

*Privy Council Appeal No. 41 of 1943*

*Allahabad Appeal No. 47 of 1939*

Musammat Jaggo Bai - - - - - Appellant

v.

Rai Bahadur Hari Har Prasad Singh and another - Respondents

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 26TH JUNE, 1947

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*Present at the Hearing :*

LORD DU PARCQ

LORD NORMAND

LORD OAKSEY

LORD MORTON OF HENRYTON

[*Delivered by* LORD MORTON OF HENRYTON]

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This is an appeal, by one of the two defendants in an action, from a decree of the High Court of Judicature at Allahabad, whereby the present appellant was ordered to pay to the plaintiff in the action, the respondent Rai Bahadur Hari Har Prasad Singh (hereafter called "the respondent") the sum of Rs.26,000, with interest thereon at the rate of 4 per cent. per annum from the 16th December, 1928, down to the date of payment. The other person named as a respondent, Seth Beni Chand, is not before their Lordships' Board and no question arises as to him.

The relevant facts are as follow.—On the 18th February, 1921, one Babu Bindeshwari Prasad executed a mortgage of a village called Nayagaon in favour of the appellant and her son Seth Beni Chand to secure a total sum of Rs.60,000 with interest. On the 16th December, 1928, the appellant signed a document whereby, after referring to the mortgage of 18th February, 1921, she stated:—

"I, the executant, myself paid the entire amount of debt from my own pocket. As I am a *pardanashin* lady I got the name of Seth Beni Chand entered in the mortgage-deed by way of precaution. At present I stand in need of money and it seems impossible for me to realize the amount of the document aforesaid."

The remainder of the document, as set out in the judgment of the High Court, is as follows:—

"Accordingly negotiations for transfer of the document aforesaid together with all the rights were started with Rai Bahadur B. Harihar Prasad Singh through B. Girja Shanker Vakil of Lucknow, and it has been settled that I shall transfer the amount of the mortgage-deed aforesaid with interest together with all the rights and powers for a sum of Rs.52,000 and I shall see that the Rai Bahadur aforesaid acquires the entire property permanently. In case the legal advisers of the Rai Bahadur aforesaid consider that I would not be in a position to transfer the entire property mentioned in the mortgage-deed free from all defects and disputes, unless Seth Beni Chand is made to join the deed of transfer, I shall transfer to the Rai Bahadur aforesaid one-half of the property mentioned in the document aforesaid for a sum of Rs.26,000 without raising any plea or objection. Whenever within three years the Rai Bahadur aforesaid wants I shall execute the deed of transfer in respect of the mortgage-deed, dated 18th February, 1921, and have it registered in any way and in favour of anyone proposed by him. For the

present, I have already received a sum of Rs.7,000 out of the amount agreed upon by means of a cheque No. 4-A 19,887, dated 28th November, 1928, and I have this day received Rs.19,000 by means of cheque No. 4-A 19,893, dated 16th December, 1928, *i.e.* in all I have received a sum of Rs.26,000. At the time of compliance and completion of the deed of transfer I shall, as directed by the Rai Bahadur aforesaid, allow credit for the sum of Rs.26,000 and accept the balance of the amount settled, whatever it might be, subject to the terms noted above."

By this document, as their Lordships construe it, the appellant agreed that she would either transfer the mortgage to the respondent or, if the respondent's legal advisers took a certain view, she would transfer to the respondent "one half of the property mentioned in the document aforesaid." It is not necessary to consider how the latter form of transfer would have been framed or what would have been its effect; for reasons which will appear later, these questions did not arise in either of the Courts in India. The document does not contemplate that Seth Beni Chand shall be a party to the proposed transfer, either of the whole or the half, nor does it contemplate that he shall receive any part of the purchase price. It is clear from other documents that the appellant and her son were far from friendly at this time.

On the 25th December, 1928, Seth Beni Chand wrote a letter to the respondent which is, so far as material, in the following terms:—

"I too shall have no objection to the settlement made between you and my mother Musammat Jaggo Bai with regard to the mortgage-deed dated 18th February, 1921, executed by B. Bindeshwari Prasad, deceased, *i.e.* she would transfer the mortgage-deed aforesaid to whomsoever you would write for a sum of Rs.52,000 principal and interest. . . . I also agree to that transaction, but out of Rs.52,000 a sum of Rs.26,000 ought to be given to my mother and a sum of Rs.26,000 to me. If you have paid a sum of Rs.26,000 to my mother so much so good and if you have not yet done so please do pay the amount."

The writer goes on to emphasize that the respondent should keep "in deposit" the remaining half of the purchase price, and continues:—

"As regards the existing dispute between me and my mother I shall soon get it settled. If, God forbid, it is not settled at an early date I shall get the amount from you after giving a sufficient security and you would not be put to loss. But if you without asking me pay the amount of my half share, *i.e.* Rs.26,000, to my mother, I shall not be bound by the said settlement."

It appears therefore that, although the mother and son were both willing that the mortgage should be transferred to the respondent at the price of Rs.52,000, they held differing views as to who should receive the purchase money. The mother insisted on receiving the whole, the son insisted on receiving half. In these circumstances it does not appear that the documents just quoted constituted an agreement whereof specific performance could have been obtained against both the mother and the son.

In the events which happened, no transfer to the respondent was ever executed, and on the 23rd February, 1929, both the mother and the son wrote letters by which they clearly refused to carry out any transfer. However, negotiations for the completion of the sale appear to have continued, for reasons which it is unnecessary to discuss, and on the 7th December, 1931, shortly before the expiry of the three-year period mentioned in the document of 16th December, 1928, a Vakil acting for the respondent served a notice on the appellant in the following terms:—

"As directed by my client Rai Bahadur Hari Har Prasad Singh, resident of Arrah, notice is hereby given to you that as per agreement, dated the 16th of December, 1928, you had promised that in case on the advice of and in consultation with the legal advisors the aforesaid Rai Bahadur should be willing you shall execute a deed of transfer, *i.e.* a sale-deed with respect to one-half of the demand including interest due under the mortgage-deed, dated the 28th of February, 1921, for a sum of Rs.60,000 executed by Babu Bindeshwari Prasad

in favour of Musammat Jaggo Bai and Beni Chand in consideration for a sum of Rs.26,000 which amount has already been received by you by means of two cheques and that you shall transfer to the aforesaid Rai Bahadur by means of execution and completion of the sale-deed all the rights and interest appertaining thereto; and that you have not executed and completed the said document in spite of repeated demands and in spite of having received the amount referred to above. So if you fail to complete the document within a period of 4 days remedy shall be sought in court after the expiry of the time allowed and you shall be saddled with costs."

The notice went on to make an alternative offer, which need not be set out.

By her reply to that notice, which is dated 11th December, 1931, the appellant refused to comply with it, and rejected the alternative offer, but in a letter of 14th December, 1931, signed by Seth Beni Chand and by counsel on behalf of the appellant, and also in certain telegrams, the defendants expressed their willingness to transfer the mortgage on payment of a further sum of Rs.26,000. The respondent did not accept this proposal and in their Lordships' view he was justified in refusing to accept it. Both Courts in India found as a fact that the respondent had already paid Rs.3,000 on account of the purchase price to Seth Beni Chand, in addition to the Rs.26,000 which he had paid to the appellant, and that the balance still remaining due was therefore Rs.23,000 and not Rs.26,000.

On the 23rd February, 1932, the respondent issued his plaint in the Court of the Subordinate Judge of Banda against the present appellant and Seth Beni Chand. The relief claimed by the plaint was as follows:—

(a) That the defendants be ordered to execute a deed of assignment of their mortgagee rights under the mortgage-deed, dated the 18th February, 1921, executed by the late Bindeshwari Prasad in favour of the defendant on payments by the plaintiff of a sum of Rs.23,000 the balance of the amount of sale-consideration or any other amount that the court may be pleased to fix and a decree in favour of the plaintiff be passed for the specific performance of the contract against the defendants.

(b) That if, for any reason, in the opinion of the court a decree for specific performance of contract cannot be passed, the defendants may be ordered to refund the sum of Rs.29,000 with interest to the plaintiff and a decree for a sum of Rs.26,000 be passed against the defendant No. 1 and for a sum of Rs.3,000 against the defendant No. 2 with interest by way of compensation from the date of payment up to the date of realisation, and the court may grant any further relief.

(c) That the costs of the suit may be awarded to the plaintiff against the defendants.

It is to be noted that the respondent did not claim a transfer of "one half of the property mentioned in the mortgage-deed" from the appellant.

The case came on for trial before the Subordinate Judge, and on the 20th February, 1937, after all the evidence had been given, "Babu Makut Behari Lai, pleader for the plaintiff, stated that regard being had to the facts of the case, he does not want to press the point re specific performance prayed for in relief". The Subordinate Judge gave judgment on 19th March, 1937. He held that each of the defendants "rescinded the contract without any reasonable cause" and that the respondent (the plaintiff before him) was prepared to carry out his part of the contract and was entitled to be refunded the amount paid by him to the defendants. He thought that each of the defendants should pay interest at the rate of 6 per cent. per annum on the sums received by them respectively, up to the date of repayment of these sums by them. Accordingly, he gave judgment in favour of the respondent for Rs.26,000 against the appellant and for Rs.3,000 against Seth Beni Chand, with interest at the rate aforesaid, and ordered that the respondent's costs should be paid by the defendants in certain proportions.



The present appellant appealed alone to the High Court of Judicature at Allahabad. That Court held that the appellant and Seth Beni Chand had "repudiated the contract," and that the Subordinate Judge was right in ordering the appellant to repay Rs.26,000 to the respondent, but modified the order of the Subordinate Judge by giving to the respondent interest on the Rs.26,000 at the rate of 4 per cent. only, from the 16th December, 1928, down to the date of payment. The appellant was ordered to pay the respondent's costs of the appeal, and the order of the Subordinate Judge as to costs was left undisturbed.

Their Lordships do not think it could truly be said that there were concurrent findings of fact in the two courts in India. The finding that the defendants had repudiated or rescinded the contract was, in substance, an expression of opinion as to the true construction and effect of the relevant letters and telegrams.

The appellant appeals from the order of the High Court, and counsel contended on her behalf that the defendants in the action had never repudiated the agreement to transfer the mortgage and that the conduct of the respondent amounted to a repudiation. He relied particularly upon two points:—

(1) that the appellant was never informed of the advice the respondent had obtained from his legal advisers, and

(2) that the appellant and Seth Beni Chand had offered to transfer the mortgage to the respondent by the letter of 14th December, 1931 and the telegrams already mentioned.

As to the former contention, it was not a term of the sale agreement of 16th December, 1928 that the respondent should inform the appellant of the advice he had obtained and, in any event, their Lordships think that the Notice of 7th December, 1931 makes it reasonably clear that the respondent's legal advisers had advised him that the appellant could not execute a valid transfer of the mortgage as a whole without the concurrence of Seth Beni Chand. It is indeed difficult to see how the legal advisers could have arrived at any other conclusion, and the evidence shows that the respondent had taken advice. At the trial before the Subordinate Judge a witness on behalf of the respondent stated: "We had taken legal advice from Babu Ganga Prasad regarding the agreement obtained from Mst. Jaggo Bai." As to the latter contention, their Lordships adopt the reasoning of the High Court, which was expressed as follows:—

"The offer of the 14th December, 1931, to execute a Deed of Transfer of the mortgage rights by Musammat Jaggo Bai and Seth Beni Chand on payment of Rs.26,000 was not a *bona fide* offer to carry out the contract. The sum due by the plaintiff under the contract was Rs.23,000 and not Rs.26,000. In these circumstances, in our judgment, the defendants and not the plaintiff are in breach of the contract."

Their Lordships feel no doubt that the defendants refused to carry out the sale agreement, and counsel for the appellant naturally felt unable to contend that, if this were the true view of the matter, the claim for return of the Rs.26,000 paid to the appellant could be resisted. He did, however, attack that portion of the decree of the High Court which awarded interest from the 16th December, 1928 onwards, contending that no interest should be awarded, or, alternatively, that no interest should be awarded prior to the 20th February, 1937 when the respondent abandoned his claim for specific performance of the sale agreement. Their Lordships agree with the alternative contention. They are prepared to assume in favour of the respondent, without deciding the point, that interest could be awarded for an earlier period; but they are clearly of the opinion that the discretionary power to award such interest, if it exists, should not be exercised in the circumstances of the present case. During the whole of the period prior to 20th February, 1937, the respondent was claiming specific performance of the sale agreement against both defendants to the action—a form of relief which, in their Lordships' view, he could never have obtained. The respondent had never, during that period, made any demand for repayment of the Rs.26,000 save the demand in the plaint, which was conditional

upon the Court expressing the opinion that a decree for specific performance of the contract could not be passed. At any time prior to 20th February, 1937, the appellant could have resisted any claim for repayment of this sum, on the ground that the respondent was still seeking specific performance and that, if he obtained that relief, the appellant would be entitled to retain this part of the purchase price. As from 20th February, 1937, having regard to the abandonment of the claim for specific performance, the respondent was rightfully claiming the return of the Rs.26,000 and the appellant was wrongfully withholding that sum from him. In these circumstances, their Lordships think that an award of interest at 4 per cent. as from that date, but from no earlier date, does justice between the parties. The contrast between the position prior to the 20th February, 1937 and the position after that date, when the respondent for the first time sought unconditionally the return of the money paid, does not appear to have been brought to the attention of the High Court and, in these circumstances, their Lordships feel justified in differing from the exercise by that Court of its discretion to award interest, even on the assumption that such a discretion existed in regard to interest accruing prior to the 20th February, 1937.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court should be modified by altering the date for the commencement of interest from the 16th December, 1928 to the 20th February, 1937.

Each party must pay his or her own costs of this appeal. The orders of the Courts in India as to the costs of the proceedings before them will remain undisturbed.

In the Privy Council

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MUSAMMAT JAGGO BAI

v.

RAI BAHADUR HARI HAR PRASAD SINGH  
AND ANOTHER

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[DELIVERED BY LORD MORTON OF HENRYTON]