

Privy Council Appeal No. 22 of 1917.

Bengal Appeal No. 140 of 1914.

Jodha Mahto and Another - - - - - *Appellants*

Dewan Babu Adya Prashad and Others - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM, IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 26TH JULY, 1918.

Present at the Hearing:

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

This is an appeal from a judgment of the High Court of Calcutta reversing a decision of the Subordinate Judge. The plaintiffs, who are the present appellants, sue to recover possession of a property which they said had been sold to them by the second party defendants for the sum of 19,998 rupees and conveyed by a sale deed of the 17th March, 1910, which was registered on the 19th. The first party defendants claim to be purchasers of the same property under a contract of sale made in February preceding, but only completed by a sale deed of the 8th April, registered on the 11th. The purchase-money under the deed was the same, but it was their case that the original contract had been for a lesser sum, 16,000 rupees.

The first party defendants supported the case of the second party defendants as to the earlier contract and subsequent sale. In order to account for their conduct in having made themselves parties to two sales of the same property to different purchasers they had a story that the plaintiffs were entitled to retain a considerable part of the purchase-money to pay off mortgages, and ought to have handed over to them the balance, 8,601 rupees, in cash, but kept back about half to meet debts which they

said were due to them from the sellers and the rest as a premium on a lease which they, the purchasers, were to grant to the sellers of some other property, whereas the bargain had been that this lease should be granted without a premium.

The case of the sellers was that on learning that they were to be treated in this way they had, though it was a very delicate matter for them to do, to go back to the original purchasers, confess the fraud that they had intended to practise, and ask them nevertheless to complete their contract; and further, that they succeeded in persuading the original sellers, who had been so badly treated, to increase the purchase money for which they had contracted to the larger sum which they were going to get from the plaintiffs.

The first party defendants, who claim to be the original purchasers, supported this story so far as they were concerned, averring the original contract with themselves, and the confession made by the sellers and their agreement to give the larger sum to avoid litigation. As to this it might be stated that it was part of the seller's case that, though they did go as it were *ad misericordiam* to the first party defendants, they nevertheless said that if the first party defendants would not advance their price they would go and sell elsewhere.

The plaintiffs challenged the existence of this prior contract, and they also said that they had had no notice of it before the property was on the 17th March sold to them.

The case was tried on oral and documentary evidence, and the Subordinate Judge stated certain issues for his determination, of which the most material are the following :--

- " 4. Was there an agreement for sale of the property in suit between the defendants' first and second parties prior to that of the plaintiffs ?
- " 5. Were the plaintiffs aware of such an agreement, if any ; and if so, is the plaintiffs' purchase affected thereby ; and if so, in what way ?
- " 6. Has the plaintiffs' kobala been vitiated on account of fraud, if any, practised by them on the defendants' second party ? Have the plaintiffs acquired any title by virtue of the kobala ?

The strongest point in favour of the first party defendants was founded on two documents called chitthis, dated the 18th and 20th February respectively, by which the sellers purported to acknowledge the receipt of sums of money on account of earnest-money, 600 rupees, in the first case, and 435 rupees in the second, on account of the sale of the property for 16,000 rupees, the reason given for the non-execution at that time of a deed of sale being that the sister-in-law of one of the sellers, who form a joint family, had recently died, and that her funeral ceremonies remained to be performed, and in the meantime no business could be done. The Subordinate Judge, for reasons which he gave in his judgment, did not believe these chitthis to

be genuine, or, more correctly speaking, was of opinion that they were not executed on the dates which they bear and did not record genuine transactions, but were executed after the first party defendants had learned of the sale to the plaintiffs, and with a view of supporting the story of an earlier sale to themselves. He did not believe that there was an earlier contract of sale. He also found that, supposing there had been such a contract, the plaintiffs had no notice of it before the sale deed to themselves was executed, and were entitled to stand upon their deed.

With regard to the issue No. 6, he found for the plaintiffs upon it; and he gave judgment for the plaintiffs, giving them a decree of possession upon payment of the balance of the purchase-money—which the defendants had refused to accept, but which the plaintiffs were always willing to pay—with costs, and he ordered the defendants to pay the costs.

From this decree the first party defendants alone appealed. It became unnecessary, therefore, for the High Court to consider the sixth issue, or the conduct of the second party defendants, except in so far as it, and the first party defendants' knowledge of it, bore upon the probability of their story. The learned Judges of the High Court came to the conclusion that the chitthis were genuine documents, that there was a binding contract of sale in favour of the first party defendants concluded on or about the 16th February and evidenced by the two chitthis, which were supported by the oral testimony of witnesses whose evidence they saw no reason to disregard. They further thought that the evidence showed that the plaintiffs had full knowledge of the contract between the two sets of defendants. It must be presumed that the learned Judges meant, though they have not expressly said so, that the plaintiffs had this knowledge before the 17th March.

Their Lordships have considered the material, oral, and documentary evidence in support of the alleged contract of the 16th February, and they are struck at once by two things: first, by the language of the sale deed of the 8th April. In this deed, which, in the ordinary Indian form, is made by the sellers alone, and speaking in the first person, they, the declarants, unblushingly avow the fraud of which it is necessary for their case, and for the case of the first party defendants they should have been guilty; they state the alleged original contract for 16,000 rupees, the receipt of the earnest-money and the two chitthis, and that the plaintiffs then "excited our cupidity"; that they yielded to the temptation and agreed to sell to the plaintiffs; that the plaintiffs in their turn cheated them in the way which the Subordinate Judge has stated and disbelieved; that they then gave notice to the plaintiffs that that they made a contract previously with the first party defendants, and not as one would expect that with a late repentance they would perform it, but unless the plaintiffs put the matter straight they would sell to the first party defendants

or to somebody else. The same line is taken by the principal defendant and principal witness for the defence, Adya Prashad, and by his karpardaz, Fateh Bahadur, who puts it quite plainly that the sellers came to him and to his employer, and that when the employer said that he would not raise his price beyond the original 16,000 rupees, the sellers said if he would not give the full 19,998 rupees they should sell elsewhere.

It seems to their Lordships that the recitals in the sale deed under which the first party defendants claim, and the statements which according to the evidence the sellers made and the first party defendants without protest accepted, make it clear that there was no binding contract of sale at or about the 16th February or previously to the contract under which the plaintiffs claim. There may have been negotiations and discussion. The sellers may have used the first party defendants badly, as they certainly behaved badly to the plaintiffs, but there was no such contract entered into between the sellers and the first party defendants as to prevent the sellers from making a good title to the plaintiffs by the sale deed of the 17th March. It is unnecessary, therefore, to consider any other points at issue in the case. The judgment of the Subordinate Judge upon issue No. 4 was right, and the plaintiffs are entitled to possession of the property.

Their Lordships will therefore humbly recommend His Majesty that the decree of the High Court should be reversed and the decree of the Subordinate Judge restored, and that the appellants should have their costs against the first party defendants in the High Court and of the present appeal.



In the Privy Council

JODHA MAHTO AND ANOTHER

v.

DEWAN BABU ADYA PRASHAD AND
OTHERS.

DELIVERED BY

LORD PHILLIMORE.

PRINTED AT THE FOREIGN OFFICE BY G. M. HARRISON.

1918.