

Privy Council Appeals Nos. 34, 35, 36, 37 and 38 of 1917.

Seth Ghunsham Das and others	-	-	-	-	-	-	-	-	<i>Appellants</i>
									<i>v.</i>
Umapershad and another	-	-	-	-	-	-	-	-	<i>Respondents.</i>
Same	-	-	-	-	-	-	-	-	<i>Appellants</i>
									<i>v.</i>
Garibdas	-	-	-	-	-	-	-	-	<i>Respondent.</i>
Same	-	-	-	-	-	-	-	-	<i>Appellants</i>
									<i>v.</i>
Fatehchand and another	-	-	-	-	-	-	-	-	<i>Respondents.</i>
Same	-	-	-	-	-	-	-	-	<i>Appellants</i>
									<i>v.</i>
Bhargava Commercial Bank, Limited	-	-	-	-	-	-	-	-	<i>Respondents.</i>
Same	-	-	-	-	-	-	-	-	<i>Appellants</i>
									<i>v.</i>
Hanoomanprasad	-	-	-	-	-	-	-	-	<i>Respondent.</i>

Consolidated Appeals

FROM

**THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES,
INDIA.**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD JANUARY, 1919.**

Present at the Hearing :

LORD ATKINSON.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by MR. AMEER ALI.*]

These five consolidated appeals from a judgment and decrees of the Court of the Judicial Commissioner of the Central Provinces arise out of five suits brought in the Court of the District Judge of Jubbulpore by one Chandmal since deceased. The appellants

before the Board are his representatives. The object of the suits in each case was to set aside certain orders for attachment before judgment obtained by a number of creditors of one Dhanroopmal who, the plaintiff alleged, had already conveyed to him by an usufructuary mortgage the properties attached, in consideration of a debt owing to him from Dhanroopmal. The creditor-defendants on the other hand alleged that the mortgage in question was executed in collusion with the plaintiff as a device to defeat the claims of Dhanroopmal's creditors and to retain the properties wholly or partly for the benefit of Dhanroopmal or his family.

The District Judge before whom the suits came for trial in the first instance held that the mortgage to the plaintiff represented a *bonâ fide* transaction and accordingly set aside the orders for attachment.

The Additional Judicial Commissioner on appeal arrived at a totally different conclusion. Viewing the circumstances as a whole he has held against the *bona fides* of the mortgage; and reversing the District Judge's orders dismissed the plaintiff's suits. From these decrees Chandmal's representatives have appealed to His Majesty in Council.

The facts of the case are set out at length and with considerable lucidity in the judgment of the Appellate Court. For the purposes of their Lordships' decision it is, therefore, enough to give only a short outline of the history of the transaction in dispute and of the grounds on which it is impeached.

The deceased plaintiff Chandmal and Dhanroopmal were related to each other as uncle and nephew. They were members of the well-known Marwari caste of money-lenders, and the family carried on money-lending and banking business on an extensive scale in various parts of British India. The ramifications of their financial operations are very clearly stated in the following passage of the Additional Judicial Commissioner's judgment :—

“ What, however, is manifest and indisputable from Dhanrupmal's statement is that the members of the entire Marwari family, whose genealogical tree heads this judgment, are in the closest commercial relations with one another—that they have numerous shops in various parts of India, carrying on money-lending business, and holding landed property under names and styles which do not always indicate the true owners thereof. Some are called by the names of deceased ancestors : in some we find joined together the names of the living and the dead : in others we find the name of a single adult : in yet others we find business carried on by the adults in the names of minors who have no hand in the management. Some of the shops are the joint or partnership property of all ; in some two members are partners : others again appear as the exclusive property of a single member. Many of these various branches have dealings with one another, and the books as to those dealings are of course regularly kept in the ordinary course of business, and are capable at any given time of showing one branch in debit to another. A few examples will suffice to support the above assertion. The Jubbulpore firm, which is described as the exclusive property of Dhanrupmal, went by the names of Raghunathdas Hamir-mal—both dead men. A partnership firm in

Bombay, owned by Chandmal, Kanakmal and Dhanrupmal, went by the names of the first two. Dhanrupmal states that he had a firm in Bombay bearing the names of Karanmal, Bagmal, which were the names of two of his three minor sons; while Chandmal had a firm called Raghunathdas Chaganmal, being called after Chandmal's deceased grandfather and Chandmal's minor son. In Ajmere Dhanrupmal claims to own a firm called Chandmal Dhanrupmal. In Sambhar, Aligarh, Bhilsa and other places Dhanrupmal and Kanakmal have or had joint firms. In Piparia such a joint firm goes by the name of Kanakmal only. It is also not disputed that, though a partition of some assets has been found to have taken place in Sambat 1933, a portion of the original joint family estate remains undivided. The details and extent of this property, who is now in possession of it, and how the income is applied, are facts which it was most important to have cleared up, but they are facts which the plaintiff and Dhanrupmal have carefully suppressed in this suit."

The family, consisting of Chandmal and his two brothers Dhirajmal and Chandanmal and their children, were at one time joint, but in 1877 there appears to have been a separation. There is no question, however, that a substantial portion of the family properties and outstandings were left joint, and with regard to these the accounts were kept quite apart from the properties and businesses owned by each branch of the family. These accounts were called "tisira bahis" or "Three Share Accounts." It may be mentioned here that Dhanroopmal is the son of Chandanmal, and Kanakmal, whose name also occurs frequently in the case, is the son of Dhirajmal.

Chandmal and Dhanroopmal had in Bombay, among other places, two separate businesses. The names under which they were carried on are not material. Dhanroopmal carried on business on a large scale also at Jubbulpore. He appears to have enjoyed the confidence of the residents and many people placed with him on deposit considerable sums of money. It is also clear that Dhanroopmal's "shop" at Bombay was extensively financed by Chandmal's "shop" in Bombay with the result that in 1898 it found itself heavily indebted to Chandmal.

About the beginning of September, 1898. Dhanroopmal's shop in Jubbulpore suspended payment. In the meantime his creditors had commenced suits for the recovery of their monies. Whilst his affairs were in this critical condition he executed on the 26th September the mortgage in dispute in favour of his uncle Chandmal, which covered all his properties inclusive of his immovable properties in Jubbulpore. There is no question that the document was executed in great hurry and with much secrecy. The stamp paper was procured from Agra, while the parties resided at Ajmere and the properties were situated at Jubbulpore. The allegation is, and the document recites, that it was in consideration of a sum of Rs. 90,900 which was found due after certain remissions on account of the advances made by Chandmal's business in Bombay to Dhanroopmal. It is not altogether clear when the account was actually adjusted; certainly it did not represent the result of a final adjustment for various sums were subsequently found due and are said to have been remitted. After

the execution of the mortgage deed there were negotiations between the creditors and Dhanroopmal's agent at Jubbulpore for some sort of composition with the creditor. At the meetings held for the purpose of discussing the terms of composition or at least at some of them, Chandmal's representative was present. He certainly knew of the negotiations and there can be little doubt that Chandmal was informed of them. Dhanroopmal appears to have insisted that the creditors should make a payment of Rs. 15,000 to enable him to get the mortgage revoked. The creditors were not willing and the negotiations fell through. In the meantime the creditors who had already brought suits for recovery of their moneys proceeded to attach Dhanroopmal's properties in Jubbulpore. Chandmal put in a claim in each action under section 278 of Act XIV of 1882 (the old Civil Procedure Code) for their exemption from attachment on the ground that they were in his possession in his own right under the mortgage. These claims were summarily rejected on the 10th of May, 1901. Chandmal lay by for a year; on the 10th of May, 1902, just before the day the period of limitation was to expire he instituted the present actions in the Court of the District Judge. It will be seen from the above summary of facts that the sole question for determination in the case is whether the mortgage was a *bona fide* transaction entered into with the object of securing the debt of Chandmal or whether it was a mere contrivance for defeating or delaying the just claims of the other creditors and retaining the properties for the benefit of or in trust for Dhanroopmal.

The District Judge rightly threw on the plaintiff the onus of establishing that the transaction was entered into in good faith. In dealing with the case, however, he seems to have fallen into an error. He took each fact which militated against the *bona fides* of the mortgage separated from the rest of the facts and proceeded to demonstrate that it was quite consistent with good faith and by this process he arrived at the conclusion to which their Lordships have referred. The course adopted by the District Judge was patently erroneous; for in a case like the present it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole. This was done by the Additional Judicial Commissioner with the contrary result.

In support of his case the plaintiff produced an enormous number of account books consisting of, it is said, two cartloads. The District Judge referred the examination of these books to the representative of a native banking firm of high repute, whose character for honesty has not been impugned. This gentleman appears to have examined the books with great labour and care, assisted by the pleaders on both sides; the result of this examination he embodied in a report which he submitted to the District Judge, who does not seem to have been satisfied with it. In his report the Commissioner had pointed out various circumstances which seemed to him to throw grave doubts on the *bona fides*

of the transaction between Chandmal and his nephew. Large extracts from the report are given in the Judicial Commissioner's judgment. Their Lordships would like to refer to one passage only:—

“Whether Dhanrupmal had property other than that mortgaged at the time of mortgaging this property cannot be correctly ascertained, because Rai Seth Chandmal has not produced the account book which contains (a record of) the joint property. Although Jankipershad applied for the production thereof, Rai Seth Chandmal did not produce it, and his agent states there is no such book. There may not be any such book, as alleged by the agent, yet there must be some memoranda in which the joint property is entered. From the Tisira books it is apparent that there is some memorandum from which items have been carried over into the Tisira Bahi. For example, how else could it be known that the Raja of Bikanir owed Rs. 2,00,001 which was realised from him and was divided between the three? From the Tisira Bahi khatas it can be seen how much was paid and received, but it cannot be ascertained what amount of joint outstandings and property the three men possess. The nakal of the Tisira Bahi, which is produced, is made up of old and new pages: from pages 1 to 44 it is of old paper, from pages 45 to 92 it is of new, and again from pages 93 to 100 it is of old. It also contains an account on which a stamp is fixed. The rokad (day-book) of tisira is written up to Sambat, 1939; the remainder of the debit and credit items are written up in the nakal bahi (transcript or fair copy of original day-book).”

On this the Judicial Commissioner rightly observes as follows:—

“I think there can be no doubt that this report was intended to show that while the accounts which the plaintiff chose to submit for examination showed, upon arithmetical comparison of the entries found therein, a sum of Rs. 90,900 standing to the debit of Dhanrupmal, and the accounts were kept in accordance with mercantile regularity, it was impossible to say that the sum represented a real debt.

- (a) Because the whole of the accounts between the parties had not been produced;
- (b) Because various sums had been left out of account which ought to have been included; and
- (c) Because, in fact, the accounts were still open on the date of the deed, the consideration for which was fixed by guess-work.”

The District Judge has treated the circumstances to which the Commissioner felt his duty to call attention as “objections” on his, the Commissioner's part, and he proceeded to demolish them. Their Lordships have carefully studied the report in conjunction with the Commissioner's evidence, but have not been able to discover any inconsistency likely to discredit the Commissioner's testimony. What he says in substance is that although the books produced showed a balance of Rs. 90,900 against Dhanrupmal it was impossible to say, considering the multiplicity of their dealings and the non-production of the books relating to the properties that were still joint, that the balance shown represented a real debt.

One outstanding fact in connection with this transaction remains unchallenged. It is a usufructuary mortgage but the entire usufruct of the immovable properties mortgaged, the only really available assets of Dhanroopmal, was reserved for his wife and children. The clause which provides this deserves attention. It runs thus :—

“As the whole of the mortgaged property is an ancestral one and as the support of my wife Musst. Bhur Kuar and my sons Kuar Karanmal, Jasmal and Bagmal is dependent on it, the sons and their mother will therefore be entitled to receive a monthly allowance of Rs. 200 and Rai Seth Chandmal will, from the date of his entering into possession of the villages, etc., and until such time as he remains in possession thereof, pay without any objection the money either through Musst. Bhur Kuar their mother or Karanmal their real brother. In case Kuar Karanmal or their mother leave Ajmer for some other place the Seth Sahib will be remitting money to them at that place.”

Their Lordships agree with the Appellate Court that the District Judge's estimate of the income arising out of the properties was hypothetical and based on assumptions for which there were no valid grounds.

It should be remembered in this connection that even if the properties were ancestral the interests of Dhanroopmal's sons were liable for the payment of his debts which were not incurred for immoral purposes.

In their Lordships' opinion when the facts are considered as a whole, there can be little doubt that the mortgage was a mere device for reserving the bulk of the available assets of Dhanroopmal for the benefit of his family and indirectly for himself. The secrecy and haste with which the document was executed, the subsequent negotiations for a composition with the creditors on a payment by them to get the mortgage revoked, the non-production of material books, the unsatisfactory character of the evidence relating to the adjustment, above all the reservation of the entire usufruct of the immovable properties for the wife and children of the debtor, not to speak of the relationship of the parties which in other circumstances might not be very material, all tend to the conclusion at which their Lordships have arrived. On the whole their Lordships concur with the very able judgment of the Additional Judicial Commissioner, and are of opinion that these appeals should be dismissed with costs. And they will humbly advise His Majesty accordingly.

In the Privy Council.

SETH GHUNSHAM DAS AND OTHERS

v.

UMAPERSHAD AND ANOTHER.

SAME

v.

GARIBDAS.

SAME

v.

FATEHCHAND AND ANOTHER.

SAME

v.

BHARGAVA COMMERCIAL BANK, LIMITED.

SAME

v.

HANOOMANPRASAD.

DELIVERED BY MR. AMBER ALI.