

Privy Council Appeal No. 27 of 1934

Allahabad Appeal No. 43 of 1932

Mohammad Habibul Haq and Others (Original Plaintiff) - *Appellants*

v.

Seth Tikam Chand (since deceased) now represented by Seth
Bhag Chand (Original Defendant) - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 21ST JANUARY, 1938.

Present at the Hearing :

LORD MACMILLAN.

LORD ROCHE.

SIR GEORGE RANKIN.

[*Delivered by* LORD ROCHE.]

This is an appeal from a decree, dated 6th July, 1932, of the High Court of Judicature at Allahabad setting aside the decree, dated 29th May, 1928, of the Subordinate Judge of Agra.

The dealings between the original parties to the suit or their predecessors in business extended over very many years and litigation or disputes culminating in litigation have been in progress for nearly twenty years. Of the matters litigated between the parties only two points remained for decision upon the hearing of this appeal. Those points are :

First: Whether a deed bearing date 25th January, 1918, executed by the original plaintiff in favour of the original defendant remained effective notwithstanding a compromise between the parties made in 1921 or was cancelled by such compromise.

• Second: Whether the original plaintiff was or was not entitled to the benefit of certain government promissory notes of the face value of Rs.13,000 which had been deposited by him with the said defendant as security and was or was not entitled to recover the said promissory notes or the amount realised by their sale.

The Subordinate Judge found on both these points in favour of the plaintiff. The High Court reversed his decision on both points. Hence this appeal.

The facts relevant to the understanding of the two points in issue are as follows: The original plaintiff (hereinafter for convenience referred to as the Sheikh) was a contractor and for the purposes of his business he had been for many years financed by the original defendant (hereinafter for convenience referred to as Tikam Chand) and by the father and grandfather of Tikam Chand. On 31st December, 1917, an agreement was drawn up between the Sheikh and Tikam Chand the effect of which was that the sum stated to be due from the Sheikh was Rs.505,186 and that this debt was to be satisfied partly by a sale deed in favour of Tikam Chand of certain properties of the Sheikh and partly by a bond for the residue of the indebtedness. A sale deed bearing date 25th January, 1918, was in fact executed in respect of properties valued at Rs.165,000 and by the same deed a mortgage was created on other property valued at Rs.25,000. On 26th January, 1918, the Sheikh executed a bond in respect of the residue of the debt. The amount of the bond was over three lacs of rupees. There was a dispute in this suit as to whether the total indebtedness was really five lacs or thereabouts or whether that sum was merely provisional and subject to modification by taking of an account. The Subordinate Judge has accepted the view in favour of the Sheikh that the amount was merely provisional, while the High Court has taken the opposite view. Their Lordships regard this matter as of little if any importance. It is at all events clear that as regards the bond the position was entirely altered by an agreement in writing between the parties dated 8th December, 1919, by which it was agreed that the sum due under the bond dated 26th January, 1918, was Rs.139,000 and provision was made for satisfying and securing this amount. The sale agreement dated 25th January, 1918, was not referred to in the agreement of 8th December, 1919.

Tikam Chand was not long satisfied with this substituted agreement of 8th December, 1919, and disputed its validity. On 30th June, 1920, he filed a suit (No. 219) against the Sheikh and certain persons employed by or related to himself claiming that the agreement of 8th December, 1919, was obtained from him by the fraud of the defendants to the suit and was null and void and that the amount due to him was not the lesser sum of Rs.139,000 but the bond amount of over three lacs of rupees. In other words he sought to restore the position under the bond. Again no mention was made of the sale deed. That deed had become operative as from its date and the properties which it purported to convey to Tikam Chand were in fact transferred to him. The suit No. 219 of 30th June, 1920, did not proceed to trial but was compromised between the parties. A petition of compromise dated 25th October, 1921, was presented to the Court and on 7th November, 1921, a decree was passed on that petition. The decree set out the terms of compromise of which the material terms are as follows:

1. The documents, dated the 26th January, 1918 and 8th December, 1919, the possessory mortgage-deed, dated 6th January,

1920, and the rent agreement, dated 6th January, 1920, executed by defendant No. 1 in favour of the plaintiff shall be declared to be null and void. No party shall, in future, be competent to seek any remedy of any kind against the other party under those documents.

2. In lieu of the amount of claim and costs and interest, etc., to this date defendant No. 1, *viz.*, Sheikh Mohammad Habib Ullah shall pay to the plaintiff a sum of Rs.1,65,000 in cash of the current coin, half of which is Rs.82,500, in three years and six months time as per details given below.

Then followed details of instalments to be paid and provisions as to interest and as to the pledge and hypothecation of certain specified properties of the Sheikh as security for payment. Execution proceedings were taken by Tikam Chand to enforce this decree but before full satisfaction was obtained this suit was brought by the Sheikh on 13th April, 1926. He in his turn alleged fraud and attacked the compromise of 1921 and sought to set it aside as obtained by fraud. He alleged that the compromise was based upon a new promise by Tikam Chand to finance his business with fresh loans of large amount and in other directions to support his business. This part of the claim failed before the Subordinate Judge and there was no appeal from his decision. But there was also a claim based on the contention that under or notwithstanding the compromise the Sheikh was entitled to succeed in respect of points 1 and 2 referred to at the beginning of this judgment. It is on these points that the Courts below have differed and they now remain for decision.

As to point 1 their Lordships have no doubt that the High Court was right in deciding against the Sheikh and that the Subordinate Judge was in error in deciding in his favour. As a mere matter of construction their Lordships are of opinion that the sale deed was not referred to or superseded or cancelled by the compromise. There is no reference in the compromise decree to a document which though it may have been executed on 26th January, 1918, clearly bore date of 25th January, 1918. The language and punctuation of clause 1 of the decree of 7th November, 1921, indicate that only one document of 26th January, 1918, is referred to and where two documents of one date are in question, as in the case of documents dated 6th January, 1920, both are expressly mentioned. Again the decree is specific and detailed as to the working out of its provisions and it is quite inconceivable if a sale deed already carried into effect at the date of the compromise were intended to be set aside by the compromise that consequential provisions should not be found there as to re-transfer of the properties in question and as to what was to happen as to mesne profits and other similar matters. If evidence as to surrounding circumstances and as to the identity of the deeds in question was admissible, a matter their Lordships think it unnecessary to determine in view of their decision as to the true construction of the document, then the effect of the evidence given is certainly against the appellants. So far as can be traced no reference to the sale deed occurred in the contentions of the parties down to the

time of the compromise decree. The provisions of that deed had been carried out and done with. What was in dispute was the residue of the debt, its amount and the method of its satisfaction: in other words the money bond and the arrangements which were substituted for such bond. On the evidence of the responsible lawyer who drew up the compromise it is difficult and indeed impossible to imagine that he included under the name of a document of 26th January a document which was dated 25th January and which had never been mentioned to him in connection with the compromise he was dealing with and putting into legal form. On this point therefore the appeal fails.

The second point seems no more difficult of solution; but here their Lordships are clearly of opinion that the Subordinate Judge was right and that the High Court was in error. The notes were originally deposited by the Sheikh as security for his borrowings. The bond of 26th January, 1918, provides for their realisation as part satisfaction of the bonded debt. The substituted agreement of 8th December, 1919, treats them as still held by Tikam Chand as security and as the property of the Sheikh for which he was to have credit in part satisfaction of the reduced amount of indebtedness. So they remained to the end unless a story set up by Tikam Chand were established—a matter as to which the onus rests entirely on his side. That story is as follows: The sale agreement provided that one of the properties sold which was an uncompleted bungalow should be completed by the Sheikh; and if it were not so completed by him power was given to Tikam Chand to complete it at the expense of the Sheikh. The story is that Tikam Chand did so complete it and his right to payment was satisfied by the realisation with the consent of the Sheikh of the promissory notes and by the application of the proceeds to this specific debt of the Sheikh. This story was supported by hearsay evidence only, which, apart from its inadmissibility, was of no weight or value. The Subordinate Judge was in their Lordships' opinion correct in dismissing the story as unproved and the Judges in the High Court seem to have put the onus on the wrong party and to have decided that they were not satisfied that the Sheikh had disproved the truth of the story. They also appear to have regarded the story as probable. Their Lordships take an entirely different view. They have already pointed out that the sale agreement, which was the document containing the provisions as to this bungalow, was over and done with at a time when the bond was varied by the agreement of 8th December, 1919. The promissory notes were then treated as still the property of the Sheikh and as proper to be dealt with in connection with the general and residual indebtedness of the Sheikh and not in connection with the bungalow or any matter of the sort. The High Court also considered that if the notes were left with the defendant without any particular contract article 49 of the Limitation Act applied to bar the Sheikh's claim in as

much as it was not made within three years. Their Lordships agree with the Subordinate Judge that this article had no application. The notes remained with Tikam Chand as security or at any rate for safe custody and on either view not article 49 but article 145 is the relevant article and the suit was well within time. The appeal must therefore succeed on this point. The notes have been sold under circumstances not satisfactorily explained, but the appellants, though they cannot recover the notes, are entitled to credit in the account between the parties for the sum realised by the sale of the notes with interest. If they have fully satisfied their indebtedness under the compromise decree out of other monies they are entitled now to payment of Rs.15,000 the proceeds of the notes and interest thereon as decreed by the Subordinate Judge. Their Lordships will humbly advise His Majesty accordingly. There remains the question of costs. The success which the appellants have in the end secured is small in comparison with the extent of the original claim and even in comparison with the claim with regard to the sale deed which was in controversy before the High Court and before this Board. Their Lordships therefore think that the proper order would be that each party should bear its own costs in the two Courts below and upon this appeal.

In the Privy Council

MOHAMMAD HABIBUL HAQ
AND OTHERS

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SETH TIKAM CHAND (since deceased) now
represented by SETH BHAG CHAND

DELIVERED BY LORD ROCHE

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