Ramoona and another *versus* Manick Moyee Chowdhrain and others, has reference to a very peculiar case. In that case there were two co-plaintiffs, in no way connected with each other, suing under four distinct causes of action; one plaintiff suing on two distinct against one defendant for one portion of the property, and against the other co-defendant for the other portion of the property; and the other co-plaintiff suing on two distinct causes of action against the two co-defendants in the like manner. In that case, on the particular facts brought before the learned Judges, they held that "the causes of action of the "two co-plaintiffs were so distinct in their "nature as to be dependent on entirely dif- "ferent evidence for their respective sub- "stantiation." In like manner they observed that "the defence of the two co-defend- "ants might easily be imagined to be equal- "ly different on the different cause of action." They, therefore, thought that "it would be "a monstrous injustice that the defendants "should be obliged, in spite of their protest "in the beginning, to have their distinct "defences to the one claim and the other "confused together and tried as one be- 'tween them and the two several plaintiffs action, just as if the two plaintiffs 'had a common ground of action against them."

Now, in the present case; the plaintiff has a common ground of action as against the two other widows of her deceased husband; the defences of the defendants will not be dependent on entirely different and distinct evidence; in short, there is nothing but these two deeds of *bye mukassa* which prevents the plaintiff from succeeding in her claim, her share in the estate being admitted and not disputed under the Mahomedan Law.

I, therefore, fail to see why the question of the genuineness or otherwise of these deeds of *bye mukassa* should not be tried in this suit; more particularly with reference to the position of the parties, to the fact that the other heirs, that is, the sons and daughters of the late Kader Ali, do not dispute the plaintiff's claim; and, lastly, to the fact that this suit will dispose of the whole question of the extent of the plaintiff's share in the estate, if any, and prevent further litigation.

In this view of the case, I would reverse the decision of the Judge, and remand the case to the Judge to be tried, as it was tried in the Court of first instance on the merits. The case is therefore remanded for trial with reference to this judgment, under Section 15 of the Letters Patent.

The 3rd June 1869.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Secondary evidence—Objection.

Case No. 765 of 1869.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 29th December 1868, reversing a decision of the Subordinate Judge of that District, dated the 18th September 1866.

Kissen Kaminee Dassee (Plaintiff), *Appellant,*

versus

Ram Chunder Mitter and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Romesh Chunder Mitter* and *Gopal Lall Mitter* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

An objection to the reception of secondary evidence is properly made in the Court of first instance, but cannot be allowed in any appeal Court.

Phear, J.—THE only question in this case now is whether or not a certain property named Dogachea is dealt with by a certain ikrar, and thereby divided amongst the members of the family into four parts. If it is, the plaintiff is entitled to succeed in her suit. This ikrar is not itself produced in Court, but the plaintiff gives secondary evidence of its contents. The Lower Appellate Court is of opinion that this secondary evidence is weak and insufficient to prove that Dogachea did form part of the property divided by the ikrar; and on that account it considered that the plaintiff had failed to make out her claim.

We think that if, under the circumstances of this case, secondary evidence was admissible, the secondary evidence in question very distinctly makes out that Dogachea *was* part of the property divided by the ikrar.

Kishoree Mohun is the principal witness, and he appears to make three unmistakeable assertions: *first*, that Dogachea was the property of Anund Chunder; *secondly*, that two years after Anund Chunder's death, all his property was divided by the ikrar,

which is now in question in this suit; and, *thirdly*, that this property (Dogachea) was particularly named as part of the property divided.

If this witness is worthy of being believed, his testimony entirely makes out the plaintiff's claim.

On the other hand, the defendant complains that secondary evidence of the contents of the deed ought not to have been received, because he says the plaintiff has given no evidence to the effect that it is not within her power to produce the deed itself.

I believe we are unanimous in thinking that this objection comes now too late.

The issue was distinctly raised in the Court of first instance as to the custody in which the deed was, and as to its contents; and it does not appear that any objection to the admission of the secondary evidence on that issue was made in that Court.

The case came up to this Court on special appeal from the decision of the Lower Appellate Court, and as far as we can learn, neither in this Court nor in the Lower Appellate Court, was any objection ever hinted relative to the reception of this evidence. It was only when the case was remanded back to the Lower Appellate Court for re-trial upon an issue named that the objection was first made.

Now, I need not point out that an objection of this kind not only comes properly in the Court of first instance, but cannot well be made in any appeal Court. For, if it were made at the time when the evidence is tendered, and were then held good, it would be in the power of the party desiring to adduce secondary evidence to take some steps for procuring the original, or at any rate to account for its absence. In a Court of appeal, this course is out of the question.

But, further, I am not altogether prepared to say that, under the circumstances of this case, the secondary evidence would have been improperly received, even had it been objected to. The plaintiff had in her verified plaint asserted that the original document was in the possession of the principal defendant, and she had asked the Court to summon him to produce it, thus doing all she could, in pursuance of the provisions of Section 40 of Act VIII. of 1859, for procuring the production of the document if she really believed, or had cause to believe, that it was in the possession of that defendant. The defendant in his written statement declared that the document was not with him, but at the same time supported the *bona fides* of the plaintiff's statement by saying that he knew where it was; that it was in the possession of Tarinee Churn, and therefore certainly not under the immediate command of the plaintiff. Then we have Tarinee Churn examined in the cause, and deposing on oath to this document, with all the other documents, being in possession of the first named defendant.

I should be very loth to say that a Court of justice having arrived at this stage of the conflict between the parties could not, in the exercise of its discretion, allow the plaintiff to produce secondary evidence of the contents of the document, to go of course for as much as it might be worth.

We think, then, that the defendant has not succeeded in his contention, and that the plaintiff has good ground, on special appeal, to complain of the conclusion at which the Judge has apparently arrived. For, to repeat, we think that the admission of secondary evidence cannot now be rightly objected to, and that the secondary evidence which the plaintiff has adduced, if it is to be believed, established the plaintiff's case.

We, therefore, reverse the decision of the Lower Appellate Court, and remand the case for re-decision, adding the direction that if the Judge believes the evidence of Kishoree Mohun Bose he ought to give a decree in favor of the plaintiff.

Costs will follow the event.

The 3rd June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Uniform rent—Rent in kind and in cash.

Case No. 608 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 12th December 1868, reversing a decision of the Deputy Collector of that District, dated the 15th September 1868.

Miterjeet Singh and others (Defendants), *Appellants,*

versus

Toondun Singh (Plaintiff), *Respondent.*