

*Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.*

1907  
July 18.

MAN GOBINDA CHOWDHURI

v.

SHASHINDRA CHANDRA CHOWDHURI.\*

*Commission—Evidence—Evidence taken on commission on behalf of the defendant—Right of the plaintiff to refer to such evidence—Civil Procedure Code (Act XIV of 1882) ss. 389, 390—Practice.*

REGARD being had to the provisions of ss. 389 and 390 of the Code of Civil Procedure (Act XIV of 1882) as also to the practice of the mofussil Courts, the deposition of a *pardanashin* lady taken on commission, although not tendered by the party on whose behalf it was taken, is yet admissible in evidence and can be referred to by the other side as a part of the record of the case.

*Kusum Kumari Roy v. Satya Ranjan Das*(1) and *Hemanta Kumari v. Banka Behari Sikdar*(2) distinguished.

*Nistarini Dassee v. Nundo Lal Bose*(3) and *Dwarkanath Dutt v. Gunga Dayi*(4) referred to.

SECOND APPEAL by the plaintiffs, Man Gobinda Chowdhuri and others.

This appeal arose out of an action brought by the plaintiffs to recover possession of certain immovable property after establishment of their title thereto. The allegation of the plaintiffs was that the land in dispute had formerly belonged to four brothers, viz., Ram Gati, Shiva Gati, Uday Nath and Guru Dayal; that the 8-anna share of Shiva Gati and Guru Dayal was sold at an auction and purchased by the plaintiff's father; that the remaining 8-anna share was subsequently purchased by their father from the sons of Ram Gati and Uday Nath, and thus their father became the proprietor of the entire 16-anna share of the property

\* Appeal from Appellate Decree, No. 71 of 1906, against the decree of Lalit Kumar Bose, Subordinate Judge of Sylhet, dated Sept. 23, 1905, modifying the decree of Mohar Lal De, Munsif of Habiganj, dated Dec. 12, 1904.

(1) (1903) L. I. R. 30 Calc. 999.

(3) (1899) I. L. R. 26 Calc. 591.

(2) (1905) 9 C. W. N. 794.

(4) (1872) 3 B. L. R. App. 102.

and was in possession of the same since then; that the defendant No. 1 in collusion with other defendants dispossessed them of a portion of the property on the allegation that he had purchased it from one Nrityamoyee, the widow of Guru Dayal; and hence the suit.

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The main contention of defendant No. 1 was that the plaintiffs had acquired only 14-anna share in the disputed property, and that the remaining two annas belonged to him; he further contended that the original proprietor, Ram Kunai *alias* Sachin Ram, had a brother named Gopi Ram, and the disputed property belonged to both of them in equal shares. Gopi Ram died childless and left his brother's sons, Guru Dayal and Shiva Gati, as his heirs; Uday Nath, Ram Gati and the wife of Gopi Ram had predeceased him; hence the 8-anna share of the said Gopi Ram was inherited by Guru Dayal and Shiva Gati in equal shares, each of whom again got another 2-anna share of the property as heir of their father. The 4-anna share of Guru Dayal having been disposed of during his life-time, his widow inherited only the remaining 2-anna share and sold it to defendant No. 1. The defendant examined his vendor, Nrityamoyee the widow of Guru Dayal, by commission; but the witness having deposed in a hostile way, defendant declined to tender the deposition in evidence.

The Court of first instance, on the plaintiffs' application to read the evidence of Nrityamoyee taken on commission as a part of the record of the case, permitted him to do so, and having held that the plaintiffs had proved their title to the disputed property, decreed the suit.

On appeal, the learned Subordinate Judge refused to refer to the evidence taken on commission as not being evidence in the case, but having held that the plaintiffs proved their case to the extent of 14-anna share of the property, passed a decree as regards that share. Against this decision the plaintiffs appealed to the High Court.

*Babu Nilmadhab Bose (Babu Brojendra Nath Chatterjee with him)*, for the appellants. The Court below was wrong in holding that the evidence taken on commission, although not

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referred to by the party on whose behalf it was taken, the other side could not refer to it, as not being evidence in the case. Section 389 of the Code of Civil Procedure clearly points out that such evidence shall form part of the record of the suit; that being so, the plaintiffs were entitled to refer to it: see *Nistarini Dassie v. Nundo Lall Bose*(1). This case, no doubt, is in conflict with the case of *Hemanta Kumari v. Banku Behari Sikdar*(2). Whatever may have been the practice of the Original Side of the High Court, the practice of the Appellate Side was that such evidence formed part of the record of the case, and could be referred to: *Dwarkan Nath Dutt v. Gunga Dayi*(3). The mofussil practice also the same. If the commission, the return thereto, and the evidence taken under it are to form part of the record under s. 389 of the Code of Civil Procedure, how can the evidence be excluded from consideration?

*Babu Jadu Nath Kanjilal*, for the respondent. The cases of *Kusum Kumari Roy v. Satya Ranjan Das*(4) and *Hemanta Kumari v. Banku Behari Sikdar*(2) are in my favour. They clearly lay down that the evidence taken on commission, if not tendered by the party on whose behalf it is taken, cannot be taken in evidence.

HOLMWOOD AND SHARFUDDIN JJ. One Sachin Ram alias Ram Kanai had four sons, Ram Gati, Shiva Gati, Uday and Guru Dayal. Ram Gati died, leaving a son Rash Mohan, and Uday died leaving a son Umesh. The plaintiff bought the right, title and interest of Shiva Gati and Guru Dayal in three parcels of land situated in Taluks 9, 10 and 11 of Pergana Bamai at an auction sale. He afterwards bought the right, title and interest of Rash Mohan and Umesh by private contract. He alleges that on taking possession of the 16 annas, he was dispossessed of two annas by defendant No. 1 who had purchased 4 annas from one Nrityamoyee, widow of Guru Dayal. The way in which defendant No. 1 claimed this land was by asserting that Ram

(1) (1899) I. L. R. 26 Calc. 591.

(2) (1905) 9 C. W. N. 794.

(3) (1872) 8 B. L. R. App. 102.

(4) (1903) I. L. R. 30 Calc. 499.

Kanai had a brother, Gopi Ram, who was joint in mess and property with him, that therefore Gopi Ram had 8 annas of the property, that he survived Ram Gati and Uday, and on his death his 8 annas went in equal shares to Shib Gati and Guru Dayal. Thus they would have six annas each of the property, and Guru Dayal's widow would have two annas over and above the four annas purchased by plaintiff.

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The appellant's case is that Ram Kanai was separate, and he complains of the judgment of the lower Appellate Court on two grounds, *first*, that the lower Appellate Court has taken a wrong view of the presumption that the property in a Hindu family is joint, and, *secondly*, that it has improperly excluded the important deposition of Nrityamoyee taken on commission.

The Subordinate Judge says: "It is settled law that the normal state of Hindu family is joint and the onus is on him who alleges separation; but when separation is admitted, there can be no presumption as to when the separation took place." At the end of his judgment he adds that there is a document executed by Guru Dayal under whom the defendant No. 1 claimed in which separation is clearly admitted. Therefore there was no such strong onus on the plaintiff in this case. The Subordinate Judge has clearly misdirected himself as to the document Ext. 14 which lands him in the rather ridiculous conclusion that "Shiva Gati and Guru Dayal made mistakes about their shares in the mortgage bond on account of ignorance of Hindu Law, and that their share was really 6 annas each though they did not know it." But this is not the only point in which he appears to have been mistaken. He decides that the family was joint on an alleged admission of plaintiff No. 2. It is clear that the former deposition of plaintiff No. 2 contains no such admission. What the Subordinate Judge considers to be an admission is a statement that although Gopi Ram was entirely separate in estate, he, after the death of his wife, lived in commensality with his nephew, and being a lonely man, he followed his nephew from one place to another. That he was entirely separate in estate is asserted throughout the deposition and there can be no doubt about it.

But when we come to the exclusion of the evidence of Musst. Nrityamoyee, we are compelled to hold that this vitiates

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the Subordinate Judge's judgment in appeal altogether. We are unable to say what effect would have been produced on his mind if he had fully considered it. If her evidence was improperly excluded, the whole case would have to go back for a reconsideration of the whole of the issues in the light of that evidence and in the light of the remarks we have made before. It is now practically conceded that Nityamoyee's evidence ought to be admitted. The defendants examined her on commission, the deposition was filed on the record and the defendants refused to tender it. The plaintiffs pre-umably with the leave of the Munsif, read it as part of their case, and there is nothing in section 389 of the Civil Procedure Code to prevent their doing so, and it is quite in accordance with mofussil practice.

Our attention has been drawn to a practice prevailing on the Original Side of this Court with regard to the admission of evidence taken on commission. We have referred to four rulings two of which conflict with the other two. Beginning with the judgment of Mr. Justice Macpherson in 1872 in *Dwarkanath Dutt v. Gunga Deyi*(1), it was there laid down that evidence taken on commission by one party which is part of the record may be used by the other. This was followed by Mr. Justice Stanley in *Nistarini Dassie v. Nundo Lall Bose*(2), but the opinions of both the learned Judges have since been dissented from by Mr. Justice Sale in *Kusum Kumari Roy v. Satya Ranjan Das*(3), and by Mr. Justice Bodilly in *Hemanta Kumari v. Banku Behari Sikdar*(4).

Now, we are entitled to follow the view of the learned Judges so far as section 389 of the Civil Procedure Code is concerned, but we are in no way concerned with the practice which has grown up on the Original Side of this Court. In the case of *Nistarini Dassie v. Nundo Lall Bose*(2) it was pointed out at the Bar that under the provisions of section 389 of the Civil Procedure Code, evidence taken on commission shall, subject to section 390, form part of the record in the suit. Stanley J., therefore, held that the plaintiff is entitled to refer to the evidence as a matter of record. Section 390 of the Civil Procedure Code provides "Evidence taken under

(1) (1872) 8 B. L. R. App. 102.

(3) (1903) 1 L. R. 80 Calc. 999.

(2) (1899) 1 L. R. 26 Calc. 591.

(4) (1903) 9 C. W. N. 794.

a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead, or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court; or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in the last preceding clause, and authorizes the evidence of any person being read as evidence in the suit. . . .”

It is clear that the Munsif in this case did allow the plaintiff to read this lady's evidence as evidence in the suit, and none of the other questions contemplated by section 390 arose, as the lady was exempted from appearance as *pardahnashin*. It seems to us that it is not competent to the Court of first Appeal to exclude evidence which is not inadmissible by any rule of law, but which the Subordinate Judge merely considered ought to be excluded under an assumed rule of practice. We, therefore, hold that the evidence of the lady must be received and must be considered by the lower Appellate Court.

For these reasons, we set aside the judgment and decree of the lower Appellate Court, and direct that the case go back to him for a fresh decision on the whole of the issues and the evidence, after taking into consideration the remarks made in this judgment.

Costs will abide the result.

*Appeal allowed; case remanded.*

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