

Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Chandhri Mohammad Mehdi Hasan Khan v. Sri Mandir Das ; and of Sri Mandir Das v. Chandhri Mohammad Mehdi Hasan Khan, from the Court of the Judicial Commissioner of Oudh ; delivered the 18th June 1912.

PRESENT AT THE HEARING :

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY MR. AMEER ALI.]

These are two consolidated Appeals from a Judgment and Decree of the Judicial Commissioners of Oude, dated the 31st of July 1907, and arise out of a suit brought by the Plaintiff in the Court of the Subordinate Judge of Barabanki on the basis of a mortgage-bond executed by the Defendant Chowdhri Mehdi Hasan on the 22nd of December 1898, in favour of one Sukh Dei, since deceased. It appears that Sukh Dei carried on in her lifetime a money-lending business, and that the Plaintiff has obtained a succession certificate under Act VII. of 1889 to collect the debts due to her estate. The present action was launched on the 16th of February 1906 for the recovery of over Rs. 62,000, principal and interest, by the sale of the mortgaged premises. At the time of the institution of the suit the Plaintiff produced only a copy of the document, alleging that the original had been lost. The Defendant in his answer admitted its execution, but alleged

that the debt was discharged. In support of his allegation he produced the original document containing the endorsement of payment by Sukh Dei and her general agent Bansidhar.

In view of the presumption embodied in Section 114 of the Indian Evidence Act (I of 1872), the Subordinate Judge was of opinion that the burden of establishing that the obligation created by the bond was still outstanding lay on the Plaintiff. Their Lordships consider this to be the real meaning of the issue framed by him on the 6th of September 1906 after argument. The Plaintiff accepted the *onus* and obtained an adjournment for the production of evidence in rebuttal of the presumption arising from the possession of the document by the Defendant. The hearing of the case was resumed in January 1907, and the Plaintiff examined a number of witnesses to prove that the Defendant had dishonestly obtained possession of the bond after Sukh Dei's death through the instrumentality of Bansidhar. He also attempted to establish that Sukh Dei was not at Barabanki on the date of the alleged payment. The Defendant then went into evidence regarding the fact of payment and the delivery of the document to his servants on his behalf. The Subordinate Judge disbelieved the Plaintiff's witnesses. With regard to the Defendant's evidence, he observed as follows :--

"I would have hesitated in believing the testimony of Defendant's witnesses also, had it not been corroborated by the facts that the bond bearing an endorsement of payment was filed from the Defendant's custody, and it was stated by Plaintiff's own witnesses that the said endorsement was in the hand-writing of Sukh Dei's general agent, Bansidhar."

In the result the Subordinate Judge dismissed the suit with costs.

From this Decree the Plaintiff appealed to the Court of the Judicial Commissioner of Oude.

The learned Judges who heard the Appeal were of opinion that at the trial the *onus* had been wrongly thrown on the Plaintiff. In this view the learned Judge who delivered the principal Judgment proceeded to examine in the first instance the evidence produced by the Defendant and came to the conclusion that it was not reliable. He then considered the testimony of the Plaintiff's witnesses and was of opinion that it was false. As regards the fact that the document on which the suit was based was in the possession of the Defendant, and produced by him with the admitted endorsement of Sukh Dei's general agent, he held that it must have come into the Defendant's hands by some dishonest means. He accordingly reversed the decision of the First Court and decreed the Plaintiff's claim; and his learned colleague concurred in this Judgment. The Defendant has appealed to His Majesty in Council and there is a Cross Appeal by the Plaintiff on the question of interest disallowed by the learned Judges in the Court below. But he has not appeared either in support of the Judgment in his favour or to argue his own Appeal.

Their Lordships after a careful consideration of the case have come to the conclusion that the Judgment and Decree of the Judicial Commissioners cannot be sustained.

Assuming that any question of *onus* remained after the parties had gone into evidence, and that it lay on the Defendant to establish the allegation of payment, he appears to have proved facts which strongly support the presumption of law arising from the possession of the bond.

He shewed that the endorsement of payment on the document was in the hand-writing of Bansidhar, who, it is admitted, was the "recognised" and general agent of Sukh Dei and held a power of attorney from her, and that it bore

his signature. The Defendant also produced a letter of demand on behalf of Sukh Dei, dated some seventeen days before the date of the alleged payment, signed by Bansidhar. He proved further that this Bansidhar used to give acquittances on Sukh Dei's behalf. Matadin, who, according to the Plaintiff's own witnesses, is the Defendant's treasurer, states that he and two other fellow servants carried the money to Sukh Dei's house, and that she after payment signed the document in Hindi in his presence below the endorsement written by Bansidhar and returned it to him. There is not a trace of cross-examination in the evidence of this witness with regard to the genuineness of Sukh Dei's signature. That statement remains uncontradicted, for no attempt, so far as their Lordships can see, was made to re-call the Plaintiff's witnesses to say the alleged signature of Sukh Dei was not in her hand.

To meet the case made by the Defendant, the Plaintiff produced three classes of testimony. He attempted to show that the Defendant was heavily involved in debt at or about the time of the alleged payment, and he wished the Court to draw from this circumstance the inference that repayment was unlikely. The Trial Judge very properly, in their Lordships' opinion, observed that the fact of the Defendant's indebtedness "in itself would not go to prove that he did not repay the debt in question." And he referred to the evidence of one of the Plaintiff's witnesses to show that the Defendant was in funds in June 1902 and repaid other debts.

The real and substantial case put forward by the Plaintiff was of a two-fold character--first, that the bond was dishonestly and fraudulently made over to the Defendant by Bansidhar after Sukh Dei's death; and, secondly, that Sukh Dei was not at Barabanki on the date of the alleged

payment. It is to be remarked that, although a book was produced by a Pujari, whom the Subordinate Judge calls "a tutored and untruthful witness," to prove Sukh Dei's absence from Barabanki, no attempt was made by the Plaintiff to produce her *mahajani* books of account regularly kept in the course of business.

The Subordinate Judge disbelieved the story told by the Plaintiff's witnesses and the Appellate Court agreed with him in holding that their testimony was worthless. But it has built up a theory of its own, based chiefly on surmises, regarding the manner in which the bond came into the possession of the Defendant. The gist of the Appellate Court's judgment is to be found in the following statements, which also show how the learned Judges have looked at the case. Referring to the testimony of the Plaintiff's witnesses, they say:—

"Worthless as this evidence is, it does not in any way make the Defendant-Respondent's case more probable. In the view that I have taken of the evidence of payment, it is difficult to account for the possession of the bond on the part of the Defendant; yet there are documents on the record whence it may be inferred that some person for his own ends laid his hands on the document soon after the death of Musammat Sukhdei and that through him it came into possession of the Defendant."

And after referring to the disputes among Sukh Dei's relations after her death, they go on to say:—

"The Plaintiff's inability to account for its disappearance no doubt suggested to him the reprehensible course of procuring false evidence, but when the question is considered whether the possession of the endorsed bond on the part of the Defendant raises a presumption of payment, due weight should be attached to the possibility during this state of confusion of some person purloining the bond or even of its being lost and afterwards found and coming into the Defendant's possession."

Their Lordships cannot help considering this mode of treating a case where two distinct and

conflicting sets of facts are opposed to each other as unsatisfactory. The Plaintiff came into Court with a definite story to account for the possession of the document by the Defendant. The learned Judges agree with the First Court in holding that story to be false, and yet they proceed to build up a case for the Plaintiff on what they call a "possibility." As already observed, the Defendant did not rest his case merely on the legal presumption which arose from the possession of the document; he produced positive testimony which received corroboration from that presumption, and he proved facts which made his statement probable. The learned Judges having disbelieved the evidence on both sides, have set aside the presumption under Section 114 of the Evidence Act, which only embodies the ordinary rule of law, by a possibility based on surmises. Now, it is a settled principle that suspicion, though a ground for scrutiny, cannot be made the foundation of a decision, and that is exactly what appears to have happened in this case.

With reference to the conflicting views of the two Courts in India regarding the question of *onus*, in view of the presumption under Section 114 of the Indian Evidence Act their Lordships are of opinion that the Subordinate Judge was right in holding that the production by the Defendant of the bond with the endorsement of payment cast on the Plaintiff the burden of establishing the affirmative proposition that the debt was still outstanding, in other words, of showing that the bond came in Defendant's possession by dishonest means and that the signatures to the endorsement were either forgeries or unauthorised.

On the whole their Lordships are of opinion that the Judgment and Decree appealed against should be set aside and the Plaintiff's

suit dismissed with costs in all the Courts. And they will humbly advise His Majesty accordingly. The Plaintiff will pay the costs of these Appeals.

In the Privy Council.

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HASAN KHAN

v.

SRI MANDIR DAS

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