Privy Council Appeal No. 10 *of* 1933.

Bengal Appeal No. 43 *of* 1931.

Surendra Krishna Roy, since deceased (now represented by Birendra Krishna Roy and others), and another - *Appellants*

v.

Mirza Mahammad Syed Ali Matwali, since deceased, 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 8TH NOVEMBER, 1935.

Present at the Hearing:

LORD THANKERTON.

SIR LANCELOT SANDERSON.

SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

This appeal arises out of a suit brought on the 30th January, 1918, for declaration of title to and for possession of a parcel of land at Kidderpore now known as 18, Kaila Sarak Road. On the side of the plaintiff and on the side of the defendants there have been various devolutions of interest, to which however it is not now material to direct attention. The plaintiff's case was that in 1903 he purchased the lands in schedule Ka to the plaint from a Commissioner of Partition who was selling them under an order of the Court made in a partition suit having reference to the Bhukailash Raj estate. The property which he purchased was *lakheraj* and it is now admitted that the plaintiff has the title which he claims and that it covers the land in suit. The suit lands were at one time described as measuring about 1½ bighas but according to later measurements it would seem that they amount roughly to an acre, being about 2 bighas 13 cottas.

The case for the plaintiff is that the defendants have no interest in these lands higher than a precarious tenancy interest terminable by fifteen days' notice. The defendants on the other hand contend that they have a permanent tenancy right. They set up the case that in 1830 a predecessor of the plaintiff granted to one Sobrati a mourasi mokarari kayemi patta, and that in 1856 Sobrati granted a dur-mourasi patta to Korban Ali Serang; that Korban Ali in 1912 transferred his rights to Anwar Miah and that Anwar Miah in 1914 sold to Elias Maurice the

original defendant No. 1. The title of Maurice has pending suit become vested in certain persons of the name of Roy who are the appellants before the Board.

Though the suit was instituted in 1918 it did not come on for trial until 1927. In 1921 it appears to have occurred to the advisers of the plaintiff that as he had not given any notice to determine the defendants' tenancy he would be in a difficulty upon his own case in recovering khas possession. Accordingly an order was obtained giving permission to withdraw the suit and to bring a fresh suit, but this question was taken in revision to the High Court by Elias Maurice defendant No. 1 who agreed to waive notice under section 106 of the Transfer of Property Act, and that the suit might proceed upon that footing. An order was made by the High Court accordingly and no question of notice or limitation now arises to be discussed.

At the hearing of the suit in 1927 the learned Subordinate Judge accepted as genuine documents of 1830 [exhibit B] and 1856 [exhibit C]: holding that the defendants had made out permanent right, he gave to the plaintiff a declaration of his superior title to the land but dismissed his prayer for khas possession. On appeal by the plaintiff to the High Court of Calcutta the learned Judges took a different view of the genuineness of the documents of 1830 and 1856, and refused to hold them proved or to presume their genuineness under section 90 read with section 4 of the Indian Evidence Act. Whether they were right or wrong in taking this view is the sole question which their Lordships have now to determine.

In the High Court both learned Judges comment upon the suspicious appearance of exhibits B and C and Mukerji J. refers to the shining ink and the thin pointed pen as particular matters of suspicion. On the whole however their Lordships do not think fit to proceed upon this ground.

It has to be admitted that at no time before 1912 when these documents are recited in the transfer by Korban Ali to Anwar Miah is any mention of or reference to these documents to be discovered in the evidence.

The High Court were materially influenced by two other documents which seem to cast great doubt upon the genuineness of exhibits B and C. The first, exhibit 4A, purports to be an original unregistered kabuliyat executed by Korban Ali in 1892 in favour of the Bhukailash estate which is known to have been at that time under the receivership of Mr. A. M. Dunne. It is written on stamped paper and at the head of it there is written " Confirmed, A. M. Dunne " [in handwriting], " receiver of the estate of Raja Kallisunkur Ghosaul Bahadur " [rubber or other stamp]. Underneath that again in handwriting is " for one year certain A.M.D." and the initials A.M.D. are also at the foot of the second page of the document. At the top of the first

page the name " Korban Ali Serang " purports to be signed. The document purports also to be signed at the foot by Purno Chandra Chattopadhaya and Ramdhan Basu. The document recites that :

> " A plot of 1½ bighas of land . . . within the zemindari of the estate under your administration bearing a monthly rental of Rs.2/7- is recorded in the name of Sobrati Sheikh. Since the said Sobrati Sheikh has absconded and since it has been notified that the said plot of land would be re-settled, I willingly appear (before you) and agree to the said settlement and pray for the same; and according to my prayer, you settle the said land with me enhancing annas 7-8 pies over and above the said rent."

The document further purports to contain a promise by Korban Ali to pay the rent every month to the tehsildar of the Bhukailash estate and to provide that on the expiry of the term the receiver should be entitled to make settlement of the said land and jama according to his pleasure. There are moreover provisions whereby Korban Ali promises not to construct any pucca building on the land nor to do any other work giving rise to a permanent interest in the land. It was further provided that if the land was required Korban Ali would vacate the same on receipt of 15 days' notice. The description of the land is given as No. 7 Tilakporhoi in Dihi Komedanbagan, Perganah Magoora, Police Station Ekbalpur, and in the schedule certain boundaries are given which will be referred to later in this judgment.

The second document bearing upon the genuineness of exhibits B and C is a *heba-bil-ewaz* dated 20th May, 1900, exhibit 7, which purports to have been executed by Sheikh Korban Ali Serang in favour of his wife Srimutty Najibannessa Bibi, daughter of Haidarali Serang. The document before the Court is not the original but is a certified copy obtained from the Registration Office. It bears the registration number, No. 981, and has over the signature of the Registrar a statement that execution is admitted by the above Sheikh Korban Ali Serang who is identified by Sheikh Ahmed Ali, etc. The recitals in the document are to the effect that Korban Ali owes his wife Rs.1,000 for dower : that he has not the means to pay the dower at once but that he has taken a lease of 1½ bighas of land with tank within certain boundaries in the taluq of Raja Satya Nandan Ghoshal, Zemindar, in village Koylasarak, Police Station Ekbalpur, on an annual rent of Rs.35/-; that he has built thereon one tiled hut with mud walls and three tiled huts with mat walls, and is in possession of the same and of certain articles thereinafter mentioned by letting out the same to tenants. The deed goes on to say that Korban Ali fixes the price of the huts with all rights and incidents thereon and of the articles at Rs.598 and makes a gift of them to his wife in lieu of dower. " You become vested with my rights and title from to-day and being entitled to make gift and sale thereof go on enjoying and

possessing the same in great felicity down to your sons, grandsons, and heirs in succession, by paying the fixed rent in the Zemindar's sherista ''.

It will be observed upon the face of this *heba-bil-ewaz* that the annual rent of Rs.35 therein referred to is exactly the same as twelve times the monthly rental of Rs.2/14/8 reserved in exhibit 4A. It will be observed also that whether or not it can truthfully be said that exhibit 7 purports to make a transfer of the huts and chattels only and not of any interest in the land, a construction which is somewhat difficult, the recitals are inconsistent with the right of Korban Ali being that of dur-mourasi tenant under exhibit C the instrument of 1856. Under that patta his rent would not be an annual rent of Rs.35/- nor would it be payable into the Zemindar's sherista.

Having regard to the fact that no reference to exhibits B and C can be traced prior to 1912 the learned Judges of the High Court took the view that the kabuliyat of 1892 and the *heba-bil-ewaz* of 1900 cast such doubt upon the genuineness of exhibits B and C that the defence must be held to have failed to prove the permanent right alleged, it not being proper to make any presumption under section 90 in favour of the genuineness of exhibits B and C.

The other evidence in the case, certain survey papers, the municipal records and the municipal bills, adds little or nothing to the proof of a permanent right.

The main contention on behalf of the appellants before the Board with reference to the documents of 1892 and 1900 was that these documents are not properly proved and that it is not proved that the land to which they relate is the land in suit.

In the High Court it was pointed out that the kabuliyat of 1892 (exhibit 4A) was itself at the time of the trial in 1927 over 30 years old, and that under section 90 of the Indian Evidence Act the presumption could be made that it was executed by Korban Ali as it purports to be. At one time it was argued that section 90 would not apply to this document by reason that it was filed in Court by the plaintiffs on the 11th November, 1918. Their Lordships are however of opinion that under section 90 of the Indian Evidence Act the period of 30 years is to be reckoned, not from the date upon which the deed is filed in Court but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof. This was decided in the case of *Minu Sirkar* v. *Rhedoy Nath Roy* (1879) 5 Calcutta Law Reports 135.

It is true that the only evidence given with reference to the signatures other than that of Mr. Dunne was altogether ineffective, but Kumar Satya Mohan Ghosal, who says that he is 60 years of age in 1927, gives some evidence about the partition suit of the Bhukailash joint estate.

He says

> " A receiver was appointed to the estate. Mr. Fergusson was the Receiver, then Mr. Dunne was Receiver . . . . This is the signature of Mr. Dunne in the kabulyat executed by Korban Ali. Signature proved (ext. 4)."

In cross-examination he says " The signature of Mr. Dunne, exhibit 4, was not made in my presence." Upon this learned counsel for the appellants is justified in his comment that evidence is not properly given of the facts which under section 47 of the Evidence Act it is necessary to prove. On the other hand the learned trial Judge's note " Signature proved " contains no hint of objection taken at the time, and the only cross-examination on the point appears to be directed, not to showing that the witness is unacquainted with the handwriting of Mr. Dunne, but merely to the fact that he did not witness the signature. The document having been filed by the plaintiff comes *prima facie* from proper custody nor has the custody been challenged by any cross-examination.

As regards exhibit 7 it is objected that the original is not before the Court but only a certified copy. Elias Maurice, defendant No. 1, giving evidence in 1916 in a previous proceeding having reference to the land in suit stated (exhibit 11)

> " My title deeds include a deed of gift from Korban Ali to his wife Najibannessa Bibi in 1900. I can produce it as I have got it now and produce. It is in respect of three huts and one Malgudam on the 7 katta plot (ext. A.)."

It would seem therefore that the objection to the admissibility of exhibit 7 is that defendant No. 1 himself should have been given a notice to produce the original before the certified copy was put in evidence.

The appellants however cannot make anything of this objection. Elias Maurice giving evidence in the present case appears to deny that he got any *heba-bil-ewaz* from his vendor, and gives no account of what happened to the document; though there is a passage where he says generally " I made over all the documents to the mortgagee ", a reference to the present appellants who were substituted for him in January, 1930, before this case was dealt with by the High Court. The only purpose of a notice under sections 65 and 66 of the Evidence Act is to give the party an opportunity by producing the original to secure, if he pleases, the best evidence of the contents. The difference between a certified copy and the original for the purposes of the present case is not very obvious, but secondary evidence is admissible when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect produce the original document in reasonable time [section 65]; and under section 66 the Court has absolute power, when it thinks fit, to dispense with a notice under these sections. As defendant No. 1 had not filed the original,

denied having ever had it, and gave no reliable account of what happened to it, the appellants can hardly claim now that the certified copy should have been rejected when tendered by the plaintiff. But in truth the appellants' criticisms are misconceived. In the face of the evidence given by Maurice as recorded in exhibit 11, the defendants were in no position to ask the Court to presume the genuineness of the documents of 1830 and 1856 unless the contents of the *heba-bil-ewaz* were laid before the Court. Rather than find against them on their own failure to produce the document it was eminently reasonable in the circumstances of this case to permit the plaintiff to produce the certified copy.

In these circumstances their Lordships have no difficulty in holding that the kabuliyat of 1892 and the *heba-bil-ewaz* of 1900 are documents which the Court is entitled to look at, the former being presumed to be genuine under the provisions of section 90, and the latter being proved. That the lands mentioned in these two documents are the lands in suit is a conclusion as to which there is no real difficulty. In view of the evidence of Maurice himself it is difficult to suggest that the lands of the *heba-bil-ewaz* are different lands, and though the names of neighbouring tenants have naturally altered between 1892 and 1900 the correspondence in the description of boundaries given in these two documents is marked. The learned Judges of the High Court had ample ground for coming to the conclusion that they both refer to the suit lands. In these circumstances it appears to their Lordships that the documents of 1892 and 1900 cast the gravest doubt upon the genuineness of the alleged pattas of 1830 and 1856, and that the learned Judges of the High Court, rightly refusing to presume the latter documents to be genuine, were justified in the decree which they made.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

(32374—3A) Wt. 8034—41 180 11/35 P. St. G. 338

In the Privy Council

SURENDRA KRISHNA ROY, SINCE DECEASED (NOW REPRESENTED BY BIRENDRA KRISHNA ROY AND OTHERS), AND ANOTHER

v.

MIRZA MAHAMMAD SYED ALI MATWALI, SINCE DECEASED, AND OTHERS

DELIVERED BY SIR GEORGE RANKIN

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