

Privy Council Appeal No. 14 of 1927.

Kessarbai - - - - - *Appellant*

v.

Jethabhai Jivan - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 28TH JUNE, 1928.

Present at the Hearing :

VISCOUNT SUMNER.

LORD ATKIN.

SIR JOHN WALLIS.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD ATKIN.]

This is an appeal from the High Court of Bombay in which the Appeal Court reversed a decision of Mr. Justice Crump on the original side. It involves a pure question of fact. There are two suits which were tried together. In the first, begun on the 26th January, 1922, one Kessarbai, the widow of Karsandas Ludha, claimed to recover possession of four cases of saffron, the property of the firm of Khatau, Ludha & Co., of which she was a partner, from the defendant Jethabhai. The plaintiff's co-partner Odhavji is joined as a defendant. In the second suit, commenced on the 1st February, 1922, Jethabhai seeks against the two partners in the firm a declaration that the four cases of saffron are charged in his favour with the payment of Rs. 20,000, an advance made by him to them, and seeks payment of the said sum and the enforcement of his charge. The question is whether the advance was ever made and the charge given. Kessarbai, the plaintiff in the first suit, is an old Hindu widow of a former partner in the firm of Khatau, Ludha & Co., who carried on business in Bombay as importers of saffron. At the material time she was a partner together with one Odhavji, who derived his interest from the will of Khatau Karsanda's brother.

Jethabhai, the defendant, carried on business as a Mukhtar, or clearing agent, and had acted in that capacity for the plaintiffs for some years. For some months before the events in question Odhavji had been residing out of Bombay. He used to send instructions to Keshavlal, a clerk of the plaintiff, and as he alone had power to draw on the firm's banking account, he drew and met the necessary cheques. Kessarbai, the resident partner, is illiterate, and can only sign her name in Gujarati. She, however, took an active interest in the business, assisted by the advice of her brother Topanbai, who had a business of his own. Under the directions of the two partners Keshavlal appears to have taken an active part in the management of the business. In November, 1921, the firm, in their own name but on joint account with two other persons, bought from a firm in Valencia 400 lbs. of saffron. The goods were shipped in the s.s. "Mirzapore," and arrived at Bombay on the 4th January. On that day Odhavji appears to have presented himself in Bombay, and under a claim to profits of the business drew out sums of Rs. 20,000 and Rs. 10,000 from two of the banking accounts, and removed the firm's cash book. This proceeding not unnaturally disturbed his partner Kessarbai, who consulted the firm's solicitor, Mr. Jamietram, of the firm of Matubhai, Jamietram & Co., and was advised that the acts done were within the powers of a partner, and further consideration of the steps to be taken was postponed for a day or two. Before this discovery on the same day Kessarbai had dealt with the cases of saffron. She had money in the till and on call, and she took up the bill of lading, paying the price of about Rs. 20,000. The transaction showed a profit at current prices. She then through Keshavlal endorsed the bill of lading to Jethabhai and instructed him to clear the goods. The duty would amount to about Rs. 2,200. The conflict between the parties begins with the events of the next day, the 5th January, and as the defendant sets up the affirmative case of a written pledge, it will be convenient to set out his case first. He says that on the morning of the 5th January, Keshavlal came to see him, told him that Odhavji had taken away the cash book and Rs. 30,000, and that Kessarbai wished to see him. He went over to Kessarbai, who told him of Odhavji's misdoings, wept, and asked him to go with her brother Topanbai and Keshavlal to her solicitors. She was sure her own solicitors would not give satisfactory advice, and, if so, would he take them to his own solicitors? He consented and returned to his office. Ten minutes later Keshavlal came to the office, said that Kessarbai could not tell him personally, but she wished to borrow Rs. 20,000. Jethabhai said he would advance that sum against the four cases. He then wrote out a promissory note for Rs. 20,000, payable on demand, stamped it; Keshavlal wrote above and below this stamp, "Khatau, Ludha & Co.," and "widow of Karsandas," and took the note away for signature over the stamp by Kessarbai. In half an hour he brought it back signed. He then gave Keshavlal an open bearer cheque for

Rs. 20,000, drawn to Khatau, Ludha & Co., on the Netherlands Bank. Such a cheque was undoubtedly cashed over the counter by the Netherlands Bank that day. The paid cheque bears endorsements purporting to be those of the firm and of Keshavlal, and the bank books record the name of Keshavlal as the person to whom the cash was paid. No evidence was called from the bank as to the circumstances of the payment. Keshavlal left with the cheque, and at 12.30 returned with Topanbai. The trio then visited first Kessarbai's solicitors, where they saw Mr. Matubhai, in Mr. Jamietram's absence. They only spoke of Odhavji's doings, and not being satisfied with the advice they received, went on to Mr. Dastur, Jethabhai's solicitors. Jethabhai introduced the other two, who began to recount their grievances against Odhavji. Jethabhai left the room, saw Tapidas, Mr. Dastur's managing clerk, and told him he had advanced Rs. 20,000 against four cases of saffron on a promissory note. Tapidas told him that the promissory note gave him no charge, and at Jethabhai's request prepared a draft document creating a charge, which he gave to Jethabhai. The parties by that time were completing their interview with Mr. Dastur, who was drafting a notice to Odhavji terminating the partnership, but required further information before completing. Jethabhai then returned to his office about 3.0 or 3.10. He sent a messenger to Keshavlal, asking him to call. Keshavlal sent back a note saying he would be with him in half an hour. Such a note, undated, is produced. About 5.30 one Chunilal, a friend of 15 years' standing, came in. He occasionally translated documents into English for Jethabhai, and had at least once written a Gujarati letter for him. Jethabhai produced Tapidas' draft and a piece of thick paper, and asked Chunilal to write it. Jethabhai then left the room for a few minutes and on returning found that Chunilal had begun to write the document in English. He told him this was not what he wanted, and took a pair of scissors and cut off the English part and threw it away. Chunilal then wrote the document in Gujarati and Jethabhai put a stamp on it. Chunilal left at 6.30, and afterwards Keshavlal arrived. Jethabhai told him that the promissory note gave no charge, and he must have another document signed, and produced Chunilal's engrossment. Keshavlal raised no objection; he signed "Khatau, Ludha & Co.," and "widow of Karsandas" above and below the stamp as before, took the document away, and in about three-quarters of an hour returned with the document signed. The document bears the admitted signature of Kessarbai. Jethabhai then produced the promissory note, wrote "Cancelled" upon it, and returned it to Keshavlal, who there and then tore it up and threw the pieces under the table. On the 7th January Jethabhai cleared the goods, paying Rs. 2,200 duty, and took the goods into his own godown, and on the 10th January insured them in his own name as goods either his own or on trust or commission. On the 7th January Chatterbhuj came to demand the goods and was told by Jethabhai that he

could have them on paying the clearing charges and Rs. 20,000 which had been advanced on them. On the 16th January Jethabhai instructed his solicitor to make a formal demand for repayment of the money advanced, but before this was done Mr. Jamietram, on behalf of Kessarbai, demanded delivery of the goods advanced, to which Jethabhai's solicitors set up the pledge.

The story on behalf of Kessarbai is very different. According to her and her witnesses, on the discovery of Odhavji's action, she decided to take the bill of lading into her possession, and on the morning of the 5th January, Keshavlal was sent to Jethabhai to ask for the document. Jethabhai asked the reason; he was told that the fear was lest Odhavji should take the goods. He said this would be obviated by warehousing the goods, and he would come over to get Kessarbai's consent. He came over; there was a discussion between Kessarbai and Jethabhai as to Odhavji's misdoings. It was arranged that Jethabhai should accompany Topanbai and Keshavlal to the solicitors. Kessarbai consented to Jethabhai's suggestion that the goods should be warehoused and was told she would have to sign a paper, which she said she would only do after consulting her brother; Keshavlal and Jethabhai then went to Jethabhai's office, where he handed to Keshavlal a typewritten document in English, unstamped, written on a half sheet of foolscap, on which Keshavlal recognised the words warehouse bond. He understood the goods were to be warehoused in a Port Trust warehouse. He came back with the document, showed it to Chatterbhuj, and Kessarbai, after showing it to Topanbai, signed it. Topanbai and Keshavlal then went to Jethabhai's office and handed him the document. The three then went on to the solicitors, first Mr. Jamietram, then to Mr. Dastur. They agree that while at Mr. Dastur's Jethabhai left the room for a time. They say they left Mr. Dastur's office about 4.0. There never was a promissory note. Keshavlal never received any cheque or endorsed one.

Then next day, the 6th January, Jethabhai sent for Keshavlal about 1.0 o'clock. Topanbai had left Bombay to visit a sick relative. Jethabhai said that the English bond was lost and there must be another. He gave Keshavlal a paper of the size of a half-page of foolscap and dictated to him. He affixed a stamp at the foot of the document and asked Keshavlal to obtain Kessarbai's signature. There was a blank space between the end of the writing and the stamp, which Jethabhai said was for inscribing the terms and conditions of the warehouse bond. Keshavlal took the document to Kessarbai, who signed it. She says that the paper was longer than Exhibit A, which is the document of pledge. There was a little writing at the top; the lower part was blank. After Kessarbai had signed the document Keshavlal added the words, "Khatau, Ludha & Co." and "widow of Karsandas" above and below the signature, and in Chatterbhuj's presence made a copy of the wording, which is produced. It is dated the 5th January, 1922, which Keshavlal says was the

date dictated to him as the original by Jethabhai. As translated the document runs :—

“ To Thakar Jethabhai Jivan.

“ To wit. What is to be written is as follows : As regards the bond which you had caused to be written in respect of keeping four cases of saffron in the warehouse for a period of three months, the same has been lost. Therefore you, having got four cases of saffron passed in your name have kept the same in your godown. We will take delivery of the said goods after paying to you the amount due to your Bill expenses. The space which has been kept blank hereunder has been kept for writing the terms of the bond.”

Chatterbhuj, not Keshavlal, took the document back to Jethabhai. It then struck Keshavlal that he might as well have the goods cleared and take them into the firm's possession. He sent Chatterbhuj the same day, with the amount of the duty, to ask for delivery from Jethabhai. He was told by Jethabhai to come the next day, as the accounts were not made up. He went on the 7th and received the same answer. Eventually Odhavji and Kessarbai joined forces, and on the 17th January Mr. Jamietram, Odhavji, Keshavlal and Chatterbhuj went to Jethabhai's office to demand the goods. They could not see Jethabhai; they did see his clerk Desar. Mr. Jamietram says he asked for the goods and was told the accounts would be made up and the goods delivered that evening. He was not told that money had been advanced on the goods. The respective suits were begun shortly after.

Thus it will be seen that there is a direct conflict of testimony between the parties. The document of pledge (Exhibit A) relied on by the defendant, bears Kessarbai's admitted signature, and their Lordships are of opinion that the burden is laid upon Kessarbai in the first instance to displace the inference that naturally arises from this material fact. The Trial Judge came to the conclusion, after seeing all the witnesses, that the story of the plaintiff's witnesses was true, and it appears to their Lordships that there was not sufficient ground to warrant the appellate tribunal coming to a contrary conclusion. The learned Chief Justice in the Appellate Court discovered a conclusive fact in the endorsements upon the cheque for Rs. 20,000 said to have been handed to Keshavlal against the alleged promissory note. On comparing the endorsements with admitted signatures of Keshavlal, the Chief Justice felt no doubt that the endorsements were genuine. Feeling certain, therefore, that it was Keshavlal who cashed the cheque, he came to the conclusion that Kessarbai's story was false.

If their Lordships were able to reach the same degree of certainty as to the genuineness of these endorsements from the materials before the Court, they would agree with the Appellate Court. There is no room for an honest difference of opinion

between Jethabhai and Kessarbai on the form of the document when signed by Kessarbai. Either it had a blank or it had not. Kessarbai's story would have to be rejected if the evidence of Keshavlal were destroyed on this material point. But their Lordships are unable to come to the same conclusion as the members of the Appellate Court. They would have thought it unsatisfactory and dangerous in any event to stake a decision in such a case as this on the correct determination of the genuineness of a signature by mere comparison with admitted signatures, especially without the aid in evidence of microscopic enlargements or any expert advice. But their Lordships have also themselves carefully compared the endorsements with the admitted signatures, and they are unable to feel the certainty which was expressed by the Chief Justice. The signatures appear to be written with different ink and possibly at different times, and though the purported signature of the firm bears a close resemblance to some of the genuine examples produced, notably to a signature in a letter of authority addressed to Jethabhai himself, the purported signature of Keshavlal himself is by no means convincing.

It is a remarkable feature of this case that no one was called from the bank to prove the circumstances in which the bearer cheque was paid over the counter, and the endorsements of the payee and of Keshavlal placed upon it, or even to say that no one in the bank recollected the circumstances. The cheque is for a large amount ; it is one of 13 entries of payments made on that day by the bank as appearing in their day book, which appears to represent the whole of the payments for the day and amounts to Rs. 35,292. The book appears to record the number of the 21 notes in which the sum was paid ; the initials of the paying clerk of the bank are on the cheque. A bank official was called, but only an accountant clerk, to produce the books, who knew nothing of the relevant facts. Their Lordships are unable to accept the view that the case must be decided in favour of Jethabhai on the ground that the cheque was undoubtedly cashed by Keshavlal.

Nor can their Lordships adopt the view that the probabilities are such as to establish the truth of Jethabhai's story. On the contrary, there are features of the case which suggest grave doubts as to the truth of the allegation of pledge. Kessarbai appears to have had no sufficient motive for borrowing such a large sum as Rs. 20,000. There is no evidence that Odhavji's drawings had put the firm in financial difficulties ; there were other liquid resources available to her ; and though undoubtedly she was anxious lest Odhavji should lay his hand on the cases of saffron, there were other and simpler ways than a loan of placing them out of his control once the goods were paid for and cleared. In fact, the transaction as alleged interfered, for the time at least, with deliveries under a profitable contract. It is further

significant that, on Jethabhai's own statement, within 48 hours Kessarbai had changed her mind and had claimed delivery of the goods. But apart from general considerations, the details of the transaction as narrated by Jethabhai and his witnesses arouse suspicion. It is a very material fact that the document is written on a piece of paper the upper edge of which has been cut by scissors, and that the writing appears to be close at the beginning and to expand towards the end, the characteristic signs of a document written above an existing signature. Jethabhai, according to his story, returned to his office about 3.0, sent at once for Keshavlal, who despatched a note that he would be with him at a time which would not be later than 4.0; yet having all the means in his office of preparing the written document which he was anxious to secure, he waited to have it prepared till Chunilal's accidental arrival about 5.30. Keshavlal, in fact, did not arrive till after 6.30. These details do not cohere. A further improbability is the allegation that, on handing over the signed document of pledge, Jethabhai handed back the promissory note cancelled, and Keshavlal there and then destroyed it. That Jethabhai should not continue to hold the note as additional security seems unlikely; that Keshavlal, the clerk or managing clerk, should take upon himself to destroy it and not return it to his employer seems still more unlikely. The business book, which records the contemporaneous transaction, has obviously had the transaction entered after the book had been closed for the day. Their Lordships have already commented on the absence of any evidence from the bank who cashed the cheque. In these circumstances there appear to their Lordships no sufficient grounds for holding that the opinion of the Trial Judge that the witnesses for Kessarbai were telling the truth and the witnesses for Jethabhai were not, was wrong. Their Lordships are of opinion that the decree of the Appellate Court should be set aside and the decree of Mr. Justice Crump restored, with costs here and below, and will humbly advise His Majesty accordingly.

In the Privy Council.

KESSARBAI

v.

JETHABHAI JIVAN.

DELIVERED BY LORD ATKIN.

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