(1869) 03 CAL CK 0036

Calcutta High Court

Case No: Special Appeal No. 2981 of 1866

Syed Azur Ali and Others		APPELLANT
	Vs	
Kali Kumar Chukerbutty		RESPONDENT

Date of Decision: March 12, 1869

Judgement

Markby, J.

In this case the plaintiff brought a suit to recover an alleged loan of Rs. 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, and 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 been objected here, that the secondary evidence was inadmissible, because the plaintiff had not sufficiently accounted for the non-production of the original mooktearnama.

2. 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 into 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 fresh 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.

3. We, therefore, think that the secondary evidence was not admissible, and that the verdict in the plaintiff''s favour 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.

4. 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 that 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.