1903 NOV. 30.

ORIGINAL CIVIL.

prevented by sufficient cause from appearing at the hearing. The plaintiff elected merely to apply for an adjournment and to take the risk of that application being rejected. The reason assigned for the plaintiff not being in a position to proceed with the case was that her husband was ill, but the evidence failed to show that he was so ill as not to be able to be present on the day the casewas called on. As to that the evidence is in effect the same as it was before Mr. Justice Harington. 31 C. 150=8 C. W. N. 97.

The affidavit by the medical practitioner in support of the certificate which was granted by him and which was produced before the learned Judge on the first occasion, was not affirmed until the [155] 25th November instant, that is to say, a date long subsequent to that on which the application ought to have been ready. In my opinion, therefore, the plaintiff was not prevented by any sufficient cause from appearing when the case was called on for hearing.

For these reasons I must refuse the present application with costs.

Application refused.

Attorney for the plaintiff : *Mahomed Sultan Alum.*

Attorney for the defendants : *C. C. Bose, N. L. Mallick, G. H. Mookerjee, N. C. Bose,* and *Sanderson & Co.*

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31 C. 155.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Geidt.

KISHORI LAL GOSWAMI *v.* RAKHAL DAS BANERJEE.*

[19th August, 1903.]

Evidence—Secondary evidence, admissibility of—Objection to reception of secondary evidence in appellate Court—Evidence Act (1 *of* 1872), *ss.* 61, 65 *&* 66.

No objection should be allowed to be taken in the appellate Court as to the admissibility of a copy of a document which was admitted in evidence in the Court below without any objection.

Kameswar Pershad v. *Amanutulla* (1) dissented from.

[Ref. 59 I. C. 461; 63 I. C. 968, Foll. 14 I. C. 539.]

SECOND APPEAL by Kishori Lal Goswami, the defendant No. 1.

This appeal arose out of an action brought by the plaintiff to recover possession of a certain plot of land. The allegation of the plaintiff was that the plot of land, described as *Ka* in the [156] plaint, belonged to his maternal grandfather, Ananda Chandra Mukerji who had a 12 anna share, and to his brother Mahesh who had a 4-anna share only ; that after the death of Mahesh, the plaintiff's mother purchased the said 4-anna share of Mahesh from his heirs ; that since the death of his mother the plaintiff was in possession of that share ; that after Ananda's death his son Rakhal succeeded him, and after his death his widow Tarini Debi succeeded to the property, and after her death the plaintiff and his mother's sister's sons, Mohendra Nath Banerji and Kedar Nath Banerji, each taking one-third share of the property in suit, and so the

*Appeal from Appellate Decree No. 377 of 1901 against decree of Jogendra Nath Roy, Additional Subordinate Judge of 24-Parganas, dated Jan. 4, 1901, modifying the decree of Srigopal Chatterjee, Munsif of Barasat, dated Feb. 23, 1900.

(1) (1898) I. L. R. 26 Cal. 53.

1903 AUG. 19.

APPELLATE CIVIL.

31 C. 155.

plaintiff obtained altogether an 8-anna share; that he brought a suit for partition against his cousins the said Mahendra Nath and Kedar Nath, making the defendant No. 2 a party to that suit as he had set up a *darmourasi* lease; that the said lease was declared void in that suit, and he (plaintiff) subsequently purchased his cousins' share, and thus became entitled to the whole 16 annas of the property; that the defendant No. 2 sold his *darmourasi* right (though it had been declared void in the said partition suit) to the defendant No. 1 who dispossessed him (plaintiff) from the land in dispute.

The defence mainly was, that Mahendra got a *mourasi mokrari* lease of 9 bighas of land of which the disputed land was a part, from the said Tarini Debi and Amrita Lal Mukerji and granted a *darmourasi* lease of 4 bighas to the defendant No. 2, but in a partition suit the plot of land leased to him fell into the share of the plaintiff, and the disputed plot fell into the share of Kedar Nath and Mahendra Nath, who then put the defendant No. 2 in possession of it; that subsequently the defendant No. 2 sold his right to the disputed land to defendant No. 1; and that the plaintiff's purchase was collusive. In support of his case the defendant No. 2 filed a copy of the *darmourasi* lease which was admitted in evidence in the Court of first instance without any objection by any body. The Court of first instance decreed the plaintiff's suit so far as Kedar's share was concerned, but dismissed it with respect to Mahendra's share. Against that decision two appeals were preferred in the Court of the Additional Subordinate Judge of 24-Parganas, one by the plaintiff, and the other by the defendant No. 1.

[157] The learned Subordinate Judge allowed the appeal of the plaintiff, but dismissed that of the defendant No. 1, holding that the copy of the *darmourasi* lease was not admissible in evidence inasmuch as the loss of the original had not been proved.

Babu *Lal Mohan Das* (Babu *Shib Chandra Palit* with him) for the appellant. As the copy of the lease was admitted in evidence without raising any objection by the respondent in the Court of first instance, the lower Appellate Court was wrong in allowing any objection to be taken as to its admissibility while disposing of the appeal. The case of *Kashee Nath Mookerjee* v. *Mohesh Chunder Goopto* (1) lends support to my contention.

Dr. *Ashutosh Mookerjee* (Babu *Jadu Nath Kanjilal* with him) for the respondent. Under s. 61 of the Evidence Act, contents of a document may be either proved by primary or by secondary evidence. But secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in s. 65 of the Evidence Act: *Krishna Kishori Chaodhrani* v. *Kishori Lal Roy* (2). Loss of the original not being accounted for, the copy of the document is not admissible in evidence: see *Ameeroonnissa Khatoon* v. *Abedoonnissa Khatoon* (3), *Kameshwar Pershad* v. *Amanutulla* (4).

Babu *Lal Mohan Das*, in reply, referred to s. 65, cl. (*f*), Evidence Act, and to the case of *Akbur Ali* v. *Bhyee Lal Jha* (5).

MACLEAN, C. J. I rest my decision upon one circumstance namely, that no objection having been taken in the first Court to the reception

(1) (1876) 25 W. R. 168.
(2) (1887) I. L. R. 14 Cal. 486; L. R. 14 I. A. 71.
(3) (1875) 15 B. L. R. 67; 23 W. R. 208; L. R. 2 I. A. 87.
(4) (1898) I. L. R. 26 Cal. 53.
(5) (1880) I. L. R. 6 Cal. 666.

1903 AUG. 19.

APPELLATE CIVIL.

31 C. 155.

of the certified copy of the lease in question by the present respondent, the lower Appellate Court ought not to have allowed it to be taken in that Court. The first Court was satisfied that a case had been made out for the admission of this document as secondary evidence, and admitted it without objection by [158] the present appellant, and the suit proceeded. The authorities in this Court establish that, if no objection has been taken in the Court below, under such circumstances as the present, the objection should not be allowed in the Appellate Court. If the case just cited to us, *Kameshwar Pershad* v. *Amanutulla* (1) lays down an opposite view, with every respect I dissent.

The case must go back with the intimation of our opinion that, under the circumstances, the certified copy of the lease in question was properly admitted, and the case must be heard having regard to it. What the effect of the lease may be we cannot say.

It was conceded by the appellant that the appeal as regards Kedar's share must be dismissed with proportionate costs.

The rest of the case must, therefore, go back and the proportionate costs of that part of the appeal will abide the result.

GEIDT, J. I concur.

Case remanded.

31 C. 159 (=8 C. W. N. 657.)

[159] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Geidt.

GOBINDA CHANDRA SHAHA *v.* HEMANTA KUMARI DEBI.*

[19th August, 1903.]

Parties—Sale for arrear of revenue, suit to set aside—Secretary of State, whether necessary party—Public Demands Recovery Act (B. C. I. of 1895) *ss.* 7, 8.

In a suit to set aside a sale held under the provisions of the Public Demands Recovery Act, the Secretary of State for India in Council is a necessary party.

Bal Mokoond Lall v. *Jirjudhun Roy* (2) and *Balkishen Das* v. *Simpson* (3) distinguished.

[Dist. 32 C. 1130=1 C. L. J. 542 ; 1. I. C. 313.]

SECOND APPEAL by the plaintiffs, Gobinda Chandra Shaha and others.

This appeal arose out of an action brought by the plaintiff to set aside a sale held under the provisions of the Public Demands Recovery Act (B. C. I. of 1895). The allegations of the plaintiff were that no part of the amount for which the certificate was issued was due by the judgment-debtors ; that no notice under section 10 of the Public Demands Recovery Act was served on them ; that the sale proclamation was not published, and that they thereby sustained substantial injury ; and that the property which was worth about Rs. 500 was purchased by defendant No. 1 who was one of the judgment-debtors in the certificate originally made by the certificate officer, for Rs. 15 only.

* Appeal from Appellate Decree No. 396 of 1901 against the decree of Akhoy Kumar Banerjee, Subordinate Judge of Faridpur, dated Nov. 30, 1900, reversing the decree of Jadab Chandra Sen, Munsif of Bhanga, dated Jan. 6, 1900.

(1) (1898) I. L. R. 26 Cal. 53.
(2) (1882) I. L. R. 9 Cal. 271.
(3) (1898) I. L. R. 25 Cal. 893 ; L. R. 25 I. A. 151.