

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.

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

Application refused.

Attorney for the plaintiff: *Mahomed Sultan Alum.*

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

J. E. G.

APPELLATE CIVIL.

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

KISHORI LAL GOSWAMI

v.

RAKHAL DAS BANERJEE.*

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Evidence—Secondary evidence, admissibility of—Objection to reception of secondary evidence in Appellate Court—Evidence Act (I 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.

Kameshwar Pershad v. Amanutulla (1) dissented from.

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

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

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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 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 mokurari* 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-Perganas, one by the plaintiff, and the other by the defendant No. 1.

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 Chander Goopto* (1) lends support to my contention.

Dr. Ashutosh Mookerjee (Babu Jadu Nath Kanjital 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 Chaudhrani v. Kishori Lal Roy* (2). Loss of the original not being accounted for, the copy of the document is not admissible in evidence: see *Ameer-oonnissa Khatoon v. Abedoonnissa Khatoon* (3), *Kameshwar Pershad v. Amanulullu* (4).

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

(1) (1876) 25 W. R. 168.

(2) (1887) I. L. R. 14 Calc. 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 Calc. 53.

(5) (1880) I. L. R. 6 Calc. 666.

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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.

S. C. G.

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