

Court of the Subordinate Judge, to be disposed of according to law. There will be no order as to the costs of this appeal as between the appellants and the defendants other than the Raja of Jheria.

*Appeal dismissed as against respondent 1.*

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for respondent No. 1 : *Pugh & Co.*

Solicitors for respondent No. 2 : *W. W. Box & Co.*

J. V. W.

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**PRIVY COUNCIL.**

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DAMUSA

v.

ABDUL SAMAD.

P. C.<sup>o</sup>  
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27.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,  
CENTRAL PROVINCES.]

*Second Appeal—Power of Judicial Commissioner on second appeal to interfere with concurrent findings of fact of the lower Courts—Omission to decide real question in case or frame issue on it—Wrong decision on evidence—Civil Procedure Code (Act V of 1908), s. 100.*

In this case the Judicial Commissioner in a second appeal set aside the concurrent findings of fact of the Courts below in favour of the appellants, on the grounds that the real question in the case had not been considered, nor had an issue been framed on it, and that those Courts had wrongly decided that on the evidence there was fraud on the part of the respondent. The Judicial Commissioner found that there was no evidence to support the finding of fraud, and that the real question in the case should, on the evidence, have been found in favour of the respondent, and made a decree in his favour.

<sup>o</sup>*Present* : VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, SIR JOHN EDGE AND MR. AMEER ALI.

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*Held*, that, under the circumstances of the case, the Judicial Commissioner had, on the terms of section 100 of the Civil Procedure Code, 1908, power to act as he had done, and to decide what was the real question in the case, notwithstanding that an issue had not been framed on it.

APPEAL 122 of 1917, from a judgment and decree (27th June, 1913) of the Court of the Judicial Commissioner, Central Provinces, which reversed a judgment and decree (5th January, 1912) of the Court of the District Judge, Amraoti, who had affirmed a judgment and decree (5th May, 1911) of the Court of the Subordinate Judge, Amraoti.

The plaintiffs were the appellants to His Majesty in Council.

The suit in which the abovementioned decrees were made was brought by the appellants to set aside a deed of sale dated 26th of June, 1909. The Subordinate Judge decreed the suit, and that decision was affirmed by the District Judge. In second appeal however the Judicial Commissioner (J. K. BATTEN, Additional Judicial Commissioner) reversed the findings of fact arrived at by the District Judge and set aside the decrees of the Courts below and made a decree against the appellants. The question for determination in this appeal was whether the Judicial Commissioner was right in reversing, in a second appeal, the findings of the first Appellate Court on questions of fact.

For the purposes of that question, the facts are sufficiently stated in the judgment of the Judicial Committee.

On this appeal,

*De Gruyther, K.C.*, and *J. M. Parikh*, for the appellants, contended that the findings of fact by the District Judge were on second appeal binding on the

Judicial Commissioner. The non-payment of the purchase-money on 26th June, 1909, was not due to the appellants' laches, nor to any fault of theirs. There was nothing, it was submitted, in section 100 of the Civil Procedure Code, 1908, to empower the Judicial Commissioner to act on the grounds he gave for interfering with the findings of fact of the Courts below. The appeal was one which had to be decided on the facts. Reference was made to *Durga Chowdhurani v. Jewahir Singh Chowdhuri* (1) and *Nafar Chandra Pal v. Shukur Sheikh* (2). The Courts below found the transaction not to be a mortgage, but a sale with right of re-purchase. Reference was made to *Bhagwan Sahai v. Bhagwan Din* (3), *Balkishen Das v. Legge* (4) and *Jhanda Singh v. Wahiduddin* (5). In any case the appellants are entitled to set aside the sale deed, as the first respondent did not pay or tender the amount of the purchase-money either on 26th or 27th June 1909.

*Sir William Garth*, for the first respondent, contended that on the evidence, and on the construction of the sale deed and agreement of 26th June, 1908, taken with the lease and counterpart of 28th June 1908, the transaction should have been held to be a mortgage by conditional sale, and not a sale with a contract for re-purchase only, and time was not of the essence of the contract. There was no evidence on which the lower Courts could properly find fraud on the part of the respondent. The Courts below had not considered the real question in the case, and under those circumstances the Judicial Commissioner was

(1) (1890) I. L. R. 18 Calc. 23 ; (3) (1890) I. L. R. 12 All. 387 ;  
L. R. 17 I. A. 122. L. R. 17 I. A. 98.

(2) (1918) I. L. R. 46 Calc. 189 ; (4) (1899) I. L. R. 22 All. 149 ;  
L. R. 45 I. A. 183. L. R. 27 I. A. 58.

(5) (1916) I. L. R. 38 All. 570 ; L. R. 43 I. A. 284.

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quite justified in setting aside their findings of fact. Even if time was of the essence of the contract, in the events that happened and the respondent not having been proved to have been unwilling to pay the purchase-money on 26th, 28th, or 30th June, payment on 28th was, under the circumstances, within time.

*De Gruyther, K.C.*, in reply, referred to Order XLI, rule 25 of the Civil Procedure Code, 1908.

The judgment of their Lordships was delivered by  
 Feb. 27. VISCOUNT HALDANE. This is an appeal from a judgment of the Judicial Commissioner, Central Provinces, which reversed a judgment of the District Court, Amraoti, which in its turn affirmed a judgment of the Subordinate Judge there.

The question which arises is whether the appellants are entitled to cancellation of a sale deed, dated the 26th June, 1909, executed by them in favour of the respondent Abdul Samad, and to possession of the land to which it relates. Abdul Samad was the owner of three fields and on the 27th June, 1908, he executed a deed in favour of the appellants purporting to be a deed of absolute sale of these fields for Rs. 3,000 (it being the fact that the fields were of a much greater value). He also executed an agreement reciting the sale deed and providing that if purchase-money of the same amount be paid for the fields on the 27th June, 1909, the appellants should resell, but the entire amount was to be paid on the date mentioned. This agreement was of the same date as the deed of sale. There was also a lease, dated two days later, on the 29th June, 1908, under which the first appellant purported to let the fields to the first respondent, in the *benami* name of his nephew, for a year at a rent which would have been equal to about 24 per cent. interest on the purchase-money.

The effect of the transactions referred to was that the first respondent remained as before in possession of the fields. A year later, on the 26th June, 1909, which was a Saturday, he appears to have been desirous of then paying the stipulated purchase-money of Rs. 3,000, and of obtaining a re-conveyance of the property. A sale deed was drawn up for signature by him and the appellants, and for registration, and he paid to the appellants' agent Rs. 720, being the rent due under the lease, as well as Rs. 30 laid out for the stamp on the deed. The terms of the re-conveyance provided that the amount of the purchase-money was to be received by the appellants from the first respondent in the presence of the registering officer at Kholapur. The deed was drawn up on the stamped paper and executed by the appellants, who went to the registration office and presented the document for registration. The first respondent was not there, but his agent was, with a sum of money in bags, out of which he paid the Rs. 30 for the registration fee. He then went to fetch the first respondent, taking the money with him. After he had gone the appellants waited, but only until the sub-registrar left the office and went upstairs to his private quarters in the same house, and then they went away. A little later (about 3-30 P.M.) the respondent arrived, but was told by the sub-registrar's clerk that the deed could not then be registered. In the registrar's minute-book an entry was made to the effect that the vendors were present and that the deed had been presented for registration, but that, as the purchaser was not present to pay the amount to the debtors, and as the debtors had not made their statement, registration was adjourned until the purchaser should make his appearance, up to the 26th October, 1909. Whether this is accurate or not, it appears that the reason why the vendors and

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the registrar were not there when the purchaser arrived a little later was that the sub-registrar, feeling unwell, had gone to his rooms upstairs, so that there was no one in the office when the purchaser arrived. The sub-registrar's view was apparently that the absence of the purchaser and the want of a statement from the vendors made it the proper course to adjourn registration till a later date. The 27th of June was a Sunday, when no business was transacted. On the Monday the first respondent went to the registry office, but the first appellant, although sent for, refused to attend, taking up the ground that the date for the exercise of the right to re-purchase was past. The first respondent explained his delay in being at the office on the Saturday as due to the fact that he had to look for and bring with him the lease which was to come to an end.

The question is whether the appellants are entitled to get rid of the sale deed which they executed, and which was registered but remained in the condition of an escrow, pending payment of the purchase-money, on the ground of the failure of the respondent Abdul Samad to attend on the Saturday afternoon before the sub-registrar had quitted the office. It appears from the evidence that the sub-registrar quitted the office before the usual hour of closing it. Witnesses were called on both sides, and there is some conflict of testimony. The Trial Judge held that no agreement had been proved on the part of the appellants to accept the money on the 28th instead of the 27th or the preceding Saturday; he also found fraud on the part of the first respondent, in the form of a deliberate intention not to pay on the date specified. The Judge of the first Court of Appeal concurred in finding that there was no agreement to substitute Monday, the 28th, for Sunday, the 27th, and that this was enough to

dispose of the case. On this point he concurred with the Trial Judge, and he also concurred with him in finding that there was fraud, the sale deed being obtained to the extent of securing its registration without any intention of paying the purchase-money. On the second appeal to the Court of the Judicial Commissioner, that learned Judge reversed the decisions in the two Courts below, holding that the real question was, Who was responsible for the non-production of the purchase money? He held that there was no evidence on which a finding of fraud could be based, and he expressed the opinion that the appellants really went away early on Saturday, the 26th, from the registration office, in order to avoid the arrival of the first respondent with his purchase-money.

It is said that, having regard to the terms of section 100 of the Code of Civil Procedure, 1908, it was not competent to the Judicial Commissioner to interfere with the concurrent findings of fact or to entertain an appeal on the grounds he did. Their Lordships are unable to agree with this contention. The view of the Judicial Commissioner was that the first respondent was ready and willing to pay the purchase-money on the 26th June, and that it was due to the action of the sub-registrar and of the appellants in leaving the office when they did that he was prevented from doing so. He was also rightly of opinion that in point of law there was no evidence at all to support the finding of fraud. It is unfortunate that an issue was not framed on the real question, which was whether the first respondent was ready and willing to pay the purchase-money on the 26th June, and was prevented from doing so by the action of the appellants. This question is a different one from the question of narrower scope whether there was a new

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agreement come to in substitution of the 28th June for the 27th as the date of completion. Their Lordships are of opinion that the Judicial Commissioner was within his powers in taking the evidence as it stands, and coming to the conclusion that the real cause of the non-completion on the Saturday was that the sub-registrar and the appellants left the registration office before the time at which the first respondent went there to complete, and without any desire on their part to have him come. Their Lordships have scanned the evidence closely and they think that it warrants this conclusion, and that it was within the power of the second Court of Appeal to draw it, notwithstanding that the appropriate issue had not been framed. The Trial Judge and the first Appellate Judge appeared to have misconceived the real question they had to try, and this was first appreciated when the Judicial Commissioner dealt with the evidence.

Two other questions were raised on which, in the view they take, it is unnecessary for their Lordships to enter. The one relates to the question whether time was of the essence of the contract, and the other whether the transaction was not really one of mortgage; but the conclusion to which they have come makes it sufficient for them to say that they see no reason for disturbing the judgment appealed from, and that the appeal ought consequently to be dismissed with costs. They will humbly advise His Majesty to that effect.

J. V. W.

*Appeal dismissed.*

Solicitor for the appellants: *Edward Dalgado.*

Solicitors for the first respondent: *Watkins & Hunter.*