PRIVY COUNCIL

Madhu Sudan Chowdhri and others

Vs.

Mst. Chandrabati Chowdhri and others
(Lords Buckmaster, CJ, Parker, Parmoor, Sir Walter Phillimore, J Bart And Mr. Ameer Ali. JJ)

20.3.1917

JUDGMENT

Lord Buckmaster CJ.

1. The difficulties with which their Lordships are confronted in this case are not connected with any question of law, nor do they arise from the recorded evidence of the witnesses. They are associated with inferences drawn from documents which are not before the Board and from circumstances attending the hearing before the High Court which it is now impossible to reproduce. Their dispute entirely depends upon certain questions of fact. These questions were all answered by the District Judge, who heard the case in the first instance, in favor of the appellants; and, but for the circumstances to which allusion has been made, it would have been difficult for the respondents to convince their Lordships that they should support the reasoning of the High Court by whom this judgment was overruled.

2. The history of this litigation extends for more than half a century. It appears that on the 22nd May 1872, two ladies, whose names appear as the first two respondents to this appeal, though one has recently died, obtained a decree in the Privy Council against one Fateh Narayan Choudhri for a sum which now exceeds 90,000 rupees. The proceedings, which were temporarily concluded by this judgment, are said to have been commenced on the 20th April, 1859. On the 18th March 1887, and the 24th August 1888, the third respondent to this appeal who is the Maharaja Rameshwar Singh Bahadur, obtained two decrees from the Court of the District Judge of Mozufferpore and from the High Court of Calcutta respectively against the respondents. The amounts due under such judgments are said to he 21,855 rupees. The said Fateh Narayan was entitled to an undivided one-fifth share in seventy-one properties in forty-five villages, and the first two respondents endeavoured to execute

their decree by attachment and sale of the said share. Fateh Narayan, however, denied that be possessed any such interest and it became necessary to institute proceedings to establish that this right existed. These proceedings were ultimately decided by the High Court of Calcutta on the 30th August 1898 in favor of the first two respondents. But the difficulties of these two ladies were not thereby ended, for the third respondent - the Maharaja - attached under his decrees their rights against the said, Fateh Narayan and, on the 1st May 1909,applied that the said one-fifth share of the judgment-debtor Fateh Narayan in the said properties should be sold.

3. It is alleged that in these proceedings the usual notices were issued and the sale proclamations were served, the date of the sale being fixed for the 15th September 1900. This execution was, however, stayed on the application of the two first respondents, who claimed that these decrees of the Maharaja were barred by the Statute of Limitations. This claim was ultimately rejected, but fresh proclamations became necessary under Section 291 of the Civil Procedure Code, and it is these proceedings that have given rise to the dispute out of which the present appeal proceeds.

4. The sale of one-fifth of a considerable portion of the properties was in fact affected on the 17th June 1901, and nearly the whole of the property was purchased by the appellants, no other intending purchasers being present at the sale - the aggregate price for the whole being 12,115 rupees. On the 17th July 1901, a petition was presented by the first two respondents seeking to set the sale aside, based upon many allegations the most material for the purpose of the present appeal being that the sale proclamation was not served on all the *Mouzahs*, that the return of service filed in the Court was filed in collusion with the purchasers, the present appellants, and that the sale was accordingly concluded at a price far below the real value a result induced by the collusion of the process server with the present appellants, who were co-sharers of the judgment-debtor in the property sold. This petition was dismissed by the Subordinate Judge on the 11th March 1904. In the ordinary course the record of the service of the sale proclamations would have been returned to the Court and there preserved as an official document. But, owing to a fire shortly after the sale, the official documents of the Court were destroyed, and in only one instance was such a record preserved. In the special circumstances of this case it may be doubted if this unfortunate accident has greatly embarrassed the litigation; it would, in any circumstances, be open to persons challenging the sale to show that these records were inaccurate and, when they were destroyed, the burden of disproving the prima facie

presumption that official acts were rightly carried out would rest with the two respondents. They called some evidence for the purpose: necessarily evidence of a negative character. It was limited in its extent; it affected only a very small number of the villages where the property was situated; and it appears to have been regarded as untrustworthy by the Subordinate Judge who saw the witnesses. The appellants, on the other hand called a large body of evidence to establish the strict regularity of all the proceedings. They brought before the Court the peon, whose duty it was to make proclamations and affix the official notices on the properties that were to be sold. He swore they were all duly affixed, and his evidence was corroborated by a servant of the Maharaja, who identified the several properties; in addition, a number of *chowkidars*, resident in the villages, gave definite evidence of the proceedings, and in nine cases produced proclamations of the sale, which they undoubtedly vouched as being the actual documents that had been fixed upon the properties in accordance with the procedure laid down by virtue of Sections 274, 287 and 289 of the Code.

5. The evidence convinced the learned Subordinate Judge that the sale had proceeded with due regard to all necessary formalities, and the judgment that he delivered does not appear to have omitted from consideration any matter excepting one, which their Lordships cannot help regarding (in the course that the case took in the High Court) as a circumstance most critical in determining the truth of the evidence. For when the case came before the High Court on appeal, these nine sale proclamations were again produced, and then - indeed, as it appears for the first time - these documents were submitted to close and critical examination, with the result that the two learned Judges who heard the appeal were convinced that the story as to their having been fixed upon the various properties in the manner specified by the witnesses was of necessity wholly false. They pointed out that the documents bore no sign whatever of exposure either to sun or rain, and they showed how impossible it was to reconcile the condition in which the documents then were with the statement that they had been affixed to a house, fastened to various trees, and exhibited in the manner sworn to by the witnesses. Their judgment has satisfied their Lordships that they intended to find, and did in fact find, not that these documents had been put up and afterwards taken down, but that they had never been exhibited at all. It further appears from their judgment that in the course of the hearing the pleader on behalf of the present appellants could not answer these criticisms, and admitted that he could not oppose "the very reasonable plea" to set aside the sale. Upon this statement the learned Judges proceeded to certain findings, with some of which at least, in the absence of argument on behalf of the respondents, their Lordships would find it difficult to agree. But these

subsequent findings do not affect the result of the incidents to which their Lordships have referred. If these documents never had been affixed then the wholly story of the service of these proclamations completely broke down. It was not merely inaccurate evidence where the inaccuracy might be regarded as due to mistake or forgetfulness it becomes a series of connected falsehoods, carefully prepared and put together for the deliberate purpose of misleading the Court. It is true that the actual documents themselves only affected nine villages, but the complete destruction of the evidence in these particulars did not leave the other cases unaffected, but destroyed the whole fabric of the story put forward by the appellants in support of their case. In these circumstances it is, in their Lordships' opinion, only right that the appellants on whose behalf this evidence had been prepared should be associated with the scheme of deceit which it was designed to carry out, and that such association should be regarded as an important element in determining whether their defense was honest and just (see *Moriarty v. London, Chatham, and Dover Railway Co*[1]*)* The documents themselves have not been seen by their Lordships, and it is now ten years since the decree of the High Court was given. Their Lordships therefore feel bound to accept the finding of the High Court, who were obviously impressed in an unusual degree by the character of these documents, which they regarded as establishing the fraudulent suppression of the proclamations. There is, indeed, additional weight given to this conclusion by the action of the pleader, to which reference has been made. He did not give a formal consent to the dismissal of the appeal, but he obviously made a statement which showed that on being confronted with these documents and the criticisms made upon them by the Court he was unable further to contend for the trustworthiness of his client's case.

6. It was pointed out to their Lordships that the actual judgment was given some 14 days after the hearing of the appeal, and it is suggested that the learned Judges might have misunderstood the action of the pleader in the conduct of the case. Their Lordships are quite unable, to accept this contention had there been any mistake in this respect it would have been incumbent upon the appellants while the matter was still fresh in the minds of the Judges, to have caused their pleader to call the attention of the Court to the fact that the statement made with regard to his conduct was a statement that had been made in error, no such step was taken and, apart from the argument of counsel, there is nothing before their Lordships to make them think that any such mistake occurred; an affidavit has indeed been filed by a person who said he was present at the trial, that he would certainly have noticed any such admission, that such admission was not made, and that the learned pleader is now unable to recall

whether in fact it did of did not occur. After such a lapse of time this is wholly insufficient, and their Lordships therefore, do not feel at liberty to express their views upon the case as it stood when it left the District Court, but consider that they are bound to accept the clear conclusion of the High Court, that the documents in question were fraudulently put forward as the actual sale proclamations affixed to the properties in pursuance of the Code, and that in fact no such proclamations were affixed at all; and this conclusion is sufficient to support the judgment which is the subject of this appeal.

7. Their Lordships realize with regret that the result of the view that they take will be to keep open the struggle in which the first two respondents have now been engaged for nearly sixty years in trying to obtain payment of a just debt. Comment upon the length of these proceedings cannot be fairly made without fuller knowledge of all the attendant circumstances than their Lordships possess. In part, at least, the two first respondents seem to have contributed to the prolongation of the struggle. The delay in bringing this case before their Lordships - a delay of ten years from the date of the decree of the High Court - is due to circumstances partly beyond the control of either party, but partly also is one for which both sides are to blame. That such delay should be possible justifies the reproach to which the administration of the law is so often and so justly made subject, a reproach which their Lordships are most anxious to remove.

8. The third respondent, the Maharaja, has taken no active part in this appeal. Reappears in the course of these proceedings to have acted as their Lordships would have expected a person in his position to act. When once the peon, who was technically his servant, was found guilty of dishonesty, he no longer desired to support the judgment to which that dishonesty had contributed. In the result, therefore, although this appeal will be dismissed with casts, their Lordships do not think that any order ought to be made as to the costs of the Maharaja. and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Cases Referred.

1. [1870] 5 Q.B.314 : 22 L.T.163 : 39 L.J.Q.B.199 : 18 W.R.625.