

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice McDonell.

1883
December 7. AKHIL CHANDRA CHOWDHRY (PLAINTIFF) v. NAYU AND OTHERS
(DEFENDANTS)*

Evidence—Jumma-wasil-baki papers—Right of witness preparing them to refresh his memory from them.

Jumma-wasil-baki papers are not admissible as independent evidence of the amount of rent mentioned therein; but it is perfectly right that a person who has prepared such *jumma-wasil-baki* papers on receiving payment of the rents, should refresh his memory from such papers when giving evidence as to the amount of rent payable.

THIS was a suit for arrears of rent brought by the plaintiff against the defendants. The plaintiff contended that the annual rental was Rs. 31-8, whilst the defendant contended that it was Rs. 25-18 only.

The Munsiff gave the plaintiff a decree slightly in modification of the amount claimed.

The defendants appealed to the Subordinate Judge, who found that witness No. 1 on the plaintiff's side could not speak with certainty as to the amount of rent received by him for the plaintiff, in former years, without referring to the *jumma-wasil-baki* papers which had been written out by him at the time of receiving rent, and held that no weight could be attached to the evidence of this witness, as the *jumma-wasil-baki* papers were not independent evidence of themselves, and the witness himself could not speak with certainty. He therefore modified the decree of the Munsiff, and gave the plaintiff a decree at the rate which the defendants had stated was the proper rate.

The plaintiff appealed to the High Court.

Bahoo Aukil Chunder Sen for the appellant.

Bahoo Srinath Banerjee for the respondents.

The judgment of the Court (GARTH, C.J., and McDONNELL, J.,) was delivered by

* Appeal from Appellate Decree No. 793 of 1882, against the order of Bahoo Kaj Ohunder Sanyal, Subordinate Judge of Chittagong, dated the 21st February 1882, modifying the decree of Bahoo Nitteogopal Sircar, Officiating Munsiff of Satkania, dated the 22nd January 1881.

GARTH, C.J.—We regret very much that we find it necessary to remand this case, but we do so, because we are led to believe, from what the Subordinate Judge himself says, that he has made a mistake in applying the rules which have been laid down by this Court with reference to the use of *jumma-wasil-baki* papers.

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There were two questions in the case: first, with regard to the rate of rent which the defendants had to pay; and, secondly, with regard to the appropriation of the payments.

We need not say anything as to the latter point, because we think that the Subordinate Judge was substantially right in the way in which he appropriated the payments.

But with regard to the first point, the Subordinate Judge says that he cannot believe the first witness who is called for the plaintiffs, because he is unable to say what is the amount of rent which he realized from the defendant in the year 1241, without referring to the *jumma-wasil-baki* papers.

Now we have had the evidence of this witness read, and it appears that he prepared the *jumma-wasil-baki* papers and collected the rents himself, and yet the Subordinate Judge thinks that he had no right to refer to the papers, to see how much he collected from the defendants.

Of course, if he collected the rents, and put down the amounts collected in these papers, he had a perfect right, in giving his evidence, to refer to the papers to refresh his memory as to the amount of the rent which he received. It must be almost impossible for any tahsildar, employed to collect rent in this way, to say what amount of rent he received in each year from a large number of tenants, unless he refers to his books, and therefore to disbelieve a man, because he is obliged to refer to his papers, is obviously wrong. Upon this ground alone we think it right to send the case back for retrial.

Of course, the credibility of the witnesses is a question for the Subordinate Judge; and if he had disbelieved this witness or any other for a sufficient reason, we could not have interfered.

But as on the one hand we are bound to see that no improper use is made of these *wasil-baki* papers, so on the other we are bound to see that witnesses are allowed to make a proper use of them.

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We therefore send the case back for retrial upon this ground only.

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The Subordinate Judge is no doubt perfectly right in saying that *jumma-wasil-baki* papers are not admissible as independent evidence taken by themselves, but when a witness is called, and he refreshes his memory from them, that is not independent evidence; and to use such papers for such a purpose is perfectly legitimate.

The costs of this appeal will abide the event.

Case remanded.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice O'Kinealy.

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CHUNDER NATH ROY AND OTHERS (DEFENDANTS) v. BHOYRUB
CHUNDER SURMA ROY (PLAINTIFF).*

Registration Act, 1877, s. 48—Oral agreement of sale—Subsequent sale to third party—Notice of prior agreement—Rights of purchaser.

Notwithstanding the provisions of s. 48 of the Registration Act, a party who purchases, even under a registered deed of sale, with notice of a prior agreement for sale of the same property, will not be allowed to retain the property as against the person claiming under the prior agreement.

Solano v. Lala Ram Lal (1) followed; *Fusluddeen Khan v. Fakir Mohamed Khan* (2), distinguished.

On the 5th Aghran 1287 (29th November 1880) the defendants Nos. 1, 2 and 3 verbally agreed with the plaintiff to sell him a five-anna share in certain properties for Rs. 95, and received Rs. 10 as earnest money on the bargain. A few days subsequent to this agreement the defendant No. 1 wrote out a contract of sale, and the plaintiff tendered the balance of the consideration-money. The defendants however refused to receive the money and sign the contract on sundry pretences, and eventually, on the 13th Aghran 1287 (7th December 1880) sold the property to defendant No. 4 (who was aware of the agreement made with the plaintiff) under a registered deed of sale.

Appeal from Appellate Decree No. 1174 of 1882 against the decree of Baboo Nobin Chunder Gangooly, First Subordinate Judge of Dacca, dated the 6th April 1882, affirming the decree of Baboo Krishno Bohari Mookerjee, First Munsiff of Manickgunge, dated the 25th August 1881.

(1) 7 C. L. R., 481.

(2) I. L. R., 5 Calo., 336; 4 C. L. R. 257.