Privy Council Appeal No. 62 *of* 1927.

Allahabad Appeal No. 22 *of* 1924.

Binda Prasad and another - - - - - - *Appellants*

v.

Lala Kishori Saran and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH FEBRUARY, 1929.

Present at the Hearing:

LORD BLANESBURGH.
LORD ATKIN.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the plaintiffs in the suit against the judgment and decree of the High Court of Judicature at Allahabad, dated the 2nd of April, 1924, whereby the judgment and decree of the Court of the Subordinate Judge of Cawnpore, dated the 8th of July, 1921, was reversed.

The suit was instituted on the 3rd August, 1920. The plaintiffs alleged that on the 3rd December, 1919, at Fatehpur, Kishori, the first defendant, entered into a contract with Gobind Prasad, the second plaintiff, who was acting for both the plaintiffs, for the sale of Mauza Rithuan, permanent *mahal* of 16 annas of Kishori Saran, and his eight annas' share in the fluctuating *mahal*.

The plaintiffs claimed specific performance of the alleged contract.

The defendant Kishori, and the other three defendants, who were subsequent purchasers of the property in suit from the first defendant in August, 1920, denied the alleged contract between Kishori and the plaintiffs.

The learned Subordinate Judge decided in favour of the plaintiffs and directed that, on the plaintiffs paying Rs. 42,000 within one month, their claim for possession should be decreed with costs against all the defendants, that the deed conveying the property to the second, third and fourth defendants should be cancelled, and that the defendants should execute a sale deed in favour of the plaintiffs.

The defendants appealed to the High Court, which allowed the appeal, set aside the decree of the learned Subordinate Judge, and dismissed the suit.

The plaintiffs have appealed to His Majesty in Council from the said decree of the High Court.

It appears that the Mauza Rithuan was originally one entire *mahal*. It was situated on the banks of a river and its area was liable to fluctuation.

There was a partition of the permanent portion into a 16 annas *mahal* of Kishori Saran and another 16 annas *mahal* of Kishori's brother.

The fluctuating portion was formed into one *mahal* Ehtamali, in which each of the brothers had an 8 annas' share.

The second, third and fourth defendants in 1913 acquired the interest of Kishori's brother for Rs. 24,000, and thus they became co-sharers with Kishori in the *mahal* Ehtamali (fluctuating), but not in the permanent *mahal* of Kishori Saran.

Kishori had mortgaged to the plaintiffs in 1911 other property belonging to him for Rs. 17,000 and interest; this property was nearer the town and was alleged to be more valuable than the property in suit.

At the time of the suit the amount owing in respect of the mortgage was about Rs. 33,000.

The plaintiffs' case was that Gobind Prasad, the second plaintiff, whose residence was at Kora, went to Fatehpur on the 2nd December, 1919; that he stayed at the house of Krishna Behari Lal, who is the younger brother of Kishori; that he told Krishna Behari that Kishori was asking Rs. 45,000 for the property in suit; that Lachman Prasad, the father of Gobind, was offering Rs. 40,000, and that he asked Krishna Behari to get the sale effected for Rs. 1,000 or Rs. 2,000 more than what had been offered; that Krishna Behari did use his influence with Kishori and that on the following day, viz., the 3rd December, 1919, Gobind Prasad agreed with Kishori to purchase the property for Rs. 43,000.

It was alleged that one Gobind Prasad, son of Badir Prasad, a Brahman, happened to come to the house of Krishna Behari, and that he was present when the alleged contract was made.

It was further alleged by the plaintiffs that on the 15th December, 1919, Lachman Prasad and his son Binda, the first plaintiff, went to Fatehpur, taking Rs. 1,000 with them, that they spent the night at the house of a *mukhtar* named Ram Adhin,

that on the morning of the 16th December Lachman and Binda went to the house of Kishori and paid him Rs. 1,000 as earnest money in respect of the contract made by Gobind Prasad on the 3rd December. It was alleged that Kishori received the money and handed it to his treasurer.

Lachman in his evidence said :—

> "My son asked for a receipt, but I prevented him from doing so, saying that there have been dealings with him since a long time, and that no such thing can take place at his house." "He (*i.e.* Kishori) said he would execute the document soon, that he would send the *karinda* within two or four days, and that I should make collections."

There is no doubt but that Mani Ram, the *karinda* of Kishori, in the early part of 1920, went to the village, taking a rent roll, that the plaintiffs or one of them collected the *kharif* rentals for 1327 *Fasli*. These rentals, amounting to about Rs. 1,100, were in respect of the autumnal harvest in October and November, 1919.

The plaintiffs granted receipts, had the collections recorded in the *patwari* papers, and deposited the Government revenue, which amounted to about Rs. 600.

The plaintiffs' case was that this collection of rents by them was in accordance with the arrangement made between Kishori and Lachman on the 16th December, 1919. It was alleged by them that the rentals collected were in respect of the permanent *mahal* and that when they wanted to collect rent in respect of the fluctuating *mahal* they were stopped by the defendant Kishori; they allege that the reason for such stoppage was that at this stage the defendants, who subsequently became the purchasers, had intervened.

The case of Kishori, the first defendant, was that he had no talk at all with Gobind Prasad regarding the sale of the property at the house of Krishna Behari, as alleged by the plaintiffs, and that he never had any negotiations for the sale of the village personally or through anyone else with Lachman Prasad He denied that Lachman and Binda had paid Rs. 1,000 or any sum as earnest money.

He alleged that he was unable to pay the interest on the above-mentioned mortgage debt and therefore he allowed the plaintiffs to collect the *karif* rentals for 1327 *Fasli* of the property in suit.

His case was that negotiations for the sale of the property to the other defendants had been going on for four or five years, and no one other than these defendants had expressed a desire to purchase it.

It appears that a deed of conveyance of the property by Kishori to the other defendants was executed on the 9th August, 1920, by which the property was sold to the other defendants for Rs. 45,000. The deed recited that Rs. 2,000 had been paid by the vendees to Kishori as earnest money, that he had left

Rs. 33,627 with the vendees in order that it might be paid by the vendees to the plaintiffs for the purpose of settling the mortgage debt and interest; it was further provided that in case the plaintiffs refused to receive the amount, the vendees should pay the money into court.

The learned Judges of the High Court came to the conclusion that Kishori had given his evidence as an honest and straightforward man.

In a later part of their judgment however they said that

> It is possible to concede in favour of the plaintiffs that they either by themselves or through some intermediary proposed that the property should be sold to them; but this would not be sufficient for the success of their case. They must prove definitely that a certain particular sum of money was agreed to be paid by them and that defendant No. 1 in lieu of that sum agreed to hand over his property to them."

This last finding seems to their Lordships to be inconsistent with their conclusion that Kishori was an honest and straightforward witness, for he had quite clearly made the case in his evidence that he had no negotiations for the sale of the property personally or through anyone else with the plaintiffs.

It may be noted that the learned Subordinate Judge did not accept Kishori as a reliable and straightforward witness, as he found against the case put forward by him.

In dealing with the evidence of Kishori viz.: that he allowed the plaintiffs to go into possession of the property in suit in order to meet the interest on the mortgage, the learned Judges seem to have been much impressed by the fact that on a previous occasion the plaintiffs had been put into possession of property which had been mortgaged by Kishori's nephew, and had made collections of rent in respect thereof, and stated that it would not be strange if another experiment like that was intended.

The learned Judges do not appear to have noted the material difference between the two transactions, viz., that whereas in the case of the mortgage by Kishori's nephew the plaintiffs went into possession of the mortgaged property, whereas in the present case it was not the mortgaged property of which the plaintiffs collected the rents, but it was property to which the mortgage had no relation at all. Further, the learned Judges appear to have attached no importance to the fact that, although the plaintiffs undoubtedly did collect some rents, which Kishori alleged were to go towards payment of the interest on the mortgage on the other property, he did not deduct any sum in respect of such collections from the amount deposited in Court in respect of the mortgage principal and interest.

There is another matter well worthy of consideration. The Rs. 1,000 alleged by the plaintiffs to have been paid on the 16th December, 1919, as earnest money appears in the plaintiffs' books under date December 18th, 1919.

The learned Subordinate Judge, after a careful consideration of the allegations put forward on behalf of the defendants, came to the conclusion that the entry was genuine.

The learned Judges of the High Court came to the conclusion that the entry could have been made at any time in the plaintiffs' books and rejected it as being of no evidentiary value.

Their Lordships have not seen the books themselves and can form no opinion of any value from the extracts which have been included in the record. They are of opinion, however, that the reasons given in the judgment of the High Court do not seem sufficient to dispose of the finding of the learned Subordinate Judge as to the genuineness of the material entries in the plaintiffs' books.

There are other matters in the judgment of the High Court which were subjected to criticism by the learned counsel for the plaintiffs. It is not necessary at present to refer to them in detail. It is sufficient to say that their Lordships are not prepared to accept the reasoning which led the learned Judges of the High Court to decide in favour of the defendants.

The question remains whether the conclusion at which the High Court arrived was correct or whether the decision of the learned Subordinate Judge should be maintained.

There are several circumstances in connection with the plaintiffs' case which are calculated to give rise to hesitation in accepting it.

As, for instance, it is not easy to adopt as sufficient the reason alleged for no receipt being given for the Rs. 1,000 said to have been paid as earnest money by the plaintiffs on the 16th December, 1919. Further, it is curious that Kishori, as held by the learned Subordinate Judge, should have suggested that the plaintiffs should begin collecting rents and that he would depute his *karinda* to help them, at a time when he had been paid Rs. 1,000 only on account of the total amount of Rs. 43,000, when it was not settled at what date the alleged contract would be completed and when it was not certain whether it ever would be completed.

It seems strange that during the alleged negotiations there should be, as stated by the plaintiffs, no reference to the amount owing by Kishori to the plaintiffs on the mortgage, and that the plaintiffs should be prepared to pay Rs. 43,000 to Kishori, without claiming any set-off in respect of the mortgage debt. It may however here be added that it is nowhere suggested that this debt was not adequately secured."

It was alleged that a *vakeel*, B. Mahesh Prasad, had been asked by the plaintiffs to draft a sale deed. Proof of this by the learned *vakeel* would have been of considerable evidentiary value; yet he was not called: the reason given was that the learned *vakeel* was conducting the case in court for the plaintiffs.

There is no entry in the books of Kishori of the payment of the Rs. 1,000, which was alleged to have been handed by Kishori

to his treasurer on the 16th of December. The entry should have been made in the ordinary course and, if the plaintiffs' story be correct, there would be no reason why that payment should not be entered in the books forthwith. The absence of such an entry is certainly significant.

On the other hand, it has to be noted that no receipt for the earnest money of Rs. 2,000 which, as appears from the deed of the 9th August, 1920, had been paid on the defendants' purchase is produced: nor does Kishori point to any entry in his books of that payment, and there are certain matters which militate against the case of Kishori being accepted, one of which is that their Lordships are of opinion that the finding of the learned Subordinate Judge that negotiations between the plaintiffs and Kishori for the purchase of the property had been going on, is correct. Indeed, it would appear from the passage in the judgment of the High Court, which has been already quoted, that the learned Judges of that Court were of the same opinion.

The material question which remains is whether the plaintiffs proved that the negotiations resulted in the conclusion of a contract, the material terms whereof were settled.

Much importance was attached, and, in their Lordships' opinion, rightly attached, by both the Courts in India to the fact that the plaintiffs went into possession of the property in suit and collected the rents.

The main question in relation to that part of this case is what was the reason or occasion for such possession. Was it because of the alleged purchase by the plaintiffs, or was it for the purpose of keeping down the interest on the mortgage?

For the reasons given above and for other reasons mentioned by the learned Subordinate Judge, their Lordships are of opinion that it would not be safe to act upon the verbal evidence of the plaintiffs or of the defendants in this respect, unless it were confirmed in material respects.

It is therefore necessary to consider whether reliable confirmation of either party's case can be found in the facts about which there can be little doubt.

Kishori's evidence was to the effect that negotiations had been going on for a considerable time between him and the other defendants with regard to the purchase of the property. He was willing to sell, and the other defendants wished to buy; the only question was as to the amount to be paid.

It appears from the evidence of Bhagwati Prasad, who was regarded by the learned Subordinate Judge as a reliable witness, that in February or March, 1920, he had a conversation with Chunnan Lal, the second defendant, and that it was clear to him, Bhagwati, from the conversation that, as far as the transaction between Kishori and Chunnan Lal was concerned the purchase price had not been agreed at that time.

If, then, in December, 1919, the proposed purchase was still the subject of negotiation between Kishori and Chunnan Lal, and

Kishori then regarded the other defendants as possible and even probable purchasers, and if, as Kishori said in his evidence, no person, other than those defendants, had expressed any desire to purchase, it seems improbable that he would have suggested to the plaintiffs that they should go into possession of the property in suit, which was not the subject of the mortgage, in order to make a collection of rents to meet the interest accruing due under the mortgage on another property. Such a possession by the plaintiffs would be calculated to complicate the position if and when Kishori was able to arrange the sale to the other defendants, as, according to his case, he was anxious to do.

Again, if Kishori's story were true, it would seem only natural that Kishori would have specified some period to which the possession of the plaintiffs and their right to collect the rents should be limited; but no limitation of time apparently was arranged.

On the other hand, if the plaintiffs were put into possession of the property and allowed to collect the rents because of the fact that Kishori had agreed to sell the property to them, there would be no reason for Kishori to stipulate any period for their possession, because in the ordinary course the property would be conveyed to the plaintiffs in pursuance of the contract.

Their Lordships have already referred to the fact that the net balance of the rents collected by the plaintiffs was not taken into account by Kishori when the total amount of principal and interest due on the mortgage was ascertained and paid into Court. This is entirely inconsistent with Kishori's story, and the explanation given in evidence by Kishori that the said sum was not taken into account because some more money was due from him to the plaintiffs under a note of hand, and which might be about Rs. 500, does not appeal to their Lordships as satisfactory.

It seems fairly clear that the plaintiffs were prevented by Kishori from making the collections of rents in respect of the *mahal* Ehtamali, in February or March, 1920. Upon that event happening there is no doubt that Gobind Prasad sent the notice in writing, dated 23rd March, 1920, to Kishori. That notice was not received by Kishori, and it was returned to the sender, as the addressee was not found at this house; he had gone to Muttra.

The fact, however, remains that in the letter of the 23rd March, 1920, Gobind Prasad put on record the case, which is substantially the same as that on which the plaintiffs rely in this suit. He alleged the contract, the payment of earnest money, the collection of the rents, the payment of Government revenue, and asked to be informed as to when Kishori would execute the sale deed.

This part of the plaintiffs' case is open to the comment that it is strange that when they found that this notice of 23rd March, 1920, was not delivered to Kishori, they did not send another to him and take care that it was delivered.

There is no doubt, however, that the letter of the 1st April, 1920, from Gobind Prasad to Chunnan Lal, Manna Lal and Mathura Prasad, the other three defendants, was received by them.

In that letter Gobind Prasad again referred to the contract between him and Kishori, the payment of the earnest money and the collection of rent, and stated that nothing remained except the execution of the deed. Having heard that they proposed purchasing the property, he warned them against proceeding therewith.

It is only reasonable to assume that on the receipt of this notice Chunnan Lal and the other defendants must have communicated the substance of it to Kishori, whether the position, as between Kishori and them, was that there was a completed contract, or whether the proposed purchase was still the subject of negotiation.

That being so, it certainly is astonishing, if Kishori's story be true, that no reply denying the statements contained in the letter of the 1st April, 1920, was sent to the plaintiffs by any of the defendants.

The next communication in writing appears to have been on the 28th July, 1920, from Kishori to the plaintiffs and their father Lachman, informing them that he had made arrangements for the payment of the debt due to them, and informing them that they could go to the office of the Sub-Registrar of Fatehpur and receive the amount.

It is obvious that by that time the purchase had been arranged between Kishori and the other defendants.

There is a copy of a telegram from Kishori to Mahesh Prasad, the plaintiffs' *vakeel* at Cawnpore, dated the 29th July, 1920, which ran as follows :-

"No talk for sale of Rithuan from Binda Prasad, Gobind Prasad. Money ready to pay their debts. Come to take money as noticed."

The terms of the telegram look as if Mahesh Prasad had communicated by telegram or otherwise with Kishori, alleging that he was under contract with the plaintiffs to sell the property, but there is no such telegram in the record.

The above-mentioned correspondence is consistent with the plaintiffs' case, and it is remarkable for the fact that though the defendants, in the opinion of their Lordships, had notice through the letter of April 1st, 1920, of the plaintiffs' claim, none of the defendants replied thereto or denied that claim until July, 1920, when Kishori obviously had been able to arrange the sale of the property in suit to the other defendants at a price higher than that at which the plaintiffs allege they had agreed to purchase the property.

The case is a difficult one by reason of the direct conflict of evidence of the parties concerned, by reason of the fact that none of the defendant purchasers were called as witnesses or their books

examined, and by reason of what seems to their Lordships to have been an inadequate investigation upon some material points.

It is a matter of comment that the plaintiffs' case was that the alleged contract was made in the house of Krishna Behari Lal, and that in the letter of 23rd March, 1920, they seem to have relied upon him as a person who would support the plaintiffs' allegations, yet when Krishna Behari Lal was called as a witness for the defendants he denied the whole of the plaintiffs' case so far as he was concerned.

Their Lordships appreciate that there is much to be said in support of the conclusion at which the learned Judges of the High Court arrived, though they are not prepared, as already stated, to accept the reasons upon which the judgment of the High Court was based, but after due consideration of the very full and adequate arguments presented by the learned Counsel on both sides, they have come to the conclusion that there was sufficient evidence before the learned Subordinate Judge to justify him in holding that the negotiations, which had been carried on between Kishori and the plaintiffs, resulted in a contract.

The issue between the parties was whether there was a contract, the plaintiffs alleging a contract, the defendants denying a contract and alleging that there was not even negotiation for a contract.

There was no dispute as to the subject matter of the alleged contract. According to the plaintiffs' story they were actually put into possession of the property, which was the subject matter of the contract; the price was arranged, viz., Rs. 43,000, and Rs. 1,000 as earnest money was paid.

The time for completion was not specifically fixed, and in the absence of any specified time it would be the duty of the parties to complete within a reasonable time.

There is no doubt that the defendants, who bought from Kishori, had ample notice of the plaintiffs' claim: in fact, the purchase was not completed by them until 9th August, 1920, which was after the institution of the plaintiffs' suit.

For these reasons their Lordships are of opinion that the appeal should be allowed, that the decree of the High Court should be set aside, and that the decree of the learned Subordinate Judge should be restored. The defendants must pay the costs of the plaintiffs in the High Court and of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

BINDA PRASAD AND ANOTHER

v.

LALA KISHORI SARAN AND OTHERS.

DELIVERED BY SIR LANCELOT SANDERSON.

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