

Seth Maganmal, since deceased, and another - - - *Appellants*

*v.*

Darbarilal Chowdhry - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 6TH DECEMBER, 1927.

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*Present at the Hearing :*

VISCOUNT SUMNER.

LORD ATKINSON.

LORD SINHA.

SIR JOHN WALLIS.

[*Delivered by* LORD SINHA.]

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This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of the Central Provinces, which reversed a judgment and decree of the Subordinate Judge of Damoh in a suit which was filed on the 11th December, 1916, in order to enforce a mortgage executed by the defendant on the 5th March, 1913.

The case has been tried under peculiarly unsatisfactory circumstances. The plaint was registered on the 2nd January, 1917. No written statement was filed, but only oral statements of the pleaders on both sides recorded, and issues were framed on these. The evidence was heard from time to time and at long intervals, and appears to have taken altogether a period of nearly three years. Judgment was pronounced by a Subordinate Judge who had not heard any of the witnesses except two, and even of these one had been partly examined by his predecessor in office. The result is that in a case which entirely depends upon questions of fact, neither of the Courts dealing with the case had the benefit of seeing the witnesses and had to appreciate the evidence recorded by another Judge. Under these circumstances their Lordships

are unable to attach the same importance as they otherwise would to the findings of fact of the Trial Court, and it is necessary that they should feel convinced that the judgment of the Judicial Commissioner under appeal is wrong before they can advise that it should be set aside.

The plaintiffs alleged that the defendant executed the mortgage in question after having received the sum of Rs. 7,000 in cash, and they prayed for the usual mortgage decree.

The defendant admitted the execution of the mortgage but denied that he had received the consideration alleged and also that he owed any money to or had received any money from the plaintiffs.

It is obvious that the onus of proving this defence lay on him, and lay heavily, seeing that it is inconsistent with his own admissions in writing hereafter referred to. It is necessary to scrutinise the defence story in detail and to see whether it is corroborated in every material part in such a way as to neutralise the effect of these admissions. For that purpose, such of the main facts as are not in dispute may be stated as follows :—

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The plaintiffs have their principal shop at Damoh, which is called "Badi Dukan." Rai Seth Sukhdeo was its Munim. The plaintiffs had also a branch shop in the Mawganj quarter of that town, doing only grain business. It was usually called the "Adat shop." In that shop the defendant's brother, Gajadhar, was the managing partner without any share in the capital. In the Paki Rokad (fair cash book) of the Adat shop there are three debit entries in the handwriting of Gajadhar showing that the following sums had been advanced to the defendant on the dates mentioned against them :

- (1) Rs. 2,600, dated 13th February, 1913.
- (2) Rs. 3,400, dated 12th February, 1913.
- (3) Rs. 1,000, dated 17th February, 1913.

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Total Rs. 7,000

The *Sarkat* or acknowledgment book of that shop contains acknowledgments of the defendant in his own handwriting purporting to have been written on these dates and admitting these loans.

The plaintiffs alleged that the defendant had borrowed from their Badi Dukan Rs. 7,000, and given the mortgage in suit in order to satisfy the debts due by him to the Adat shop as evidenced by the above documents. What the defendant had to say with reference to these facts will be apparent from the following statement made for him by his pleader on the 5th December, 1917 :

"A few days before the execution of the bond in suit, Gajadhar had gone to Jubbulpore in connection with the defendant's marriage. During his absence Rai Sahib Seth Sukhdeo found some money short in the Adat shop and wired to Gajadhar to come back. When Gajadhar came he was threatened by Rai Sahib Sukhdeo with prosecution and arrest for the alleged defalcation. As Rai Sahib Sukhdeo holds the position of an Honorary

Magistrate and is an influential man, and as Gajadhar was the only person of the defendant's family to arrange for the marriage of the defendant, the defendant in order to avoid the threatened prosecution of his brother executed a *sarkat* for Rs. 7,000 in favour of Badi Dukan as required by Rai Sahib Sukhdeo. (The Judicial Commissioner states in his judgment that the words Badi Dukan appear to be a clerical mistake. It should have been Adat shop.) In order to give a colouring of truth Rai Sahib Sukhdeo coerced the defendant into showing in the *sarkat* that the amount of Rs. 7,000 was taken on three different dates. None of these items was taken as a loan. The amount of defalcation was said to be Rs. 7,000. By executing the *sarkat* the defendant avoided complications during his marriage. On return of the marriage party the said Munim again threatened the defendant that he would prosecute unless a mortgage deed for Rs. 7,000 was given, as there was no security for the *sarkat* debt. The defendant subsequently learnt that there was no shortage of money in the Adat shop. The bond is therefore void for want of consideration and also because it was executed under undue influence, coercion and for stifling prosecution for a non-compoundable offence."

This story is entirely denied by the plaintiffs, and it is their case that the three loans in February were actually advanced from the till of the Adat shop by Gajadhar to the defendant on the three different dates as shown in its books.

The real question, therefore, is whether the defendant had in fact borrowed from the Adat shop those three sums of money, amounting to Rs. 7,000, for the satisfaction of which the mortgage is said to have been executed. The Judicial Commissioner considered that the mere fact of the actual payment before the registering officer or the ultimate removal of the money to the Badi Dukan did not affect the question as the consideration of the mortgage bond was intended to satisfy the defendant's liability to the Adat shop. The crucial question is the defendant's antecedent liability to the Adat shop.

The defendant and his brother, Gajadhar, denied that any such advance was made, and, though the Trial Court did not believe their story, the Judicial Commissioner came to the conclusion that no cash loans were taken by the defendant from the Adat shop, and that the acknowledgments in the *sarkat*-book and the entries in the Pakki Rokad were made under the circumstances spoken to by them. He considered that their evidence received material corroboration from the following circumstances :—

- (a) A telegram dated the 14th February, 1913 (Ex. D. 1), from Damoh, addressed to Gajadhar at Jubbulpore, to prove that Gajadhar was not at Damoh on the 14th February.
- (b) The non-production by the plaintiffs of the Katchi Rokad (or rough cash book) of the Adat shop for 1913, which would be the best evidence of the transactions in that month as it would contain entries made from day to day.
- (c) The fact that though all the account books were written by subordinate clerks, the only entries in the Pakki

Rokad (or fair cash book), which was written up at varying intervals from the Katchi Rokad, which were in the handwriting of Gajadhar, were under the dates 13th to the 17th February.

- (d) The failure of the plaintiffs to call the Munim Sukhdeo, who died before the hearing was actually concluded, but who could have been called on several previous dates when the case was heard, and
- (e) The evidence of several witnesses which proved that some credit entries in their names were falsely made after the 17th February in the Pakki Rokad of the Adat shop to square up corresponding debit entries which were equally fictitious and which had been made before the 17th February in order to cover up defalcations or deficits, whether Gajadhar was himself guilty of the same or not.

It was argued before their Lordships that none of the circumstances above related either singly or taken together justified the Judicial Commissioner in accepting the defendant's story.

Taking the telegram first, it purports to be sent by Nathoolal, is addressed to Gajadhar c/o Kodoolal Dasratlal, Jubbulpore, and is despatched from Damoh at 8.25 p.m. The contents are as follows :—

“Come by first train soon.”

Nathoolal, examined as a witness on behalf of the defendant, stated that the Munim Sukhdeo sent for him in Magh, 1968 (February, 1913), and asked for Gajadhar's address at Jubbulpore, he having left Damoh a day or two before, that he gave the address and thereupon the Munim sent a telegram (to Gajadhar) through his man, but he did not know its contents. Gajadhar deposed that Ex. D. 1 was the telegram he received. He had gone into the interior of the district when the telegram was received by his relative to whose care it was addressed. He got it on his return from the interior to Jubbulpore, and he immediately returned to Damoh, which he reached on the 17th or 18th February. The Judicial Commissioner came to the conclusion that Gajadhar was not at Damoh on the 14th February, 1913, and that the evidence of the plaintiffs' witnesses that the three different sums of money were actually advanced by Gajadhar to the defendant on the dates shown in the account books could not be accepted.

It is urged on behalf of the plaintiffs (appellants) that even though the telegram was sent on the 14th February, Gajadhar might have been at Damoh during business hours on that date, as the telegram was not despatched till 8.25 p.m. This depends on the distance between the two places, Damoh and Jubbulpore, and the times of the train service between them. That argument was apparently not urged, either before the Subordinate Judge or the Judicial Commissioner, both of whom were in a better position to deal with it than their Lordships, who are, therefore,

unable to hold that the Judicial Commissioner was wrong in holding that the telegram was conclusive to show that Gajadhar was not at Damoh on the 14th February.

It would further appear that the entry of the 17th February is equally fictitious, even if it is assumed that Gajadhar returned to Jubbulpore on the 17th and not on the 18th. The telegram purporting to come as it did from Nathoolal, an employee of the Adat shop, was as an urgent summons to return and could not but convey that something serious had occurred in connection with the Adat shop, and it is difficult to believe that on the very day Gajadhar returned to Damoh he should lend a further sum of Rs. 1,000 to his brother, and thereby commit another grave irregularity in connection with the cash of the shop—for such it was alleged to be by evidence on the plaintiffs' side.

The next question to consider are the facts mentioned as (b) and (c) above.

As regards the Katchi Rokad, this is what the Judicial Commissioner says :—

“ Pakki Rokad is not written from day to day, but is written at the convenience of the clerks when they get time. It is the Katchi Rokad in which transactions are entered at the very time. These are copied in the Pakki Rokad afterwards at the convenience of the clerks. It is therefore the Katchi Rokad which is the really important document. If these amounts were really advanced in cash to the defendant, as was the plaintiffs' case, they must have found place in the Katchi Rokad. Though the defendant had made determined efforts to get the plaintiffs to produce the Katchi Rokads of the Adat shop, they failed to produce them. No satisfactory explanation was given for their non-production, and the plaintiffs merely made a bald statement they had not got any Katchi Rokad of that shop. It was never alleged by the plaintiffs that Gajadhar had removed them. Rampal's evidence given as D.W.9, to the effect that the Katchi Rokads of the Adat shop were with Gajadhar cannot, therefore, be believed. Gajadhar had already been divested of all his powers over the Adat shop, and it seems very unlikely that he would have been permitted to retain these books or to remove them. From hearing to hearing the defendant was pressing for the production of the Katchi Rokads and still no suggestion was made on behalf of the plaintiffs till Rampal was examined that these had been taken away by Gajadhar.”

Similarly as regards the entries in the Pakki Rokad, the Judicial Commissioner observes :—

“ There is one very important circumstance for which no explanation has been offered for the plaintiffs. All the account books were written by subordinate clerks. On no other days were any account books of the Adat shop written by Gajadhar. It was only the Pakki Rokad of 13th February, 1913, to 17th February, that was written by Gajadhar. Gajadhar swears that he had gone through the whole of the Pakki Rokad for that year and that on no other date were any entries made by him. This has not been denied by the plaintiffs. This extraordinary circumstance of Gajadhar writing Pakki Rokad only on these particular dates could not have been a mere accident. It was apparently done with the sole object of preventing the defendant from subsequently denying his liability for these items. The plaintiffs' Munim was, it appears, taking all possible precautions to cover the real nature of the debits and to give them an appearance of ordinary

loan transactions which the defendant may not subsequently deny, otherwise there was no meaning in Gajadhar writing the Pakki Rokad only on these four days."

Their Lordships are unable to hold that the Judicial Commissioner was wrong when he says with reference to the above as follows :—

"The fair conclusion to be drawn from these circumstances is that the Katchi Rokads of the Adat shop were intentionally suppressed by the plaintiffs, and that their production in Court would have gone against them. The entries in the Pakki Rokad of these particular dates were made by Gajadhar after his return from Jubbulpore. These circumstances support the defendant's allegation that they were all made on one day. Gajadhar's statement that different dates against the different items debited to the defendant were put in order to ward off suspicion cannot be said to be without any foundation."

As regards (d) the Judicial Commissioner says :—

"The absence of the evidence of Rai Sahib Sukhdeo in the case is also remarkable. He was the principal person involved in all these transactions, and could have given us the first hand account thereof. He could have denied on oath the allegations made by the defendant and his witnesses, and his cross-examination by the defendant would have elicited several points. He attended the Court on many hearings and should have been the first witness to be put in the witness box on the plaintiffs' behalf. The principal evidence of the plaintiffs began on 10th December, 1918, and Sukhdeo was alive till the end of May following. It was said that from before 10th December, 1918, till his death, Sukhdeo was ill and unable to give his evidence. This illness did not, however, prevent his going about on tour in the interior of the district and travelling by train, as is apparent from the order-sheets of the 4th March and the 15th April, 1919. He was intentionally kept back, the idea perhaps being to put him as the last witness on the plaintiffs' side."

Their Lordships are again unable to hold that this inference is unwarranted, or that on the facts established, the learned Judicial Commissioner was in error in finding material corroboration of the defendant's story.

As regards the last-mentioned circumstances of corroboration noted as (e) above, Gajadhar's evidence was that in the books of the Adat shop certain items had been debited on dates prior to the 17th February, 1913, in the names of certain persons, though the transactions never took place. The effect was to withdraw so much money from the till. These bogus debit entries were squared up by corresponding credit entries made after the 17th February, *i.e.*, after the defendant had undertaken the liability of Rs. 7,000 as being defalcations for which his brother was responsible. If the question of these defalcations rested on the evidence of Gajadhar alone it would have been difficult to accept the story of the alleged deficiency. But the Judicial Commissioner found that some, though not all, of the alleged bogus entries were proved to be such by independent and disinterested witnesses who proved that the credit and debit entries in question appearing in the plaintiffs' books, and purporting to be records of transactions with those witnesses or their firms, did not appear in their own

books of account, and that no such transactions took place in fact. It was hardly to be expected that such independent evidence would be available in respect of all the various items relied upon by the defendant as bogus items. But the books are sufficiently discredited if a certain number are proved which precludes the possibility of error or accident, and their Lordships are unable to hold that the Judicial Commissioner was wrong in holding that the evidence of the witnesses examined by the defendant left no reasonable doubt about there having been defalcations and deficits.

In the result the Judicial Commissioner accepted the story of the defendant, and held that the acknowledgments in the Sarkat book were given and the mortgage in suit executed by the defendant under the circumstances alleged by him.

Their Lordships consider that no sufficient reason has been shown to disturb these findings of fact, which are sufficient to dispose of the case.

The plaintiffs having made a substantive case as to the consideration for their mortgage, cannot now be allowed to shift their ground and urge that the defendant accepted the civil liability of his brother Gajadhar for the defalcations which he alleged and which they denied. Their Lordships, therefore, consider it unnecessary to go into the question whether a creditor can or cannot by stifling a prosecution obtain a valid guarantee for his debt from third parties.

Their Lordships will humbly advise His Majesty that the judgment and decree of the Judicial Commissioner should be affirmed, and this appeal dismissed with costs.

In the Privy Council.

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SETH MAGANMAL, SINCE DECEASED, AND  
ANOTHER

v.

DARBARILAL CHOWDHRY.

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[DELIVERED BY LORD SINHA.]

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