Privy Council Appeal No. 12 *of* 1929.
Patna Appeal No. 52 *of* 1927.

Parsotim Thakur and others - - - - - *Appellants*

v.

Lal Mohar Thakur and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH MARCH, 1931.

Present at the Hearing:
LORD BLANESBURGH.
LORD MACMILLAN.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The question for determination in this appeal is whether the appellants are entitled to redeem a series of usufructuary mortgages upon certain property, which is described as a separated one anna *patti* in a moiety of Mouza Rajapur in the Shahabad District. The other *pattis* are referred to incidentally in the case, but they are no part of the subject matter of the appeal. The mortgages in question were executed on different dates between the 13th July, 1883, and the 23rd October, 1914, by various members of a joint family now represented by the 6th and 7th appellants, Ram Prasad and Radha Prasad, in favour of the managing members of the respondents' family. A question was raised at the trial of the suit as to one Sita, another member of the mortgagors' family, who was said to have disappeared and was not joined as a party, but this has no bearing on the matter at issue in the present appeal. The mortgages all provided for redemption on the full moon day of Jeth in any year on repayment of the

principal moneys without interest. The respondents were in possession at the date of suit. The first five appellants claimed as transferees of the equity of redemption from the 6th and 7th appellants under two permanent leases dated respectively the 19th June, 1921, and the 26th November, 1921, which were put in evidence and proved.

In the suit as originally framed the mortgagors were joined as co-defendants, with the first three respondents as representing the mortgagees, on the allegation that they (the mortgagors) had refused to join in suing, but they were subsequently made co-plaintiffs with the other appellants on their own application. The remaining respondents are minor members of the family of the mortgagees and were subsequently added as defendants.

The suit was decreed by the first Court, but this decree was reversed on appeal and the suit was dismissed. The respondents have not appeared before the Board, and the appeal has been heard *ex parte*, but the facts have been placed before their Lordships very fully by counsel for the appellants, and the judgments of both Courts have been discussed at length.

The original plaintiffs (appellants 1–5) alleged that on the 19th June, 1921, they tendered the full amount due on all the mortgages to the first three respondents, but that their tender was refused. They accordingly on the next day, which was apparently the full moon day of Jeth in that year, deposited the money amounting to Rs. 12,643 in the Arrah Court, as they were entitled to do under the provisions of Section 83 of the Transfer of Property Act, IV, 1882, by a *chalan*, which is on the record of the suit. The section provides that the Court shall thereupon cause notice of the deposit to be served on the mortgagees, who can then come in and receive the money. Section 84 provides that interest on the principal moneys shall cease from the date of the deposit, and the plaintiffs accordingly claimed mesne profits from the 19th June, 1921. The ascertainment of these profits was left over by the decree of the trial court for subsequent inquiry, and no question as to the amount arises in this appeal, which is solely concerned with the right to redeem.

The suit was instituted on the 3rd March, 1922, in the Court of the Subordinate Judge of Arrah. The plaint set out the mortgages, the plaintiffs' title under the leases above referred to, the tender and deposit, and alleged that notice of the deposit had been duly served on the mortgagee defendants. Summonses were served, and the 29th March was fixed for the filing of the defendants' written statement and the settlement of issues. The mortgagee defendants then appeared and applied for time and were given till 26th April to file their defence. On that day they again applied for time, but were allowed till the next day only, when a written statement, dated the 26th April, was put in. By it these defendants, among other pleas, denied the validity of the plaintiffs' leases and consequently their right to redeem. They denied that notice of the deposit had been

served on them, denied the adequacy of the deposit, and by paragraph 11 claimed an additional sum of Rs. 1300, which they said they had expended in resisting the claims of tenants during certain survey proceedings, and with respect to which they said the mortgagors had "contracted that they would execute a *rehan* (mortgage) bond for the same . . . or would pay the same along with the rehan money."

On the 15th May, 1922, the mortgagor defendants applied to be made co-plaintiffs, an application which it was obvious must succeed and would make redemption inevitable, and this it is suggested is the key to the somewhat remarkable course of events that almost immediately followed.

The case came on next before the Subordinate Judge on the 8th June, when issues were settled strictly on the basis of the written statement already filed. On the 13th June, the account books of the mortgagees were produced, presumably with a view to proving the expenditure alleged. On the 26th June the mortgagee defendants applied to file four documents which are referred to as Ex. A, A1, A2 and A3. Of these, Ex. A is of the greatest importance in the case. It purports to be a contract, signed by the sixth appellant Ram Prasad on behalf of his uncle and brothers, representing the family of the mortgagors, and dated the 14th November 1917, by which in consideration of the mortgagees fighting out the survey proceedings with the tenants, the mortgagors, in effect, agreed to transfer the whole of their interest in the mortgaged property to the respondents. There is some difficulty in the construction of this document, but its main purport is sufficiently set out as above. It is said to have been executed in the presence of the appellants 1–5 and with their full knowledge, and to be an effectual answer to their suit. The main question in this appeal is whether it is genuine.

The other documents, A1, A2, A3, were similar agreements in favour of the respondents, purporting to have been executed by the owners of three of the other *pattis* in Rajapur, which were also under mortgage to the respondents. Later, a fifth document, A4, came to light emanating from the owner of the remaining *patti*, and of similar purport.

The first four of these documents were accompanied by a petition of a pleader's clerk saying that they had been mislaid and could not be produced before, and this was elaborated by an affidavit of the 3rd defendant, which, however, was not filed till March of the following year. The Subordinate Judge ordered the documents to be kept with the record of the suit, the question of their admissibility standing over till the trial. The appellants challenged them all as forgeries.

Nothing further of importance occurred till the 12th July, when an order was passed making the mortgagor defendants co-plaintiffs and providing for the consequential amendments in the plaint. The order also, in view of such amendments, gave

liberty to the mortgagee defendants to file an additional written statement if so advised. Thereupon developments ensued. On the 2nd August, the 3rd defendant, Gungadhari, put in a petition ascribing the written statement of the 26th April to a mistake of his pleader. He alleged that he had come to Arrah on the 25th April, and had instructed one Jug Narain Lal, the pleader's clerk, to apply for time: that he had "related to him some of the facts of the case, and as a precautionary measure wrote out the verification portion on a blank form, and made over the same to him": that he then left Arrah, and did not know the contents of the written statement until the 1st August when he got it read to him "and learnt that para. 11 of the written statement was altogether wrong and against his instructions." He therefore prayed that that paragraph should be struck out and that in its place the following should be substituted:

> *Paragraph No.* 11.—"Defendants Nos. 4 and 5 and Sita Singh entered into a contract with these defendants that the tenants had got most of the *zerait* lands entered as their *rayati* lands in the survey, that these defendants should fight out and get the matter decided, that they would execute a perpetual *mukarari* deed in respect of the *zerait* lands which might be adjudicated as such, and a sale deed in respect of the *asamiwar* lands in favour of these defendants, the specification of which is noted in the deed of contract dated the 15th Katik 1325. The plaintiffs had full knowledge of this contract before getting the *istemrai patta* alleged by them executed. Such being the case, the plaintiffs did not acquire any right as against these defendants, nor had defendants Nos. 4 and 5 any right to execute any deed in favour of the plaintiffs."

The petition was supported by an affidavit of the same date by Jug Narain Lal to the effect that when the application for time was rejected he "gave the pleader, Babu Harnandan Prasad, certain instructions which I then remembered on the 26th April, 1922, in the evening, and the said pleader filed a written statement."

Their Lordships agree with the trial Judge in thinking that this story is almost palpably untrue. It appears from the written statement itself that the three principal defendants all verified it, though, owing to defendants 1 and 2 "having pain in their hands," the verification was written by Gungadhari alone, who affixed the marks of all three. The document is full and detailed, and it is impossible to believe that it could have been drafted without direct instructions. The last paragraph states that, in addition to the sum of Rs. 1300 claimed by paragraph 11 as above set forth more moneys were due by the mortgagors on current account for which a suit would be brought thereafter. This was obviously no part of the defence to the suit, and reads like an addition made at the instance of the clients. The Subordinate Judge adds: "All these writings, signatures of the *Vakil*, scribe, and the defendants 1–3, and the verification are in the same ink and pen as the writings show. Moreover, this written statement was corrected at places, and particularly in para. 11, which states

the defendants' case, and these corrections were initialed by the said Vakil Babu Harnandan in the same ink." It is also clear that if the story were true Babu Harnandan could have been called to support it. The defendants preferred to utilise his services as their pleader at the hearing, and he was so enabled to maintain a discreet silence upon a question of fundamental importance to his clients' case. Even Jug Narain Lal was not vouched as a witness.

Their Lordships are also quite unable to believe that if the written statement had been prepared in this haphazard way, over a blank verification by one of the defendants, no inquiry would have been made by any of them as to what had been inserted till August. This would be the more remarkable seeing that issues were raised on the 8th June, and that on the 13th Gungadhari attended the Court and filed his books of account. It is, their Lordships think, inconceivable that on this occasion he should have made no inquiry as to his written statement, or as to the issues which he then admittedly knew had been framed. It is also extra-ordinary that when he produced the account books his pleader should not have asked whether there were no other material documents.

By O. XIII, r. 1 of the Civil Procedure Code the duty is laid upon "the parties or their pleaders" to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power on which they intend to rely. Rule 2 provides that no documents which should have been, but have not been, produced in accordance with the requirements of Rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown for their non-production.

At the trial Gungadhari deposed that he had brought the documents (A series) from his house to Arrah on the 19th March, and had there showed them to Babu Harnandan and another pleader named Chobey. If this was true, it would appear to have been vital to the respondents' case to call the pleaders seeing that the appellants had charged from the first that Ex. A had been forged after the issues were framed. Whether or not there may have been a legitimate excuse for not calling Harnandan, there is no explanation of Chobey's absence from the witness-box. Moreover, if Ex. A was in the hands of Harnandan on the 19th of March, it is extraordinary that he should on the 26th April following have forgotten about it so completely as then to commit his clients to the story detailed in paragraph 11 of the written statement which he filed on their behalf.

On the whole therefore their Lordships have come to the conclusion that the story told by Gungadhari as to the circumstances under which the written statement was prepared, and as to the production of the documents of the Ex. A series in March, 1922, is false, and this leaves their Lordships, as it evidently

did the Subordinate Judge, with the grave suspicion that the document Ex. A was not then in existence at all.

The direct evidence as to the execution of Ex. A does not tend to dispel this suspicion. All the five documents of the series were said to have been written and executed at one sitting at the house of Gungadhari who deposes to the fact. He is supported by one Sheo Narain Lal, the writer of the documents, who, though apparently posing as an independent scribe, is admitted by Gungadhari to have been employed by him as his account writer for the last 16 years. Further support is claimed from one Ratal Thakur, a caste-fellow of the respondents, who happened conveniently to be passing at the time, and stopped to watch the proceedings, and from Ramdahim Rai, who in other legal proceedings in 1919 had deposed that he was a peon of the 1st respondent and had been in his service for over 20 years; he had apparently altogether forgotten this fact when he gave his evidence in the present suit in March, 1926.

But perhaps the most remarkable part of the story is that the appellants are said to have been present during the whole of the transaction; all the three witnesses to whom their Lordships have referred depose to this fact, but no one can assign any reason for their presence or suggest that they had in November, 1917, any possible concern in the affair. Their presence if established would have been a most happy coincidence for the respondents as Ex. A would on the remaining evidence be no defence to their suit.

These allegations were met by a complete denial on the part of the appellants.

The Subordinate Judge heard the witnesses on both sides, and in such a case their Lordships cannot doubt that the conclusion to which he came as to the truth or falsehood of the story is entitled to much weight. His judgment, which is dated only a few days after the depositions were recorded, shows that he disbelieved the respondents' story.

The defence also relied on the evidence of Sheo Prasad Pande, a pleader of the *Munsif's* Court. He deposed to having been consulted by the 1st respondent about the original draft from which all the A series documents were transcribed. The draft was not produced: Bhola Lal, the clerk of another pleader, by whom it was said to have been prepared, was summoned by the respondents but not examined: the 1st respondent, though the *karta* of the family, did not give evidence. Sheo Prasad was a gentleman whose career had been somewhat chequered, and he did not impress the trial judge.

Ex. A was not registered though Sheo Prasad had advised that it should be: it was not executed upon the usual stamp paper, which would have shown the date upon which, and the person by whom, it was purchased, though, again, Sheo Prasad had advised that this was necessary.

There was therefore nothing whatever but the oral evidence to which their Lordships have referred to establish that this critical document had come into existence in November, 1917.

The suits against the tenants for which the agreement is alleged to have provided were instituted in July, 1918. The plaint in one of them (they were all apparently in common form) is on the record. It was drafted by Sheo Prasad, who knew all about Ex. A, if it existed, but there is no reference to it: indeed, their Lordships think there is much force in the contention that the statements in the plaint are inconsistent with the existence of Ex. A. The respondents' story is that this document was executed willingly by the mortgagor defendants, without any pressure from the respondents, and that the suits were filed by them in consultation with the mortgagors: Sheo Prasad even said that Ram Prasad, one of the mortgagors and the 6th appellant before their Lordships, gave instructions to him in drafting the plaints. The mortgagors were defendants, 2nd party to the suits. The plaint alleges that they are colluding with the tenants in ousting the respondents from portions of the mortgaged lands, and that owing to the mortgage debt being equal to the value of the lands, the mortgagors "have got no real interest in the *patti*, nor have they got any property from which the plaintiffs can realize damages."

Ex. A provided that as soon as the suits were determined in favour of the mortgagors they would transfer the properties upon the terms arranged to the respondents. There were 13 suits filed with reference to this *patti*, and they were all, as Gungadhari admits, disposed of in a year, *i.e.*, at all events by the end of the summer of 1919. Yet no attempt was made by the respondents to enforce the agreement, nor apparently did it occur to the respondents to make any use of Ex. A until the necessity arose in June, 1922, to meet the appellants' claim.

It is not, in their Lordships' opinion, necessary to deal at length with the other documents A1 to A3. They are only introduced by the respondents to corroborate the story as to Ex. A. The evidence of their execution is the same: none of the alleged executants are called to prove them: and there are various circumstances noted by the Subordinate Judge which throw doubt upon their genuineness apart from the facts specially applicable to Ex. A.

Ex A4 related to a *patti* of which the owner was an elderly *pardanashin* woman, Musammat Bataso. This document was not produced by the respondents till the 2nd August, 1922, *i.e.*, more than a month after the production of the other documents of this series. No explanation is vouchsafed of this further delay, and the story of Gungadhari is that all the documents were kept together in one receptacle. Ex. A4 purports to bear the thumb-impression of Musammat Bataso, but in the trial court no attempt was made to prove its genuineness.

Their Lordships think that under the circumstances the relevancy of the documents A1 to A4 is very slight, and that if the respondents relied on them in confirmation of their story as to Ex. A, it was for them to prove their due execution. The

appellants, who denied all knowledge of the transactions, could hardly be expected to call the alleged executants to disaffirm them. It is, their Lordships think, obvious that even if A4 bore the genuine thumb-impression of Musammat Bataso, this, having regard to the circumstances under which it was produced, would be no evidence that Ex. A was executed by the mortgagors in November, 1917, which was the material fact in issue.

The result of this detailed examination of the evidence, so far from dispelling the suspicion which the episode of the written statement aroused, has almost necessarily confirmed it, and their Lordships are unable to hold that Ex. A is proved. This is in reality the only defence to the suit, and its failure leaves the appellants entitled to the relief they claim.

The respondents abandoned the claim for recoupment of the costs incurred in their litigation with the tenants, and having failed upon the substituted defence, they cannot fall back upon this claim, nor have they offered any evidence in support of it.

Their Lordships now turn to the judgment of the High Court. It was delivered by Das J., his colleague, Allanson J., merely concurring.

The argument adopted by the learned Judge is that, having regard to the litigation undertaken by the respondents with the tenants of the mortgagors, there must have been some arrangement as to the costs to be incurred: that the agreement set up by the respondents (*i.e.*, Ex. A), and the story told by them, is " inherently probable ": that there is no reason to disbelieve the witnesses who depose to it: and that there is nothing suspicious about what their Lordships have called the episode of the written statement.

Upon their Lordships' own examination of the facts, they are unable to accept this line of reasoning. The respondents were mortgagees in possession, and would be entitled under Section 72 of the Transfer of Property Act, 1882, to add to the principal of their mortgages any money properly expended by them in supporting the title of their mortgagors. It can hardly be said, therefore, that any express agreement was necessary. As to the " inherent probability " of the respondents' story and the credibility of their witnesses, their Lordships have little to add to the observations they have already made. The learned Judge has disregarded all the considerations which have weighed with their Lordships. In dealing with the judgment of the Sudordinate Judge, he evidently attaches no importance to the fact that the witnesses were examined in his presence: he regards Ratul Thakur, Ramdahin Rai, and Sheo Narain as witnesses of credibility, and their evidence as ample corroboration of Gungadhari: Sheo Prasad Pande is " a witness of undoubted position and respectability ": the unfortunate episode of the written statement was due to the Subordinate Judge's unreasonable refusal of the respondents' request for further time: the grant of only a day to file their defence was unparalleled in his experience.

It apparently escaped the notice of the learned Judge that the respondents had already, on their own request, been given a month's time for this purpose after the date fixed for the first hearing (see as to this Order VIII, rule 1 of the First Schedule to the Code of Civil Procedure). He believes the story told by Gungadhari as to the circumstances under which the written statement was filed : he makes no reference at all to the alleged production of the A series of documents on the 19th March, or to the Subordinate Judge's deductions from the penmanship of the original : he sees no reason why Harnandan Singh or even Jug Narain should have been called.

Their Lordships have no desire to pursue further their criticisms of this judgment. They will only say that it is, in their opinion, unconvincing and unsatisfactory. They must, however, refer to one incident. The question of the thumb-impression of Musammat Bataso was apparently regarded as of importance, and the respondents seem to have applied before the hearing in the Appellate Court began to be allowed to give evidence of its genuineness. The learned Judges acceded to this application and adjourned the hearing to give the respondents an opportunity of producing a genuine thumb-impression of the lady, and tendering expert evidence of comparison. When, after considerable delay, another thumb-impression was produced, it was found that Ex. A 4 had been tampered with while in the custody of the Court, and the thumb-impression which had been on it was torn off. It is evident that Das J. suspected that this had been done by the appellants, though no evidence of any kind with regard to the incident was before him.

In their Lordships' opinion, this additional evidence ought not to have been admitted. If the respondents desired to give evidence as to the thumb-impression, they had ample opportunity to do so in the trial Court. The provisions of Section 107 of the Civil Procedure Code, as elucidated by Order 41, Rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of Appeal.

Turning to the provisions of Rule 27, cl. (1) (*a*) has no application in the present case. Under (1) (*b*) it is only where the Appellate Court "requires" it (*i.e.*, finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent." This is laid down in the most positive terms by Lord Robertson in *Kessowji Issur* v. *G.I.P. Railway*, 34 I.A. 115, at p. 122. He was dealing with the words of Section 568 of the Code of 1882,

but they are substantially the same as those of O. 41, R. 27, of the present Code. It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. Wherever the Court adopts this procedure it is bound by Rule 27 (2) to record its reasons for so doing, and under Rule 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. Their Lordships regret to find that, so far as the record discloses, none of these conditions was complied with in the present case.

Reference has been made in this connection to certain observations contained in the judgment delivered by Mr. Ameer Ali in *Indrajit Pratab Sahi* v. *Amar Singh*, 50 I.A. 183. The question in that case was as to the power of the Board to admit additional documents which the High Court had rejected, and this power is not in any way restricted or governed by the provisions of the Code. If any incidental remarks appearing in this judgment have occasioned any doubt as to the meaning of the Rules above referred to, or the conditions under which the discretion of the Appellate Court is to be exercised, their Lordships desire to emphasise their view that the correct practice in the matter is as they have now defined it in accordance with the plain words of the Code.

They will only add that the power so conferred upon the Court by the Code ought to be very sparingly exercised, and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case. It could hardly, their Lordships think, be suggested in the present case, that the mere proof of the genuineness of the thumb-impression on Ex. A4 could be in any way decisive of the genuineness of Ex. A.

For the reasons given their Lordships have come to the clear conclusion that the decision of the trial Court was right, and they will humbly advise His Majesty that this appeal should be allowed and that the decree of the High Court should be set aside and that of the Subordinate Judge restored. The respondents must bear the costs of the appeal in the High Court and before this Board.

In the Privy Council.

PARSOTIM THAKUR AND OTHERS

v.

LAL MOHAR THAKUR AND OTHERS.

DELIVERED BY SIR GEORGE LOWNDES.

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