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GOBIND CHANDRA SARMA MAZOOMDAR v. ANAND MOHAN SARMA MAZOOMDAR

question really is as to whether Rambha, in the year 1256 (1849) did herself fully represent the estate of Shib Chandra.

We think that the case, *Gobind Coomar Chowdhry* v. *Hurochunder Chowdhry* (1), is conclusive against the special appellant, on this point; and that that case so completely exhausts the subject before us, that we think we cannot do better than adopt it without any futher arguments. We may add, however, that what is called the Shiva Ganga case, *Katama Natchier* v. *The Rajah of Shiva Gunga* (2); and another case *Nabin Chandra Chuckerbutty* v. *Iswar Chandra Chuckerbutty* (3), are strongly in point, as cases from which we may deduce that the ruling of the Division Bench of this Court before referred to, which we are now following, is strictly accurate and good in law.

The special appeal is dismissed with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

SYED AZUR ALI AND OTHERS (DEFENDANTS) *v.* KALI KUMAR CHUKERBUTTY (PLAINTIFF).*

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Special Appeal—Secondary Evidence.

[In a suit on a bond executed under a mooktearnama, which was not produced, the Court of first instance admitted secondary evidence of it, and decreed the suit. In special appeal, the High Court was of opinion that the secondary evidence had been improperly admitted, and therefore the decree in the plaintiff's favor could not stand. Upon this it was contended that the suit should be dismissed, as the Court, hearing a case in special appeal, had no power, under such circumstances, either to remand the case or to call for additional evidence.

Held, that although the powers conferred by sections 351, 354 and 355 of Act VIII. of 1859 on the Court of regular appeal, are not directly given to the Court of special appeal, yet the Court, when it found the order of a lower Appellate Court was wrong, could point out the error and direct the lower Appellate Court to make such order as would rectify the error.

*Special Appeal, No. 2981 of 1866, from a decree of the Judge of Backergunge dated 14th August 1866, affirming a decree of the Principal Sudder Ameen of that district dated the 16th March 1866.

(1) 7. W. R., 134.
(2) 9 Moore I. A., 534.
(3) Case No. 460 of 1867, 29th April 1868.

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SYED AZUR ALI v. KALI KUMARI CHUKERBUTTY.

Baboos *Chandra Madhab Ghose* and *Srinath Banerjee* for appellant.

Baboos *Kali Mohan Doss* and *Dwarka Nath Mitter* for respondent.

MARKBY, J.— IN this case the plaintiff brought a suit to recover an alleged loan of rupees 1,000 upon a bond said to have been executed by one Mohan Chandra Sen, as mooktear on behalf of the defendant. The defendants denied that they had borrowed the money, aud that they had ever given any mooktearnama to Mohan Chandra Sen, empowering him to execute the bond. The bond was produced, but not the mooktearnama. The plaintiff, however, gave evidence, which the Court of first instance considered sufficient to justify the reception of secondary evidence, of the contents of the mooktearnama. Accordingly, a book was produced from the Court in which the mooktearnama had been registered, which contained (apparently) an abstract of the contents of it.

It was objected by the defendants in the lower Appellate Court, and has beeu objected here that the secondary evidence was inadmissible, because the plaintiff had not sufficiently accounted for the non-production of the orignal mooktearnama.

We have examined this part of the evidence, and think that the Court of first instance was wrong in considering that the proper foundation had been laid for the admission of secondary evidence. The witnesses do not state that the document is lost or destroyed, on the contrary, it seems to have been perfectly well ascertained where it was. It is true, that the possession of it appears to have been changed so frequently, that the plaintiff may well have had some difficulty in bringing it in to Court, but this would not justify the reception of secondary evidence. The proper course, if the Court thought that the plaintiff had exercised real diligence, would have been to adjourn the case, in order to give him time to make efforts to produce the original, or, if there were any ground for supposing that the persons into whose custody it had come were acting under the control of the defendant, to give the latter notice to produce it.

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We, therefore, think that the secondary evidence was not admissible, and that the verdict in the plaintiff's favor cannot stand. Upon this, the question arises, what is the order which this Court ought to make on appeal. The vakeel, for the appellant, contends, that we ought at once to dismiss the suit; that we have no power to remand the case, or to hear additional evidence, or to refer the case back to the lower Court for that purpose, no such power having been conferred on the Court which sits in special appeal.

We are, however, clearly of opinion that this view cannot be maintained. It is true, as contended, that the powers conferred by sections 351, 354, and 355 on the court of regular appeal are not directly given to the Court of special appeal, but when we find that the order of the lower Appellate Court is wrong, our duty is to point out to the Court what order it ought to have made, and to direct that Court to make it. Indirectly, therefore, though not directly, we have the same power in this respect as the Court of regular appeal.

The lower Appellate Court in this case ought to have reversed the decision of the first Court, upon the ground that the secondary evidence was wrongly admitted. We now direct the lower Appellate Court to do so, and remand the case for that purpose' and the lower Appellate Court will dispose of it in accordance with sections 343 and 354 of the Code of Civil Procedure.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

W. FITZPATRICK (PLAINTIFF) *v.* GEORGE WALLACE AND OTHERS (DEFENDANTS.)*

1869. *March 12.*

Right of Occupancy--Determination of Tenancy.

In a suit by a lessee to oust the tenant in possession, *held* that, the tenancy must be shewn to have been legally determined by notice to quit, demand of possession, or otherwise.

* Special Appeal, No. 1899 of 1868, from a decree of the Judge of the Small Cause Court exercising the power of Principal Sudder Ameen of Bhagulpore, dated the 23rd March 1868, affirming a decree of the Sudder Ameen of that district, dated the the 29th August 1867.