from the subsequent conduct of the parties, but the nature of these documents must be first ascertained—*Hari Chintaman Dikshit* v. *Moro Lakshman* (3). Moreover, in dealing with such evidence no doubt the Court must act with especial caution, and in this respect I would point to *Trailokia Nath Nundi* v. *Shurno Chungoni* (4). The District Judge has not considered the evidence from this point of view. We have in this case the fact that the plaintiffs ignore the Pal defendants, while these defendants claim to be the tenants of the plaintiffs under a *mukurari* title and assert that the Hazra defendants are their tenants. But so far as the case is presented to us, the plaintiffs have not been able to prove that the Hazra defendants are their tenants. The occupation of the lands by the Hazra defendants does not necessarily prove this, if the Pal defendants have an intermediate title as *mukuraridars* making them the direct tenants of the plaintiffs. That is the real matter now in issue. I may here observe that, in stating that there is no evidence that the Pal defendants have ever received rent from the Hazra defendants, the Sessions Judge is in error. It is for him to find, whether the evidence that is on the record does or does not prove such payments. The District Judge has also taken into consideration the suit of 1875, in which the Pal defendants were sued for rent as in occupation of this land. That they held as *mukuraridars* as stated by them was denied, but this issue was never tried, and on the findings of the District Judge deciding the case this was unnecessary. The observations of the Court in throwing doubt on the documents tendered in **[746]** proof of the *mukurari* title are therefore *obiter*, and cannot now be taken into consideration; still the Pal defendants were found to be the tenants and were held to be liable for rent, and this litigation is therefore of some importance in the trial of the issue of title raised in this suit. The case must, therefore, be remanded to the District Judge for reconsideration, and especially in regard to the evidence of *mukurari* title set up by the defendants.

Costs to abide the result.

HILL, J. Without suggesting that the ultimate conclusion of the learned Judge in this case is wrong—a matter upon which I desire to express no opinion at present, I think that the manner in which he has dealt with the *potta* and *amalnama* upon which the defendants placed reliance is open to serious exception. He concedes apparently that these documents, which purport to be ancient documents in the sense of s. 90 of the Evidence Act, came from proper custody, and there can be no doubt, that, if genuine (on which assumption only the question can arise), they do come from proper custody, but he has refused to give effect to them for two reasons, neither of which is in my opinion sustainable.

It is, it is true, in the discretion of a Court, whether it will raise the presumption in favour of a document for which s. 90 provides. But this discretion is not to be exercised arbitrarily but must be governed by principles which are consonant with law and justice. And while on the one hand, as has been more than once pointed out by this Court, great

(1) (1872) 18 W. R. 485.
(2) (1881) 9 C. L. R. 425.
(3) (1886) I. L. R. 11 Bom. 89.
(4) (1885) I. L. R. 11 Cal. 589.

1902
JUNE 23.

APPELLATE CIVIL.

29 C. 740.

care is requiste in applying the presumption, for as Garth, C. J., observes in *Trailokia Nath Nundi* v. *Shurno Chungoni* (1):—"Nothing can be more easy than for an unscrupulous person, who is wrongfully in possession of property and wants to make out a title to it, to forge a deed in his own favour more than 30 years old, and then produce it himself in Court, and say that, because he is in possession of the land he must needs be the proper custodian of the deed," on the other hand it is clear that very grave injustice may be perpetrated if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons.

[747] The first reason assigned by the learned Judge for rejecting the documents is that, instead of being signed, they are sealed. But for the present purpose the sealing of a document, if the seal has been affixed for the purpose of authenticating it as the document of the person, whose name the seal bears, is sufficient. In the case of the documents now in question, there can, I think, be no doubt, on the assumption that they are genuine, that the seals were affixed for that purpose. His second reason is that there was no evidence in the case of either document to show that the alleged executant was entitled to grant such a document. This would no doubt be a very good reason for refusing to give effect to them, if the title of the alleged executants had been called in question during the trial. But we are informed that no such question was raised. The documents were said by the other side to be forgeries, but it was not suggested that, if genuine, the executants were without title; so that it would seem that the defendants were neither called upon to prove nor afforded the opportunity of proving the title of the alleged executants. The real point in dispute between the parties was as to the genuineness of the documents, and that question the learned Judge has not decided. It may be needless to point out that, because a document purports to be an ancient document and to come from proper custody, it does not therefore follow that its genuineness is to be assumed. If there are reasonable grounds for suspecting its genuineness, and the party relying upon it fails to satisfy the Court of its due execution, there is an end of it. But if no such grounds exist, and it satisfies the conditions prescribed by s. 90 of the Indian Evidence Act, then proof of execution is dispensed with, and it is to be dealt with on the same footing as any other genuine instrument. If the authority or the title of the executant, for example, be not questioned, then effect is to be given to it as though he had the requisite authority or title. If either be questioned, then of course the person on whom the burden of proof lies must adduce evidence to satisfy the Court on the point, or he fails. When the genuineness of a document purporting to be an ancient document is put in issue, it appears to have been sometimes thought that any presumption in its favour is thereby excluded. But this would be to deprive the party producing of [748] the benefit of the presumption precisely in the circumstances in which he most stands in need of its aid. And there seems to be no difference in principle between cases in which due execution is traversed without more—those, that is, in which the party relying on the document is put to proof of it, and those in which it is alleged that the document is a forgery, except that in the latter case, the suspicions of the Court may be aroused by the nature of the plea. But in the one case, as in the other, the presumption merely takes the place of the evidence which

(1) (1885) I. L. R. 11 Cal. 539.

1902 JUNE 28. APPELLATE CIVIL. 29 C. 740.

would, where a modern document is concerned, be necessary for the purpose of proving due execution. The Court may decline to raise the presumption, in which case the party producing the document must fail, unless he is provided with evidence in support of it. But where the Court thinks proper to raise the presumption, it must be met and rebutted in the same way as direct evidence of execution in the case of a modern document. The proper rule is, I think, allowing for the greater caution necessary in this country in dealing generally with documentary proof, well stated by Mr. Taylor in his work on the Law of Evidence in England. He says (page 587, 8th Edition)—"An ancient deed which has nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead, and if found in proper custody and corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of the property therein mentioned, because this is the usual course of such transactions."

It appears to me that the learned Judge has not in the present case had such considerations as these sufficiently before his mind, and I think therefore that the case ought to go back to him for reconsideration. The learned Judge, I need hardly point out, should not allow himself to be influenced when dealing with the documents by anything said with regard to them by Mr. Tottenham in his judgment in the case of *Ram Dhan Mandal* v. *Nabin Chandra Pal*, dated the 29th March 1876, which was brought to our notice.

There is also another point upon which there ought, I think, to be a more careful expression of opinion by the learned Judge. He states in his judgment: "There is also no evidence of payment **[749]** of any rent to defendants Nos. 4 to 6." Whether he means proof of payment or evidence of payment in the proper sense may be a question. But if the latter, the statement is not borne out by the record, for our attention was called to the evidence of more than one witness that such payments had been made. I accordingly agree in thinking that the decree appealed against should be set aside, and the case remitted to the lower Appellate Court to be properly disposed of.

---

29 C. 749.

PRIVY COUNCIL.

PRESENT:

Lords Macnaghten and Lindley, Sir Ford North, Sir Andrew Scoble and Sir Arthur Wilson.

SHAMBATI KOERI *v.* JAGO BIBI. [6th May and 6th June, 1902].

[*On appeal from the High Court at Fort William in Bengal*].

Purdanashin lady—Execution of document by purdanashin—Non-production of mukhtarnama—Evidence—Insufficiency of evidence that deed was explained to her and that she understood it.

In a suit brought against a *purdanashin* lady on a mortgage bond which purported to be signed in her name "by the pen of Soonder Lal, son-in-law and am-mukhtar," under a mukhtarnama, which was not produced:

***Held* that secondary evidence of the mukhtarnama was on the facts put forward to account for its non-production inadmissible, but even if admissible,**