

(1924) 02 CAL CK 0052
In the Calcutta High Court

Hari Charan Das and Another

APPELLANT

Vs

Taraprasanna Sen and Others

RESPONDENT

Date of Decision : 06-02-1924

Acts Referred:

Citation : AIR 1925 Cal 541 : 79 Ind. Cas. 354

Judgement

1. This is an appeal against the decision of the Subordinate Judge, first Court, Barisal. The plaintiffs brought a suit to recover a sum of Rs. 6,500 with interest. They obtained decree for Rs. 2,000 with interest and have appealed against this decree. The defendant No. 1 has filed a cross-objection on the ground that the suit should have been dismissed as against him.

2. The plaintiff's case at the trial was as follows: Tarini Kumar Gupta and another purchased at auction-sale in execution of a decree certain properties belonging to the estate of Syed Obidulla Choudhuri. The defendant No. 2 is a brother of Syed Obidulla Choudhuri who is now deceased, and defendant No. 3 is the wife of defendant No. 2. After this purchase the auction-purchasers entered into a contract to sell those properties to the second and third defendants for Rs. 6,000. That contract was entered into on the 23rd February, 1912 and at that time Rs. 1,000 was paid as earnest-money. The plaintiffs were the tenants of land in the property sold on temporary lease and they were anxious that the defendants Nos. 2 and 3 should obtain the property and grant them a permanent lease. The defendant No. 1 is the Sadar Naib of defendants Nos. 2 and 3. The plaintiffs entered into negotiations and arranged to pay the sum of Rs. 7,250 for a lease, the understanding being that defendants Nos. 2 and 3 should re-purchase the property and then grant them a patta. In view of this arrangement they paid, on the 15th February, 1914, corresponding to the 3rd Falgun 1320, the sum of Rs. 6,500 to the first defendant, the understanding being that this money should be paid at once to the auction-purchasers. It transpired, however, that the auction-purchasers had already agreed to sell the property to other persons named Durga Charan Das and Kali Charan Das, and, as a matter of fact, a deed of sale in favour of these persons was executed on the 16th February,

1914. When the plaintiffs ascertained that the money could not be paid to the auction-purchasers they agreed to its being retained in order that a suit might be brought for specific performance of the original contract of sale, and they then demanded a receipt from the first defendant which was granted by him and in that receipt he undertook to re-pay the money after the final disposal of the suit if it should fail.

3. The suit was brought and it was finally dismissed on appeal by the High Court on the 9th August, 1917. The plaintiffs, therefore, claimed this sum with interest at six per cent. *par annum* from that date. In their plaint they asked for this relief against the defendant No. 1 only. But they joined the second and third defendants as *pro forma* defendants apparently anticipating that defendant No. 1 might raise the defence that he acted as agent for the other defendants and then in the suit heard in their presence it might be possible to obtain relief against them in the alternative. But the plaint, as framed, asked for no relief against defendants Nos. 2 and 3 except on the contingency that, should the Court hold on the evidence and the circumstances of the case that defendants Nos. 2 and 3 also ought to be liable, then a decree might be granted against them.

4. The written statement of defendant No. 1 denies all the principal allegations of the plaintiffs. He denies that any money was paid to him or that the receipt for Rs. 6,500 filed with the plaint was signed by him. He alleges, however, that a sum of Rs. 2,000 was paid to the defendant No. 2 by the plaintiffs and others for the purpose for which the sum of Rs. 6,500 was alleged to have been paid. The learned Subordinate Judge has held that the sum of Rs. 2,000 and no more was in fact paid by the plaintiffs to this defendant and that he is bound to re-pay this sum.

5. We have been through the whole of the evidence and we are unable to agree with the finding of the learned Subordinate Judge that the plaintiffs have failed to establish their case as to the payment of Rs. 6,500. The learned Subordinate Judge has dealt with this part of the case very shortly and has not discussed the evidence at length. The plaintiff's story is that the plaintiff Hari Charan Das paid Rs. 5,000 and Rup Chandra Das Rs. 1,500.

6. The principal point found against this story is that the accounts produced by Hari Charan Das show that on the 2nd Falgun, when he left home with the money, he had not Rs. 5,000. We have examined the accounts and we are unable to hold that they support this finding. The accounts filed are accounts which were not written up daily but at intervals of few days; with reference to the period near the alleged payment of the money we have the accounts of the 28th Magh, the 3rd Falgun and the 9th Falgun. The account of the 28th Magh shows that the cash in hand at that date was Rs. 3,810 and it is argued, and the learned Subordinate Judge has held, that as the account showed no credit entries previous to the 3rd Falgun no money could have been received between the 28th Magh and 2nd Falgun.

7. In our opinion, that is not the correct inference that should be drawn. The accounts appear to us to be accounts kept by a man who did not keep his accounts regularly. At intervals he wrote up his accounts, and when he wrote them up he wrote on the day that he wrote the accounts of the transactions of the previous days without showing their actual dates. It seems unlikely that there should be no transaction for four or five days, and then on the fifth or sixth day a large number of transactions if the accounts really show only the transactions of the dates on which the accounts were written. Further, it was the duty of the defendant No. 1, if he questioned these accounts, to cross examine Hari Charan on them and give him an opportunity of explaining how he came to be in possession of Rs. 5,000 on the 2nd Falgun. Not only was no such question put to him but no question was put to him suggesting that the accounts were not genuine. On the evidence we hold that these accounts are genuine and that, far from contradicting the plaintiffs' story, they are strong corroborative evidence.

8. Then, another reason given for disbelieving the payment of Rs. 6,500 is that it is improbable that such a large payment would have been made without the plaintiffs seeing that it was actually paid to Tarini Kumar Gupta. But we have it from the defendants' own evidence that, at any rate, the sum of Rs. 2,000 was paid without a receipt being taken until some days later. If the defendant No. 1 could be trusted with Rs. 2,000, it is not unlikely that he should have been entrusted with the larger sum of Rs. 6,500.

9. Further, we have the evidence of the receipt itself. This receipt was witnessed by a pleader practising at Barisal named Ganga Charan Das Gupta. He was examined for the plaintiffs and his story is that he was asked by the plaintiff's agent to sign the receipt said to have been given by Tara Prasanna Sen and he signed it. Though Tara Prasanna Sen was not present at the time he never at any time subsequently asked Tara Prasanna whether he had signed it or not. This pleader was then living at Tara Prasanna's house. If this story is true the pleader was guilty of serious unprofessional conduct. But in any case as regards the evidence of the receipt itself it seems very improbable that the plaintiffs would have got this receipt signed by this pleader if it were a forgery. The case of defendant No. 1 on his evidence is that, though he did not sign this receipt, he signed another receipt for Rs. 2,000 under the direction of defendant No. 2. It was not suggested in the cross-examination of any witness that the receipt for Rs. 2,000 had been granted; nor was any attempt made to support the defendants' case on this point by other evidence than his own, though he says that these facts were made known to two pleaders one of whom is dead; but the other might have been called. The learned Subordinate Judge came to no finding as to whether their receipt was genuine or not. But he has held that if it be genuine there was some conspiracy between the plaintiffs and defendant No. 1. But that is nobody's case.

10. Then as regards the payment of the money, it is the plaintiff's case that this sum of Rs. 6,500 was brought to Barisal in silver coins and was kept that night at

the house in charge of the keeper of the hotel where he stayed.

11. No attempt was made to test the truth of this story by cross-examination. One would have thought, having regard to the fact that this money must have weighed over two maunds, there would be ample material for a searching cross-examination as to how it was conveyed to the hotel and from the hotel to Tara Prasanna. The natural inference to draw is that the defendants' legal advisers omitted to cross-examine the witnesses on this point for fear that such cross-examination would have the effect of strengthening the plaintiffs' case.

12. It is suggested that it is unlikely that the plaintiffs would have kept so much money in charge of the hotel-keeper, a man of no substance, and that they would prefer to keep it with their pleader or zemindar who live at a short distance. Having regard to the habits and customs of these people we see nothing improbable in the story. It appears from the evidence that, though the money was made over to the hotel-keeper's charge, the plaintiffs or members of their party themselves slept on the chest in which the money was kept.

13. It is further urged, having regard to the negotiation as to re-purchase of the property the plaintiffs would have paid the money far earlier. The only evidence we have as to the actual contract between the defendants Nos. 2 and 3 and the auction-purchaser is contained in the plaint filed by defendants Nos. 2 and 3 in the suit for specific performance. As that suit failed we cannot hold that the plaint gave an accurate account of the contract, and it is hard to draw an inference as to the probability or improbability of the conduct of the plaintiffs in the present suit when we do not know what the conditions were. But we think there is nothing improbable that the plaintiffs, though ready to pay the money for the purpose stated, did not pay it until too late, having regard to the frequency of delay in these matters; and it is not improbable that, when the plaintiffs discovered that there was danger of the property being sold to somebody else, they made a special effort and collected the money in the hopes of inducing the auction purchasers by a large cash payment to sell the property as they desired.

14. For the above reasons, we hold on the facts that the plaintiffs did pay the sum of Rs. 6,500 to the defendant No. 1 and that the defendant signed the receipt, Exhibit 1, and undertook to re pay the money on the failure of the suit for specific performance.

15. On behalf of defendant No. 1 it is urged strongly before us that, even on these findings of fact, we should hold that the defendant No. 1 is not liable as he acted as agent on behalf of defendants Nos. 2 and 3. But this is not the case which the defendant tried to make on his evidence. In paragraph 4 of his written statement he denied having any authority to make the contract or receive the money mentioned in the plaint. No issue was framed on the question whether the defendant No. 1 acted as agent or not. His case now rests on the evidence of the plaintiffs themselves and some other witnesses to the effect that the money

was paid to Tara Prasanna upon the verbal order of defendant No. 2, We do not think that defendant No. 1 can make out this case having regard to the case he made both in his written statement and in his evidence before the Court. He is not entitled to say "I have not received the money, but if I did receive it I am not accountable for it." It was not the plaintiffs' case that he acted as agent of defendants Nos. 2 and 3; their evidence as to the circumstances under which the money was paid is not necessarily contrary to their case that the defendant No. 1 did not receive the money as agent of defendants Nos. 2 and 3. The mere direction to the plaintiffs to pay the money to defendant No. 1 would not alone make the defendant No. 1 the agent of defendant No. 2. It would be necessary to prove that defendant No. 2 intended that the money should be paid to defendant No. 1 on behalf of defendant No. 2. Also it is necessary to show that defendant No. 1 accepted the money as a payment on behalf of defendant No. 2. Further, if defendant No. 1 had received the money on behalf of the other defendants it would have been entered in the estate accounts. It is in evidence that defendant No. 1 who is no longer a servant of defendants Nos. 2 and 3, is in possession of the accounts in which this payment would have been entered if it had been a payment on account of the estate. These accounts have not been produced by him.

16. The judgment then disapproved the conduct of the pleader Mr. Ganga Charan Das Gupta in signing the document without knowing or earing to know the contents.

17. The result is that this appeal is decreed. The plaintiffs will obtain a decree for the full amount claimed by them, that is, Rs. 6,500 with interest at 6% per annum from 10-8-1917 to this date. The decretal amount will carry interest at 6% per annum until payment.. As against defendants Nos. 2 and 3 the appeal is dismissed.

18. The plaintiffs will get their costs in this and in the lower Court from defendant No. 1. The defendants Nos. 2 and 3 will get their costs of this appeal from, defendant No. 1.

19. The cross-objection is dismissed.