

Privy Council Appeal No. 185 of 1919.

Wazir Sundar Singh - - - - - *Appellant*

v.

Musammat Farida Khanam and others - - - - - *Respondents*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER, 1920.

Present at the Hearing :

VISCOUNT CAVE.

LORD SUMNER.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal from a judgment and decree dated the 24th April, 1917, of the Chief Court of the Punjab, which modified a decree dated the 8th March, 1915, of the Senior Subordinate Judge of Lahore.

The history of the case may be shortly stated as follows :—
On the 2nd October, 1907, the first two respondents, acting by their agent and attorney, Mirza Jalal-ud-Din, a barrister-at-law, mortgaged certain property in Mauza Asafpura in the district of Lahore to the appellant, the Wazir of PUNCH, for Rs. 30,000. It was provided by the mortgage that the loan should bear interest at 10 annas per cent. per mensem, and that an annual instalment of Rs. 6,000 towards the payment of the mortgage money and interest should be paid at the end of each year, commencing from the date of the completion of the mortgage deed. It was also provided that if two instalments should remain unpaid the mortgagee should be entitled to take possession of the land. The advance was made by a series of payments of which the last was made on the 2nd April, 1908. The instalments of principal and interest prescribed by the mortgage deed were not paid, and on the 26th April, 1910, Shankar Das, the agent and attorney of the appellant, wrote to Jalal-ud-Din pointing out that Rs. 36,293 were due for principal and interest up to the end of March, 1910,

and calling upon him to pay the money or as much of it as he could pay and to adjust the account. The account was duly adjusted by Shankar Das and Jalal-ud-Din on the 2nd May, 1910, and the above sum of Rs. 36,293 was admitted to be due. Jalal-ud-Din asserts that on the 5th May, 1910, he paid to Shankar Das the sum of Rs. 26,510 on account of the mortgage money and interest; but this payment is wholly denied by Shankar Das. On the 4th August, 1910, Jalal-ud-Din, as agent for the mortgagors, sold the mortgaged property to Mr. Shah Din, a Judge of the High Court (since deceased) for Rs. 65,000; and the purchaser, having been informed by Jalal-ud-Din that the balance then owing on the mortgage was only Rs. 9,783, somewhat incautiously paid the whole purchase money to Jalal-ud-Din on his undertaking to discharge the balance due and obtain the mortgage deed with a release endorsed. This sum of Rs. 9,783 was the correct amount on the footing that Rs. 26,510 had been paid, as alleged by Jalal-ud-Din, on the 5th May, 1910. It is common ground that after the sale the following sums were paid by Jalal-ud-Din to Shankar Das generally on account of the mortgage money, viz., Rs. 3,000 on the 13th August, 1910, Rs. 2,500 on the 12th September, 1910, and Rs. 700 on the 21st September, 1910. Mr. Justice Shah Din from time to time pressed for the discharge of the balance owing on the mortgage and the delivery of the mortgage deed, but without effect, and ultimately, on the 28th July, 1911, he caused his nephew, Mr. Shah Nawaz, to write to the appellant referring to the sale of the property and asking for an adjustment of the account. The appellant replied requesting Mr. Justice Shah Din to settle the account with his (the appellant's) agent Shankar Das, and to pay to him the money found due. The Judge accordingly sent for Shankar Das and enquired of him what amount was still due to the appellant under the mortgage, and Shankar Das replied that the balance due was a little over Rs. 30,000. Thereupon the Judge sent for Jalal-ud-Din, who maintained that the amount due was much smaller, and produced what purported to be a receipt signed by Shankar Das for the sum of Rs. 26,510 paid on the 5th May, 1910. Shankar Das after some little hesitation admitted that the signature on the receipt was his, but alleged that he had affixed his signature to a blank sheet of paper, and that the body of the receipt had been afterwards written above his signature. He denied that a payment had been made on the 5th May, 1910. After some conversations (to which reference will be made hereafter) this suit was brought by the appellant against the mortgagors and against Mr. Justice Shah Din as purchaser, alleging that the amount due under the mortgage was Rs. 35,721 and claiming possession of the mortgaged lands.

The suit was heard by the Senior Subordinate Judge of Lahore, Mr. H. Forbes, who, on the 8th March, 1915, delivered judgment, accepting the statement of Shankar Das that the Rs. 26,510 had not been paid and that the receipt dated the 5th May, 1910, was not genuine, and giving a decree for possession

on that footing. On appeal to the Chief Court of the Punjab, that Court (consisting of Mr. Justice Broadway and Mr. Justice Scott-Smith) reversed the finding of the Subordinate Judge, and held that the sum of Rs. 26,510 had in fact been paid, as alleged by Jalal-ud-Din, and accordingly granted a decree for possession, subject to a condition that if the sum of Rs. 4,078 (being a sum ascertained on that footing) should be paid to the plaintiff or into Court within two months, the mortgage debt should be discharged and the plaintiff should not be entitled to possession. Thereupon this appeal was brought.

It is obvious that the only question arising for decision is one of fact, viz., whether the sum of Rs. 26,510 was or was not paid by Jalal-ud-Din to Shankar Das on the 5th May, 1910. If this question is determined in the affirmative, the appeal fails, but otherwise it will succeed.

For the purpose of determining the above issue, the first question arising for decision is as to the genuineness of the receipt for Rs. 26,510 (being Exhibit D1). It is admitted by Shankar Das (as above stated) that the signature upon this receipt is his; but he alleges that in the month of March, 1910, when he was about to go away for two months for a wedding, he at the request of Jalal-ud-Din signed and gave to the latter four or more blank sheets in order to enable him to make in the name of Shankar Das certain applications relating to the mutation of title to other land, and that the terms of receipt (which are in the handwriting of Najam-ud-Din, the clerk of Jalal-ud-Din) have been written in on one of these sheets of paper above his signature. The form of the receipt throws no light upon the correctness of this story, except that it is signed by Shankar Das under a power of attorney from the appellant dated the 25th May, 1909; and this power of attorney (when examined) empowers Shankar Das to act as attorney for the appellant in respect of the mortgage of Mauza Asafpura by the first two respondents and certain other mortgages, and makes no reference to the mutation proceedings, or to the property to which those proceedings related. The receipt is witnessed by Asaf Beg and Nisar Husain, both of whom must therefore have been accessory to the fraud of Jalal-ud-Din if fraud there was. Both these witnesses gave evidence of the money having been actually paid at the date of the receipt; and, although Asaf Beg appears (having regard to some later transactions by him) to be an unreliable person, there is no evidence which reflects on the credibility of Nisar Husain. Jalal-ud-Din and his clerk, Najam-ud-Din, also swore to the payment: and evidence was given by Mr. R. A. Dickie to the effect that he was sent for by Jalal-ud-Din to witness the payment and arrived too late for that purpose, but that on his arrival he found Shankar Das, Asaf Beg and another person (presumably Nisar Husain) in the office, and that Shankar Das was sitting on the floor tying up some money to take away. Mr. Dickie's evidence was not shaken on cross-examination. It was stated

by Shankar Das that a man named Shir Ram was present when he signed the blank papers; but this man was not called as a witness, nor was the failure to call him explained.

The above evidence as to the genuineness of the receipt was supported by reference to certain other documents which must now be mentioned. These are :—

(1) *Exhibit D5*, which purports to be a letter from Shankar Das to Jalal-ud-Din, dated the 11th August, 1910, beginning with the words, "You have already shown favour to me, and now once more I give you trouble for an urgent business," and requesting payment of Rs. 3,000 towards the amount due to the appellant. This letter is said by Shankar Das to be a forgery; but it was sworn by Mr. Justice Shah Din that in an interview which he had with Shankar Das on the 6th August, 1911, Shankar Das admitted that this letter was his. The sum of Rs. 3,000 was in fact paid (as above mentioned) on the 13th August, 1910, that is to say, two days after the date of this letter.

(2) *Exhibit D6*, being the receipt by Shankar Das, dated the 13th August, 1910, for the above sum of Rs. 3,000 paid to him on that date on account of the mortgage money. This receipt acknowledges payment of the Rs. 3,000 "out of the balance of the mortgage money and interest" due to the appellant under the mortgage deed; and the respondents rely upon this expression as showing that a previous payment on account had been made. The meaning of the words in Persian characters which have been translated "out of the balance of" was disputed by Counsel for the appellant; but the evidence of Shankar Das, who swore that he objected to the word "balance," but was overruled, tends to show that the translation is correct. This document is not disputed.

(3) *Exhibit D7*, which purports to be a letter dated the 10th September, 1910, written by Shankar Das to Jalal-ud-Din, and requesting payment of a further sum of Rs. 2,500 on account of the mortgage. This letter is not very material, except that it is in somewhat similar form to Exhibit D5, and also to Exhibit D9, to be hereafter mentioned, and may have some bearing on the genuineness of those documents. This letter is said by Shankar Das to be a forgery. Mr. Justice Shah Din stated that at the interview above referred to Shankar Das admitted the genuineness of this letter also. The sum of Rs. 2,500 was in fact paid (as mentioned above) on the 12th September, 1910, and a receipt for this amount is produced.

(4) *Exhibit D9*, which purports to be a letter dated the 19th September, 1910, written by Shankar Das to Jalal-ud-Din. The letter commences: "Out of the balance of the mortgage money and interest, amounting to nearly Rs. 4,000, please pay to me Rs. 1,000 more and secure a receipt therefor as usual." This letter, if genuine, is fatal to the appellant's case, as the reference to "nearly Rs. 4,000" as being the balance due would only be correct if the Rs. 26,510 had in fact been paid. Shankar Das swore that it was a forgery. Ghulab Din, a pleader of Lahore,

who said that he knew Shankar Das' handwriting, stated it to be his opinion that this letter was wholly in the handwriting of Shankar Das. Mr. Muhammad Shafi, a barrister-at-law, who acted in the suit for the respondents, swore that on meeting the appellant at the house of the Raja of Punch shortly after the dispute arose, he showed him the letter (D9), and asked him whether this letter was not wholly in the handwriting of his agent, and that the appellant admitted that it was. The appellant's evidence on this point was to the effect that he was only shown from a distance a piece of paper which he did not read or recognize; but the evidence of Mr. Muhammad Shafi is precise on the point and appears to be worthy of belief. A sum of Rs. 700 was in fact paid on the 21st September, 1910, and a receipt for this sum is forthcoming.

(5) *Exhibit D12*, purporting to be a letter dated the 15th September, 1910, written by Shankar Das to Jalal-ud-Din and referring to "the sum of Rs. 26,000 of your brother which has now become available." This letter, if genuine, supports the respondents' case; but it is disputed by Shankar Das and is not confirmed by any independent evidence, and accordingly it may be put out of account.

The general effect of the evidence above referred to is to support the statement of Jalal-ud-Din as to the payment of Rs. 26,510 on the 5th May, 1910; but there are considerations on the other side which are undoubtedly entitled to considerable weight.

Jalal-ud-Din was closely questioned as to the source from which he derived the Rs. 26,510 which he alleged that he had paid, and in response to this enquiry he told a story which appears on the face of it to be somewhat improbable. His statement is that, on being pressed for a payment on account, he applied to his elder brother, Ahmad Din, a tahsildar at Patiala, for an advance of Rs. 25,000; that Ahmad Din, having for many years had money in his house in the form of gold, silver and currency notes, sent him the amount by two messengers, and that he received the money and handed it over as received to Shankar Das with a further Rs. 1,510 of his own. He says that his brother required no interest on the loan. The story as told appears very unlikely, especially as it is not supported by any document of any kind; but it cannot be said to be wholly impossible. It is confirmed, for what the evidence is worth, by the two messengers who are said to have brought the money to Lahore, and by the fact that in the receipt (*Exhibit D1*) the money is stated to have been handed over in gold, silver and currency notes.

There is another circumstance which tends to throw doubt on the credibility of Jalal-ud-Din, namely, that his account of the disposal of the purchase money when received from Mr. Shah Din, including his account of the repayment of the Rs. 25,000 to Ahmad Din and of its subsequent disposal, is unsatisfactory.

Further, it is material to observe that the experienced Subordinate Judge, who saw most of the witnesses, accepted the

statement of Shankar Das and not that of Jalal-ud-Din, and expressed his opinion of the statement of the latter as to the repayment of the money as follows:—"The statement is the most wilfully dishonest I have ever listened to, and the witness knew it." The learned Judges of the Chief Court, however, took a different view.

If there were no other evidence in the case than that which had now been summarized, it might be difficult for their Lordships to come to a conclusion on the case. But there is a further fact to which reference has not yet been made. It was on the morning of Sunday, the 6th August, 1910, that Mr. Justice Shah Din had his interview with Shankar Das and Jalal-ud-Din, and ascertained that the receipt was in dispute; and that interview ended by the Judge advising that, as the matter might go into Court, the appellant had better be informed. But in the afternoon of the same day Shankar Das again called on the Judge and made a communication to him which is of the utmost importance. The evidence of Mr. Shah Din as to this communication was as follows:—

"Shankar Das came and said to me that he had made a mistake in the morning in denying the genuineness of the receipt for Rs. 26,500 odd, that, as a matter of fact, he had received the money and executed the receipt and that he was now prepared to go into the accounts with M. Jalal-ud-Din, and after giving credit for the amount of this receipt to receive the balance of the mortgage money from him and return the mortgage deed. At the morning interview Shankar Das had shown me the mortgage deed also which was in his possession. After Shankar Das had made this admission to me I sent for M. Najam-ud-Din, clerk of M. Jalal-ud-Din, who was still sitting in my compound in Atta Ullah's house, with the letters and receipts, and M. Jalal-ud-Din's account book which were being copied for me. I asked him to inform M. Jalal-ud-Din that Shankar Das had come and said to me about the receipt in question. I further said that M. Jalal-ud-Din should now settle the matter speedily with Shankar Das, and after getting the mortgage deed duly endorsed with the full payment of the mortgage money, he should get it back and hand it over to me. Atta Ullah and myself were present when Shankar Das made his statement about receipt, D1, in the afternoon."

The above evidence was confirmed by Mr. Shah Din's clerk, Atta Ullah, in the following terms:—

"We had nearly finished when Shankar Das returned and called me and asked to see the Judge. I took him inside. He said he had made a mistake in saying an honest man like Jalal-ud-Din had told a lie and he had received all the money. The Judge asked why he had lied. He said he had done wrong. The Judge told me to call Najam-ud-Din. I did so. The Judge said to him that Shankar Das admitted receipt of money and that he should take Shankar Das to Jalal-ud-Din and tell the latter not to proceed further in wiring to the Wazir and get a receipt on the mortgage deed and settle up the matter. Then the Judge said to Shankar Das, 'The money will be entered in one of your ledgers if you got it.' Shankar Das said it was. The Judge ordered him to show it. Najam-ud-Din remained with me and Shankar Das went off."

Shankar Das on being questioned about this interview admitted that he called on the Judge in the afternoon, but denied

that he had made the statement alleged; but the evidence of M. Shah Din (who was an entirely reliable witness) was not shaken in any respect, and their Lordships are satisfied that the confession was in fact made. In the argument before the Board, an attempt was made to explain this confession as having been made for the purpose of protecting Jalal-ud-Din, and on a promise by the latter to secure the payment of the money by notes of hand. But this explanation is not in accordance with the evidence of Shankar Das, who altogether denied having made the confession; and in any case it is difficult to believe that, if a fraud had really been practised on Shankar Das as he alleges, he would have consented for any such motive to take the fraud upon his own shoulders. In their Lordships' view, this confession makes it impossible for them to accept the evidence of Shankar Das and to hold (as in that case it would be necessary to hold) that not only Jalal-ud-Din and his clerk, Najam-ud-Din, but the witnesses Asaf Beg and Nisar Husain, and Mr. R. A. Dickie, as well as those messengers who swore that they had brought the money from Ahmad Din, had committed gross perjury, and that Jalal-ud-Din and his clerk had combined to forge a large number of the documents in the case.

Upon the whole, while it is difficult to form a confident judgment as to the side on which the truth lies in this case, their Lordships feel themselves constrained to say that the learned Counsel for the appellant have not satisfied them that the judgment of the Chief Court was wrong, and accordingly that they are unable to dissent from the finding of that Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, such costs to include the costs of a petition presented by the appellant for leave to read further evidence on this appeal.

In the Privy Council.

WAZIR SUNDAR SINGH

v.

MUSAMMAT FARIDA KHANAM
AND OTHERS.

DELIVERED BY VISCOUNT CAVE.

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