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extinguished by the previous sale held by the Civil Court. The sale held by the Revenue Courts in this case, was not held for any arrears of rent due on account of the tenure subsequent to the date of the plaintiffs' purchase, and no question arises as to the effect of the provision relating to the registration of the purchaser's name in the zemindar's sherista laid down in section 27, Act X. of 1859. Under such circumstances it is difficult to make out how the subsequent purchaser can possibly pretend to have acquired a title superior to that of the plaintiff, the purchaser at the prior sale. There is no law that I am aware of which lays down that the tenure itself is hypothecated for the rent, nor has it been shown to me that there was any such stipulation in the original lease by which this tenure was created. The mere existence of a decree for arrears of rent did not and could not subject the tenure to any lien or hypothecation, and the purchaser under the Civil Court decree must be therefore held to have acquired a full and complete title before the sale held by the Collector. I do not wish to express any opinion as to the correctness or otherwise of the decisions relied upon by the special appellant beyond remarking that the facts are not analogous.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

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April 27.

MAKBUL ALI (ONE OF THE DEFENDANTS) *v.* SRIMATI MASNAD BIBI (PLAINTIFF,) AND OTHERS (DEFENDANTS).*

Evidence—Copy of a Copy—Guardian.

See Ind. Evid. Act I of 1872, Sec. 66.

An original document, upon which the plaintiff based his suit, was proved to be in the possession of the defendant. In a previous suit, the defendant's mother had filed the document; and on removing it, had according to rules of practice, placed a copy there instead. The defendant on being summoned failed to produce the same.

Held, that a copy of such copy, so filed in Court, was admissible as evidence

Held also that a mother can bind her sons, acting in good faith as their guardian.

Baboo *Akhil Chandra Sen* for appellant.

Mr. *R. E. Twidale* for respondents.

Special Appeal, No. 3069 of 1868, from a decree of the Subordinate Judge of Chittagong, dated the 22nd August 1868, affirming a decree of the Moonsiff of that district, dated the 7th February 1868.

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MAKBUL ALI v. SRIMATI MAHNAD BIBI.

The facts of the case fully appear in the judgment of the Court which was delivered by

BAYLEY, J.—I am of opinion that this appeal must be dismissed with costs.

The plaintiff sued for a two-anna share of certain property, under a deed of partition.

The defendant's case was that the plaintiff had no right under the deed of partition; that the defendant's father was entitled to the whole of the property, and that the *Bandhaknama* and *Solenama* adduced in support of plaintiff's case, were collusive deeds.

Both the lower Courts have given the plaintiff a decree.

Against that decree the defendant appeals specially, and urges 1*stly*, that the B*andhaknama*, on which the suit is based, being a copy of a copy is not admissible as evidence.

Now there is a finding of fact, that the original document was filed in Court in 1856 by the defendant's mother and again taken away by her under the ordinary rules of Courts in such cases, *viz.*, that when a party is permitted to take any original document filed on the records of a Civil Court, such party is bound to file a copy, authenticated as correct, to take the place of the original.

In the present case, the defendant was called upon to produce the original which was found as a fact, to be in her custody. This the defendant did not do. The plaintiff then went to the Court, and from thence got a copy of the authenticated copy which had taken the place on the record of the original removed from it by the defendant as above set forth.

The English law of evidence cited to us by the pleader for the special appellant, in regard to the copy of a copy, was never intended to be applied to such circumstances as these, and it has been laid down by the Privy Council that the English law of evidence is not in all cases to be strictly applied in the Indian Courts, but only in those cases where the circumstances are such as can fairly admit of it.

There is a supplemental answer filed by the defendant in which the objection, that the copy of the copy is not admissible as evidence, is taken in this way, *viz.*, that it was inadmissible by

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reason of a certain rule of evidence laid down in Mr. Norton's work on evidence (1), and also by reason of the value of the stamp on which the copy was engrossed being insufficient. Whether the point was really pressed before the first Court or not, is not shewn to us, either by the judgment of the Court or otherwise; but be that as it may, when the original deed was found to be at the command of the defendant, and the plaintiff demanded of the defendant to produce it in Court, and shewed herself ready to procure the primary evidence, and was only obstructed by the recusance of the defendant, and so forced to have recourse to the secondary evidence. I think that the very best secondary evidence was the copy, which was filed by the defendant herself, on the records of the Court in lieu and as a correct copy of the original.

Now, as the first copy could not ordinarily under the rules of our Courts be removed from the custody of the Judge, it was only left for the plaintiff to take a copy of what the defendant herself placed there as a counterpart of the original, and it may be added that throughout the whole proceedings no clear objection has been taken as to what, if any, inaccuracy existed in the copy produced by the plaintiff. I think, therefore, that under these circumstances, there is no rule of law in our Courts of equity and good conscience to prohibit the reception of the copy as evidence in a case like the present.

The third ground is divided into two parts. The first part is that the admissions in the *Solenama*, relied upon by the plaintiff, cannot support her claim without evidence; that they were made by the plaintiff's mother and authorized by her; but it is clear that she did appoint vakeels to conduct her case in 1856, and those vakeels, by virtue of their vakalutnama, did put in that *Solenama* in her behalf. This is *prima facie* evidence that what was done was done by authority. It was always open to the defendant to shew that it was not done under authority. No proof, however, has been given or was even offered to establish this last point.

The second part of the objection is, that the *Solenama* cannot prejudice the defendant, as he was a minor at the time of its

(1) Page 283, § 581.

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execution; but it is clear that it has been taken for granted by both sides in the Courts below, that the mother throughout acted for herself and as guardian of her children, and nothing has been shewn by the defendant to disprove this; further, I concur with the lower Appellate Court in holding that when a mother, as a constituted guardian, acts in good faith for her children in any litigation, they are bound by those acts. Of course, in case of any illegal or fraudulent act of the guardian, the minors have specific remedies by personal actions, and be that as it may, the fact of the mother's having acted and having had power to act as the guardian of her minor children, was never questioned in the lower Courts.

Upon the whole, we see no ground to interfere with the decision of the lower Appellate Court, and we therefore dismiss this appeal with costs.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

JUGGESH PRAKASH GANGULI AND NILKAMAL MOOKERJEE (PETITIONERS.)*

1869 *April 27.*

Act XXV. of 1861, *ss.* 318, 404—*Suit for Possession—Declaration of Title.*

A plaintiff in a civil suit brought for confirmation of his possession by a declaration of his title to certain lands, obtained, pending his suit, an order from the Magistrate, under section 318 of the Criminal Procedure Code, that he should be maintained in possession, until ousted by due course of law. The suit was dismissed, plaintiff failing to prove his title, and the defendants then applied to the High Court, under section 404 of the Criminal Procedure Code, to set aside the Magistrates' order, and put them in possession.

Held, their proper course was by a suit in the Civil Court for possession, and the application under the Criminal Procedure Code was rejected.

THIS was an application under section 404 of the Criminal Procedure Code, to set aside an order of the Magistrate under section 318 of the same Code.

Nabinkishor Roy, for himself and as guardian of Chandra Kumar Roy, instituted a suit, on the 6th October 1866, against Juggesh Prakash Ganguli and Nilkamal Mookerjee, for confirmation of possession and title by setting aside an order of the

* Application under section 404 of the Code of Criminal Procedure.

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JUGGESH PRAKASH GANGULI AND NILKAMAL MOOKERJEE.

Survey Authorities, and for rectification of the survey map in relation to Chur Balla, appertaining to Mauza Chur Ballamaina, No. 1480 in the Towji of the Collector in the district of Tipperah. After having instituted the suit, Nabinkishor Roy, on the same day, applied to the Magistrate, under section 318 of the Code of Criminal Procedure, and a proceeding was then recorded, declaring that Nabinkishor Roy was in possession, and was entitled to retain possession of the disputed Chur lands. Juggesh Prakash Ganguli and Nilkamal Mookerjee disputed the legality of the Magistrate's order, on the ground that it did not appear on the record that the Magistrate was satisfied as to the likelihood of a breach of the peace taking place. The Judge, on appeal, refused to interfere with ths order, which still remained in force.

On the 21st December 1866, the present applicants filed their written statement as defendants, denying Nabinkishor's title or possession of the lands; and on the 28th August 1867, the Judge of Tipperah gave a decree, dismissing the plaintiff's suit. This decision was upheld on the 19th August 1868 by the High Court on appeal. Nabinkishor Roy, nevertheless, still remained in possession of the disputed land under the Magistrate's order and refused to give up possession.

Mr. *Allan* and Baboo *Tarack Nath Dutt*, for the petitioners, now moved on a petition setting forth the above facts, that the record of the proceedings before the Magistrate on the 6th October 1866, be sent for, and the order then made set aside, on the ground that it had been determined by a competent Court that the lands comprised in the Magistrate's order did not belong to Nabinkishor Roy, but to the present petitioners; and that, therefore, Nabinkishor Roy was not entitled to be maintained in possession under the said order.

BAYLEY, J.—I am of opinion that this application must be rejected. It is made under section 404 of the Code of Criminal Procedure, and we are asked to set aside the order of the Magistrate of Nowakhally, dated the 6th November 1866, and declare that the petitioner is entitled "to resume that possession which he

lost by the force and effect of the said Magistrate's order." This prayer is based on the statement that, by a judgment of his Court, dated the 19th August 1868, it was held that the plaintiff, in his appeal No. 322 of 1867, against the presen petitioner, had given no evidence whatever of his title or possession, and that the right and title to possession of the petitioner were thereby established.

Now, the terms of section 404 are these :—"The Sudder "Court may, on the report of a Court of Session or of a Magis- "trate, or whenever it thinks fit, call for the record of any "criminal trial, or the record of any judicial proceeding of a "Criminal Court, other than a criminal trial, in any Court "within its jurisdiction, in which it shall appear to it that "there has been error in the decision on a point of law "or that a point of law should be considered by the Sudder "Court, and may determine any point of law arising out of "the case, and thereupon pass such order as to the Sudder "Court shall seem right." In the first place we are asked to exercise our extraordinary powers under the provisions of section 404 of the Criminal Procedure Code, that is to say, we are asked to declare that the Magistrate passed the order, under section 318 of the Code of Criminal Procedure, so illegally that we should interfere under section 404. I do not think that the Magistrate has, in any way, proceeded either without jurisdiction in this case, or illegally. I, therefore, consider that we should not admit the application under section 404 of the Criminal Procedure Code. But, irrespective of that, I do not see that, under section 404, any power has been given to us to require the Magistrate to set aside his order; and by reason of the decision of this Court above cited, to allow the petitioner "to resume "that possession which he lost by the force and effect of the "said Magistrate's order." There is no decree in favor of the applicant which can be executed, so as to give him legal possession. There is merely a ruling by this Court that the plaintiff in that case alleged title and undisputed possession, such as no way proved this allegation. I do not think that this decision is such an order of a competent Court as would justify the Magis-

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trate considering it as a *decree* for puting the appellant in possession. I reject the application with costs.

HOBHOUSE, J.—The facts on which this application, under the provisions of section 404 of the Code of Criminal Procedure, is founded, are these:—

One Nabinkishor Roy sued on the 6th October 1866 for confirmation of his possession of by declaration of his title to certain lands. While this suit was pending, proceedings were taken by the said Nabinkishor Roy before the Magistrate, under section 318 of the Code of Criminal Procedure; and on the 6th November 1886, the Magistrate, under the provisions of the section I have quoted, gave judgment to the effect that Nabinkishor Roy was the person in possession of the property in question, and passed an order that the said Nabinkishor Roy was to be maintained in such possession, until ousted by due course of law.

In the suit instituted on the 6th October 1866, the present petitioners before us were defendants, and they denied Nabinkishor Roy's right to the lands in question, and eventually, *viz.*, on the 19th August 1868, Nabinkishor Roy's suit was dismissed in regular appeal by the High Court, on the ground that he had not established his title to the lands. It is under these circumstances that the petitioners before us ask us to set aside the Magistrate's order of the 6th November 1866. It is not shewn to us that in this decision there has been any error in point of law, but we are asked to consider a particular point of law, and pass such orders as may seem right to us. The point of law is this, *viz.*, that when this Court has on the civil side determined that Nabinkishor Roy had no title to the lands, in dispute then the Magistrate's order of the 6th November 1866, confirming, Nabinkishor Roy in possession of those lands, is an order which of itself falls to the ground, and should, therefore, be set aside. But the law says that the person who is confirmed in possession, under an order of this kind, shall remain in possession, until ousted by due course of law. The question, therefore, is whether Nabinkishor Roy can be said to have been ousted by due course of law, by virtue of the decision of the 19th August 1868.

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It appears to me that it cannot be so said, for all that the Court said in that decision was that Nabinkishor Roy had not established his title to the land, but the fact remains that he is in possession of those lands, and it does not follow that, because he has failed in this Court to prove his title to the lands, he may, therefore, be ousted by the petitioners from them. If the lands belonging to the petitioners before us, and if Nabinkishor Roy is actually in possession of them, without any title, then the petitioners have their remedy in a suit for possession; and if on the other hand, as a matter of fact, Nabinkishor Roy, notwithstanding the Magistrate's order of the 6th August 1866, is not in possession, then the petitioners are not aggrieved by that order.

In this view, I think that the petitioners have not made out a case for our interference under the provisions of section 404, and I therefore agree in rejecting this application.

Before Mr Justice Kemp and Mr. Justice Glover.

SHALGRAM (DEFENDANT) v. MUSST. KUBIRUN AND OTHERS (PLAINTIFFS.)*

1869
April 28.

Act X. of 1859, s. 4—Rent of Stone Quarries—"Quarrying."

In a suit for rent under a lease of eight annas of a certain hill, and of fourteen bigas of land, by which the lessor reserved a yearly rent of rupees 201 for the land, and the right of levying a yearly tax on the parties, who were employed in quarrying the stone, *held*, this was not a suit cognizable by the Revenue Courts, under Act X. of 1859.

Khalut Chunder Ghose v. *William Minto* (1) considered and approved.

Baboo *Tarak Nath Dutt* for appellant.

Mr. *C. Gregory* for respondent.

THE facts of this case sufficiently appear in the judgment of

KEMP, J.—The point involved in this special appeal being one of considerable importance and of some nicety, the pleaders

* Special Appeal, No. 2767 of 1868, from a decree of the Judge of Gya, dated the 30th July 1868, affirming a decree of the Deputy Collector of that district, dated the 23rd January 1868.

(1) 1 I. J., N. S., 426.