Privy Council Appeal No. 13 *of* 1928.

Bhagat Ram - - - - - - - - *Appellant*

v.

Khetu Ram and another - - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF THE FEDERATED MALAY STATES (STATE OF PERAK).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST FEBRUARY, 1929.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD DARLING.
SIR CHARLES SARGANT.

[*Delivered by the* LORD CHANCELLOR.]

This is an appeal from an order of the Court of Appeal of the Federated Malay States, reversing a decision of the trial judge which ordered the defendant to deliver up for cancellation a charge on certain rubber lands and property of the respondents.

It appears that in the year 1921 the respondents bought the land now in question for a sum of 8,000 dollars, paying 1,000 dollars in cash and giving a mortgage to secure the balance.

At the beginning of 1923 the mortgagee insisted on the interest being increased, the respondents then being in default. On the 13th January, 1923, the respondents gave a fresh charge for 8,200 dollars bearing interest at 24 per cent. per annum and in addition they gave a second charge for 4,000 dollars to another creditor. According to the uncontradicted evidence called for the respondents the property was worth some 10,000 dollars in 1922, and was valued at about 12,000 dollars two years later. In the month of February, 1923, the transaction took place which gives rise to the present action. On the 13th February of that year the respondents executed a charge in favour of the

appellant for the sum of 8,000 dollars at 18 per cent., and that charge was registered in the Land Titles Office in the Federated Malay States, ranking after the two charges to which reference has been already made. The circumstances under which that charge was given are the subject of acute dispute and give rise to the present controversy.

The appellant's story is that the respondents borrowed an additional sum of 8,000 dollars on the security of this land ; that he went with the first respondent to the Land Titles Office ; that outside the Land Titles Office before they went in he counted out 8,000 dollars in cash to the first respondent ; that they then went into the Office and executed the charge, and that the first respondent and appellant then went to see the first chargee and gave him the third charge in favour of the appellant in order that he might get the charge registered, he having in his possession the certificates of title in the land. The appellant says he arranged to get the charge handed over to him by one Sathia Moorthi, the agent of the first chargee, after registration had taken place. He says that this was duly done and that he obtained the document at the end of February or the beginning of March. He then says that being on the eve of going to India, on the 21st March, 1923, he made an arrangement with one Bhagai, of which the first respondent was informed, under which Bhagai was to collect the interest payable under the charge and to deduct a commission of 20 per cent. for so collecting it, and to remit the balance to him, the appellant, in India.

The appellant says that in September, 1925, the first respondent got the charge from Bhagai by telling him that he was intending to sell the property and wished to produce the charge to the intending purchaser ; and he claims for the whole of the principal and interest payable as stated in the document.

The first respondent's story on the contrary is that having this first charge of 8,200 dollars owing in the beginning of 1923 at 24 per cent., he arranged with the appellant in the following month to lend him the sum of 8,000 dollars in order to pay off the first charge at 18 per cent. He says that the appellant and the first respondent after the execution of the document went with the document in their possession to the first chargee, and handed the document to the first chargee on the terms that he should retain it in his own possession until the appellant paid him the 8,000 dollars, and that he should then discharge his own first charge and hand over the charge in favour of the appellant to the latter duly registered in the Land Titles Office. He goes on to say that the appellant never paid the 8,000 dollars to the first chargee and accordingly the first chargee returned the charge to him, the first respondent, two or three months after its execution. He claims accordingly that the charge has been given for a consideration which has wholly failed and asks for its cancellation.

The trial judge found in favour of the appellant, but his decision was reversed by a majority of the Court of

Appeal. If the decision of the trial judge had proceeded upon the impression which he had formed from the demeanour of the witnesses, as to which of them was telling the truth, in their Lordships' view it would be impossible on the material before the Board to reverse that decision. But a perusal of the judgment seems to show quite plainly that it was not on that principle that the trial judge proceeded. He discusses the evidence and he says that there was nothing to choose between the first plaintiff, that is to say, the first respondent, and the defendant, the present appellant, in the matter of demeanour. He says quite truly that the onus is upon the plaintiffs and he then asks himself: What assistance do the documents afford? He considers the documents and their effect and he comes to the conclusion that the documents put in at the trial as Exhibits "J" and "K" establish a case in favour of the respondents.

The Court of Appeal quite correctly state in their judgment the principles which have been laid down for their guidance in dealing with an appeal on a question of fact. They come to the view, with which their Lordships agree, that the judgment of the trial judge was not based upon his impression of the value of the evidence given by the witnesses in the witness-box, but rather from his inference from the documents which were put in evidence before him.

The probabilities seem to their Lordships to be overwhelmingly in favour of the respondents and against the appellant. It seems very extraordinary that the appellant should have agreed to lend 8,000 dollars on a property which was worth 10,000 or 12,000 dollars, which was already mortgaged for 12,000 dollars, and that he should agree to lend that sum at a rate of interest lower than that which was being paid on a first mortgage. Further, the story told as to the arrangement with Bhagai seems to their Lordships very difficult to believe. The Court of Appeal points out that the rate of commission stated in the document, Exhibit "J," is a rate unheard of in the Federated Malay States for services such as Bhagai was proposing to render. At the date when the Exhibit "J" is said to have been signed, the respondents were already in arrear with the first instalment of the moneys due under the terms of the charge. No explanation is given for the appellant never having asked for the money or made any attempt to recover it. From the day when the agreement is supposed to have been signed down to the time when Bhagai says he returned the charge, a period of over two and a half years, no attempt was ever made by anyone to collect any interest from the respondents.

The story told to account for the fact that the charge is in the possession of the respondents seems to their Lordships equally incredible. It seems impossible to suppose that if the respondents had really been in default for two and a half years, Bhagai would have handed over the charge to them for no other reason except that they wished to show it to an intending purchaser or that

he would have taken no sort of receipt or acknowledgment of its delivery.

On the other hand, the story of the respondents is corroborated in all material aspects by the evidence taken in India on commission of the Chetty, who was the holder of the first charge. The Court of Appeal has explained that the Chetty belongs to a class which is known to be of good business reputation and standing in the Federated Malay States. He had no interest whatever in the result of the action. There is nothing in the transcript of the evidence to indicate any ground for disbelieving him, or for any reflection upon his honesty or uprightness. If his story is true, then it is obvious that the first respondent is telling the truth and that the appellant's evidence cannot be accepted.

The appellant further sought to support his story by producing what were said to be the original books kept by the appellant as agent for his father-in-law, for whom he was carrying on a small business in the Federated Malay States. A document was produced consisting apparently of some loose sheets of paper with entries which, if they were accurate and contemporary, show that the appellant had used 5,650 dollars belonging to his principal in making this advance. Nobody suggests that the document was ever shown to the respondents. It is said to have been admissible in evidence by the law of the Federated Malay States. Their Lordships do not think it necessary to consider whether that was so or not. No objection seems to have been taken to its admissibility at the trial. The document, if accurate, records a most remarkable and extraordinary transaction in the use of the principal's money for part performance of the agent's loan, and their Lordships think that even if admissible it is very far from being a satisfactory document, and even if it were admissible and satisfactory it would not go a very long way towards proving the appellant's case. On the other hand, the inherent improbabilities of the story, the absence of any explanation either for the failure to demand the interest or for the identity of the amount named in the charge with that of the first charge, or of any credible explanation for the fact of the charge being in the possession of the chargors, all seem to their Lordships strong corroboration of the view taken by the Court of Appeal that the appellant's story is not accurate, and that the document was executed not in consideration of a fresh loan of 8,000 dollars, but in consideration of an agreement to pay off the first charge, which agreement was never carried out by the appellant.

Fo these reasons their Lordships agree with the view taken by the majority in the Court of Appeal; they think that this appeal fails and should be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

BHAGAT RAM

v.

KHETU RAM AND ANOTHER.

DELIVERED BY THE LORD CHANCELLOR.

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