(1869) 04 CAL CK 0039

Calcutta High Court

Case No: Special Appeal No. 3069 of 1868

Makbul Ali		APPELLANT
	Vs	
Srimati Masnad Bibi and Others		RESPONDENT

Date of Decision: April 27, 1869

Final Decision: Dismissed

Judgement

Bayley, J.
I am of opinion that this appeal must be dismissed with costs. The plaintiff sued for a two-anna share of certain property, under a deed of partition.

2. The defendant''s case was that the plaintiff had no right under the deed of partition; that the defendant''s father was entitled to the whole of the property, and that the Bandhaknama and Solenama adduced in support of plaintiff''s case, were collusive deeds.

3. Both the lower Courts have given the plaintiff a decree.

4. Against that decree the defendant appeals specially, and urges 1stly, that the Bandhaknama, on which the suit is based, being a copy of a copy is not admissible as evidence.

5. Now there is a finding of fact, that the original document was filed in Court in 1856 by the defendant''s mother and again taken away by her under the ordinary rules of Courts in such cases, viz., that when a party is permitted to take any original document filed on the records of a Civil Court, such party is bound to file a copy, authenticated as correct, to take the place of the original.

6. In the present case, the defendant was called upon to produce the original which was found as a fact, to be in her custody. This the defendant did not do. The plaintiff then went to the Court, and from thence got a copy of the authenticated copy which had taken the place on the record of the original removed from it by the defendant as above set forth.

7. The English law of evidence cited to us by the pleader for the special appellant, in regard to the copy of a copy, was never intended to be applied to such circumstances as these, and it has been laid down by the Privy Council that the English law of evidence is not in all cases to be strictly applied in the Indian Courts, but only in those cases where the circumstances are such as can fairly admit of it.

8. There is a supplemental answer filed by the defendant in which the objection, that the copy of the copy is not admissible as evidence, is taken in this way, viz., that it was inadmissible by reason of a certain rule of evidence laid down in Mr. Norton''s work on Evidence Page 283, 581, and also by reason of the value of the stamp on which the copy was engrossed being insufficient. Whether the point was really pressed before the first Court or not, is not shown to us, either by the judgment of the Court or otherwise; but be that as it may, when the original deed was found to be at the command of the defendant, and the plaintiff demanded of the defendant to produce it in Court, and showed herself ready to procure the primary evidence, and was only obstructed by the recurrence of the defendant, and so forced to have recourse to the secondary evidence, I think that the very best secondary evidence was the copy, which was filed by the defendant herself, on the records of the Court in lieu and as a correct copy of the original.

9. Now, as the first copy could not ordinarily under the rules of our Courts be removed from the custody of the Judge, it was only left for the plaintiff to take a copy of what the defendant herself placed there as a counterpart of the original, and it may be added that throughout the whole proceedings no clear objection has been taken as to what, if any, inaccuracy existed in the copy produced by the plaintiff. I think, therefore, that under these circumstances, there is no rule of law in our Courts of equity and good conscience to prohibit the reception of the copy as evidence in a case like the present.

10. The third ground is divided into two parts. The first part is that the admissions in the Solenama, relied upon by the plaintiff, cannot support her claim without evidence; that they were made by the plaintiff''s mother and authorized by her; but it is clear that she did appoint vakeels to conduct her case in 1856, and those vakeels, by virtue of their vakalatnama, did pub in that Solenama in her behalf. This is prima facie evidence that what was done was done by authority. It was always open to the defendant to show that it was not done under authority. No proof, however, has been given or was even offered to establish this last point.

11. The second part of the objection is, that the Solenama cannot prejudice the defendant, as he was a minor at the time of its execution, but it is clear that it has been taken for granted by both sides in the Courts below, that the mother throughout acted for herself and as guardian of her children, and nothing has been shown by the defendant to disprove this; further. I concur with the lower appellate Court in holding that when a mother, as a constituted guardian, acts in good faith for her children in any litigation, they are bound by those acts. Of course, in case of

any illegal or fraudulent act of the guardian, the minors have specific remedies by personal actions, and be that as it may, the fact of the mother''s having acted and having had power to act as the guardian of her minor children, was never questioned in the lower Courts. Upon the whole, we see no ground to interfere with the decision of the lower appellate Court, and we therefore dismiss this appeal with costs.