

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of A. B. Miller (Assignee of the Estate of Babu Ram Kishen) v. Babu Madho Das, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 28th July 1896.

Present:

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

Ram Kishen Das who carried on a large business in Calcutta was on the 2nd of March 1889 adjudicated an insolvent by the High Court at Calcutta and his estate became vested in the Appellant as the official assignee. On the 6th of May 1889 the Respondent's pleaders wrote and sent a letter to the Appellant stating that the Respondent was a creditor of the insolvent for Rs. 1,53,339 on balance of account with interest, that the Respondent held as collateral security for his debt the title deeds and documents of certain houses and lands situate at Benares Ghazipur and Mirzapur of the value of Rs. 65 to 70,000, and that the title deeds of the properties were delivered to the Respondent by the insolvent himself at Calcutta in February 1888. And they inquired whether the Appellant was prepared to admit the equitable mortgage. On the next day the Appellant replied by letter that it would be necessary for him to make inquiries into the matter of the mortgage claim

and if the Respondent could prove the mortgage to the satisfaction of the Insolvent Court he would be prepared to consent to the usual order for sale. He added that in the meanwhile he would be obliged if they would send for his inspection a copy of the memorandum which accompanied the deposit of the title deeds. On the 13th of May the pleaders replied that they were prepared to give the Appellant sufficient time to make inquiries, but as he appeared to insist upon their proving the claim in the Insolvent Court, and made it a condition of accepting the mortgagee's right, they were prepared to seek their remedy in a court having jurisdiction to try the question at issue. They added that if the Appellant wished to settle the matter out of court they were prepared to give him every facility in making inquiries into the matter and for this reason they gave him one week's time to make up his mind with reference to the subject of their claim. On the 17th of May the Appellant acknowledged the receipt of this letter, and referring to his of the 9th reminded them that they had not complied with the request in it for a copy of the memorandum and again asked for it. To this the pleaders on the 21st of May replied by letter "that the title deeds of certain houses &c. were made over to Babu Madho Das my client's agents Bhagwan Dass and Buldeovajee at Calcutta as collateral security for his debts. No written memo. accompanied the title deeds at the time of their deposit and for this reason we cannot furnish a copy of the same." On the 6th of June 1889 an order was made by the High Court at Calcutta for the Respondent and his gomashtha to attend before the Court and be examined in the matter of the insolvency and to produce the documents and deeds said to have been deposited. On the same day the Respondent filed his plaint

in the Court of the Subordinate Judge of Mirzapur against Ram Kishen and the Respondent praying for a decree for the amount claimed for debt and that in default of payment the properties alleged to have been mortgaged might be sold and the proceeds applied in payment. The Respondent in his written statement denied that the title deeds were deposited as alleged in the plaint.

On the 19th of September 1889 the suit was transferred from the Court of the Subordinate Judge to the Court of the District Judge of Mirzapur. Of the nine issues framed by him the only one which is now material is the fourth. That is "Were the title deeds specified in paragraph 6 of the plaint deposited by Defendant 1 with Plaintiff or his agents in Calcutta in February 1888?" The District Judge in a judgment where the evidence is fully and carefully discussed found that it was not proved that the title deeds were delivered to the Respondent's gomashas in Calcutta in February 1888 and dismissed the suit. The Respondent appealed to the High Court at Allahabad. That Court came to the opposite conclusion and made a decree in the Plaintiff's favour which is the subject of the present appeal.

Now the onus was on the Respondent to prove that the title deeds which it appeared were in his possession when the letter of the 6th of May was sent were deposited by Ram Kishen with him or his agents before the adjudication of insolvency. His case depended mainly upon the evidence of Buldeo Tiwari (the Buldeovajee in the letter of the 21st of May) and Bhagwan Dass and their Lordships will first consider their evidence. Buldeo was first examined. He is the gomashas of the Respondent and had then been in his service for eleven years. His account of the deposit of the title deeds was this. There had been

for some years large transactions between Ram Kishen and the Respondent in hundis drawn by the former and accepted by the latter and from time to time renewed. On the 27th of December 1887 a hundi having become mature and the time for renewal having arrived Ram Kishen drew a hundi for one lac of rupees and sent it to the Respondent from Calcutta requesting him to accept it. The Respondent refused to accept it which occasioned a delay of nearly a month. Then Ram Kishen came to Benares on the occasion of a marriage in the house of one of his relations. After the completion of the marriage the Respondent told the witness that Ram Kishen had come to Benares and said "go to him and dun him. Tell him that I shall never renew this hundi; nay I shall bring an action. Go to Ramkishun and tell him so." "After a day or two I went to Ramkishun and said 'This time the Plaintiff will by no means renew the hundi.' Then Ram Kishunji said to me 'go and tell the Plaintiff that I paid him off when Rs. 2,75,000 was due by me. Now a small balance is due.' I then came and said so to the Plaintiff who again said to me 'go and say that I won't listen.' I then went and told Ram Kishunji that the Plaintiff was inflexible. Then Ram Kishun said to me 'go and tell the Plaintiff that if he does not agree I will on my return to Calcutta give him what papers I have for his satisfaction.' Nay Ram (Ram Kishun) had said to me 'If you come yourself I will give the papers to you or the Plaintiff may send anyone he likes.' I went and told this to the Plaintiff. This talk took place in the course of two or three days. I told Ram Kishunji 'the Plaintiff will not believe my words unless you write a letter to him.' Then Ram Kishun had written a letter to the Plaintiff in my presence and handed it to me

“ open. There was no one when I had been
 “ there.” “ I came to the Plaintiff
 “ with the letter and I too explained to the
 “ Plaintiff that this time Ramkishun offered also
 “ to pay interest on the hundies and to deliver on
 “ his return to Calcutta his title deeds by way of
 “ security and that he should agree to it. The
 “ Plaintiff then said to me ‘remember well to
 “ ‘ draw a hundi on Ram Kishun immediately on
 “ ‘ the expiration of the term promised by him.’ ”

The letter referred to was produced. It is as follows “ From Ram Kishen to B. Madho Das.
 “ Sir my compliments to you. I send herewith 4
 “ hundis for Rs. 1,00,000. Sign them and send
 “ them with interest to Rajah Shimbhu Narain
 “ Singh. I shall after I have reached Calcutta
 “ send you the interest in 15 or 20 days or you
 “ may otherwise draw a hundi. . . . A sum of
 “ nearly Rs. 1,48,000 will be found due to you in
 “ respect of the Nij account up to Sambat 94. I
 “ shall pay the whole of this sum together with
 “ interest according to account up to November
 “ 1888 and shall not make another promise nor
 “ shall I give you the trouble to renew the Raja
 “ Saheb’s hundis. I shall write the particulars
 “ to you after I have compared what you have
 “ written. The rest is all right. Dated 29th
 “ January 1888.” The witness said he told Ram
 Kishen the Respondent would not believe his
 word unless he wrote a letter to him and yet
 there is nothing in this letter about the most
 important matter. In a later part of his evidence
 he gave a different account of when the letter
 was written. He said that subsequently to the
 writing of the letter came the proposal for the
 delivery of documents. “ Baboo Ramkishun had
 “ proposed the delivery of documents, I myself
 “ made no inquiry from Ramkishun regarding
 “ the documents. On the contrary Ramkishun
 “ himself had said ‘This time the Plaintiff does

“ ‘ not trust me and does not accept the hundi in
 “ ‘ favour of the Rajah Sahib. Therefore I
 “ ‘ myself shall deliver the title deeds of houses
 “ ‘ to him when he or his man comes.’ Ere the
 “ writing of this letter Ramkishun had not in my
 “ presence made mention of the delivery of the
 “ documents.” It is evident that at this stage of
 his examination, having seen the effect of the
 letter upon what he had before said, he sought to
 get out of the difficulty by saying that the
 proposal to deliver the documents was made
 after the letter was written; but then it may
 be asked why if, as he had said, the Respondent
 would not believe his words without a letter he
 did not have this proposal added in the letter; and
 why if he told the Respondent of the offer the
 latter did not notice that it was not in the letter
 and was satisfied without having it in. Which is
 the more probable, that the witness has not told
 the truth about what passed between him and
 Ramkishun and what he told the Respondent
 or that if he has the letter would have
 said nothing about it? It is to be observed
 that Ram Kishen, the only person present, had
 left Calcutta after the adjudication of insol-
 vency and could not be found. Most likely the
 witness knew this and had no fear of being
 contradicted or punished for giving false evi-
 dence and he must from his position have been
 considerably under the power and influence of
 the Respondent. About the deposit of the title
 deeds the witness said that he and Bhagwan
 Das went to Calcutta by order of the Plaintiff to
 take the title deeds, they called on Ram Kishen
 and said “ Please give us what you promised at
 “ Benares and leave to go back,” the witness
 Bhagwan Das and Ram Kishen were there, there
 was no one else, he demanded the title deeds
 from Ram Kishen according to his promise,
 Ram Kishen put them off on two or three days

successively and finally took the papers which were in the cloth bundle with a list in English out of a box and gave them to the witness who made a list of them in Hindi. There were 33 documents and 55 papers connected with them. The witness requested Ram Kishen to write a letter and give it to him and Ram Kishen said "There is no occasion for a letter. Take away these papers without it as the letter if written will require registration &c." The witness said that when they were not accompanied by any letter or any other writing how could the (transaction) be considered to be a mortgage and thereupon he said "Take them away as I say, such is the practice in the town." Their Lordships doubt whether it can be the practice in Calcutta to take a mortgage by deposit of title deeds without a memorandum in writing, but it may be suggested that Ram Kishen said this because he wished to conceal the transaction as it would affect his credit. The witness went on to say that he left the papers with Babu Gambhir Chand for three or four days until he went back to Benares when he took them from him and went to Benares and delivered them to the Respondent. Bhagwan Das who was in the Respondent's service and had been his gomashtha for thirteen or fourteen years, deposed that Buldeo and he went from Benares and reached Calcutta on the next day and went to Ram Kishen instantly and saw him at his office, that they said to him they were ready for the purpose for which he wanted them and he asked them to come to him on the next day or the day after, so far as he believed they went to him on the next day in the afternoon, he took them upstairs to his private room and brought a bundle from a box, there was a list in it in English and the bundle contained title deeds. Ram Kishen having seen the

list and the papers was giving title deeds to Buldeo after marking his list. Buldeo prepared a list of title deeds in Hindi in the order in which Ram Kishen gave them to him. The number of the papers was compared with both lists and Buldeo said "Please give a letter and cash also. It would not be proper to give the papers alone to the Plaintiff." Ram Kishen replied "I tried to make arrangement for money but I could not succeed in that behalf. It will be irregular to write a letter in connection with this mortgage. It is the law of the town of Calcutta, I shall pay the money within the time agreed upon. As the Plaintiff has lost patience now I will very soon get the title deeds returned by payment of money. It will be invalid to write a letter for it will require registration." Then the witness said "Babu Sahib, *i.e.* the Plaintiff, would not be pleased without taking money. Please give money along with this." He replied "There is no opportunity now. I shall remit money as soon as possible and get the things returned." Having taken the list and papers they went to the firm where Gambhir Chand was a gomashta and Buldeo said to him "Please keep these papers I shall take them back while going to Benares." Buldeo having opened the bundle the papers were counted with reference to the list and taken by Gambhir Chand. They went to him five or six days afterwards and took the papers from him and the next day left Calcutta for Benares. On their arrival at Benares the papers were given by them to the Respondent, and he ordered them to go and get the same credited in the account book of the firm which was done by Saligram Munib. In a later part of his evidence the witness said that when Gambhir Chand returned the bundle of papers to Buldeo he read four or five of the papers, that the papers

which he read contained both Hindi and Persian, he did not recollect whether Gambhir Chand said anything by reading the papers or not.

The Judges of the High Court have said that after mature consideration they had come to the conclusion that the testimony of these two men is substantially and in all its main characteristics correct and faithful. Their Lordships greatly doubt whether, having regard to the position of the men and the want of corroboration in writing, this opinion could reasonably be come to. Gambhir Chand who said he was the munib gomashtha of one of the largest native banking firms in Calcutta and had been their gomashtha for about twenty-six years was a witness for the Respondent. He deposed that Bhagwan and Baldeo kept title deeds with them about two years before the trial. The title deeds were with them for about three or four days, he asked what were the papers and they answered they got them from Babu Ram Kishen. A bundle of documents was shown to the witness and he said "These are the papers and I recognise them by the seal of the Kazi." The witness asked them why a particular document was not stamped and they said "it bears the seal of the Kazi"; they pointed out other papers bearing the seal of the Kazi and thus he then identified the papers. In cross-examination he said the only means of identification were the seals, that he had not seen the Kazi's seal before, he had never seen seals of this kind before or after the deposit of the papers, he did not know English or Persian but he noticed the Kazi's seal. Although the identification of the papers may be insufficient, if the witness was speaking the truth when he said that papers were left with him by Bhagwan and Buldeo and they said at the time they gave them to him that they got them from Ram Kishen it would be some corro-

boration of their evidence. Their Lordships are not satisfied with the reason given by the District Judge for disregarding it. It was also sought to corroborate Bhagwan and Buldeo by the entry in the account book at p. 297 of the record, and the evidence of Salig Ram, Ramman Lal and Madho Lal. It is unnecessary to go into the details of this. Their Lordships agree with the District Judge who said he did not attach much weight to this portion of the evidence. The High Court in its judgment says the entry was one which it was easy to make and it was entered in a book which could easily be tampered with.

The next evidence to be noticed is that of Baleshwar Prasad and Rai Shiam Kishen upon which the High Court has laid great stress and whose integrity the District Judge said he could not for a moment question. Baleshwar Prasad who was examined before a commissioner deposed that a conversation between the Respondent and himself in the beginning of September 1888 turned upon the state of affairs of Ram Kishen, that the witness said he had heard that his affairs were not at all satisfactory and that he had left Calcutta never to return and he advised the Respondent to realise the money due by Ram Kishen to him and the Respondent answered that as far as practicable he was making endeavours to get his money. He also said he had taken certain documents relating to gardens and houses and that Ram Kishen had also promised to allow him time to pay the money due on Raja Sambhu Narayan Singh's hundi. He did not recollect whether the Respondent mentioned to him the time when the documents were made over by Ram Kishen to him. The witness also said on cross-examination that he recollected a conversation with the Respondent about the delivery of these documents on two occasions, one was when

the Respondent was summoned to Calcutta to give evidence relating to Ram Kishen's affairs and the other about 10 or 12 days before the trial. Shiam Kishen deposed that about the end of August or beginning of September 1888 he had a conversation with the Respondent and Ram Kishen, the Respondent had said to him "you are a friend of Babu Ram Kishen kindly tell him to pay the debt due to me as I am in want of money"; that he spoke to Ram Kishen who said the Respondent should not be uneasy about his money as he had given over documents to satisfy him. The Judges of the High Court say in their judgment (Record 454) of these witnesses "If this witness (Shiam Kishen) is truthful and accurate the Plaintiff's case is true. If the Plaintiff's case is false then this witness has deliberately and wilfully sworn to a false tale. There is no alternative theory. The circumspect precision as to date precludes the explanation that the witness was honest but was by mistake referring to September 1888 occurrences of another and much latter date. Similar observations apply to the evidence of Babu Balashar Prasad."

Now Section 21 of the "Indian Evidence Act 1872" enacts that admissions are relevant and may be proved as against the person who makes them or his representative in interest but *they cannot be proved by or on behalf of the person who makes them* or by his representative in interest except in three cases named of which the present case is not one. The meaning of this section is very plainly illustrated by the illustration (a) to the section. As to the evidence of Boleshan Prasad therefore the Judges of the High Court have given very great weight to what according to law was not relevant evidence and could not be proved on behalf of the Respondent. The erroneous omission before the Commissioner and the District Court to object to

its admission did not make it relevant and their Lordships must in this appeal, as the High Court should have done, entirely disregard it. The evidence of Shiam Kishen of a statement by Ram Kishen, if the statement was made before the adjudication of insolvency, is relevant and should be considered. As to this the District Judge said he was a young man who seemed to have vague ideas of time and space and that this evidence was hard to believe. It has been seen that the High Court fully believed his evidence. Their Lordships without in the least imputing to the witness an intention to give false evidence think that the conversation he deposed to is of doubtful value. This was the Respondent's case with the addition that he had possession of the title deeds after the adjudication of insolvency on the 2nd of March 1889 and the evidence of his attorney relating to it. The Appellant sought to show that the Respondent obtained the possession after that date. For this purpose he put in a letter dated the 27th of February 1889 written by Bijrawan Das, who had been the head gomashtha of Ramkishen for 17 or 18 years, and addressed to Hur Kishan Das the gomashtha of Ram Kishen at Benares. It enclosed a letter as follows:—"Sanwal Das pays his compliments " to Bhai Hur Kishan Das. Show to Babu " Jagmohan Dasji the very time he may ask you " to show him all the old papers in respect of " the Benares property or any other place. Out " of those papers give him any papers which " he may think fit to be sent. Make a list " of the same and make those papers over to " him. He will forward them to me. Do this " work quietly. Don't delay in showing him " the papers. 27th February 1889." The letter then ran—"Dear Hur Kishan Das. I Bijrawan " Das pray for your welfare. In accordance with " this letter show to Babu Jagmohan Das all

“ the papers you have about the houses. Don't
“ speak to anybody about this. (Signed) Bijrawan
“ Das. Give him any of these papers which he
“ may ask you to be sent here.” Bijrawan Das
deposed that he was Ram Kishen's “munib”
for 17 or 18 years in Calcutta. He was
formerly in Benares and used to attend to Ram
Kishen's work there. When he went away to
Calcutta Har Kishen Das his nephew used to
work. Ram Kishen Das regularly lived in
Calcutta and used to visit Benares occasionally.
Sawal Das was his regular attorney for eight
or nine months before the business fell into
disorder. The deeds relating to the Calcutta
property used to be kept by Ram Kishen
himself and Har Kishen Das used to keep the
deeds relating to the properties in Benares,
Ghazipur and Mirzapur. About the letter he
said “When the Plaintiff (the Respondent) was
“ very pressing in his demands then Babu
“ Sawal Das gave him a letter about making
“ over certain papers to him. Sawal Das handed
“ that letter to me also and I also wrote on it.
“ That letter was sent to Har Kishen Das. That
“ letter was written about the papers, namely,
“ the deeds in dispute. The latter clause is in
“ my handwriting. The Plaintiff was present
“ when this letter was written.” Har Kishen
Das deposed that he received the letter by post
on the 1st or 2nd of March, that Jagmohan Das
is the Respondent's son-in-law, he came to him
in the afternoon of the day he received the letter
and went away without seeing the papers saying
he would come next morning. He came the
next morning bringing a clerk with him and
having selected 13 bundles of papers took them
and gave a receipt for them in his own hand-
writing. The receipt was not produced, the
witness saying that he received a letter from
Sanwal Das asking him to send it, which he said
he had not got and it was not produced, and

he sent the receipts enclosed in a letter to Sanwal Das. Afterwards on reading a list signed by Jagmohan Dass he said the number should be 12 not 13. The Respondent did not after this evidence had been given offer to examine either Jagmohan or Sanwall although Har Kishen had in his examination in the Insolvent Court in July 1889 more than seven months before the trial deposed that he had received a letter from Sanwal Das about the title deeds instructing him to send them to Jagmohan Das and he carried out those instructions and made over the title deeds to him. It was not the duty of the Appellant to call either of those persons.

Upon this part of the case their Lordships are unable to agree with the High Court in its opinion that the letter of the 27th of February did not refer to the title deeds in suit, and they do not see any ground for the High Court speaking (Record p. 462) of the Appellant's "case being surrounded with difficulties ambiguities and demonstrated falsehoods the main part of their position being almost certainly shown to be untrue." Upon the whole of the evidence they are of opinion that the Respondent failed to prove that the title deeds were deposited as a security for his debt as he alleged and they will humbly advise Her Majesty to affirm the decree of the District Court, omitting from it the exception from the costs of Defendant No. 2 (the Appellant) of the costs of the witnesses Gregory and Apcar and Baba Kumar Guka and Norendro Nath Sen, which should not have been disallowed, and to reverse the decree of the High Court and order the appeal to it to be dismissed with costs. The Respondent will pay the costs of this appeal.
