

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

1888  
June 29.

WALI-UL-LAH KHAN AND ANOTHER (DEPENDANTS) v. MUHAMMAD ISRAR-  
UL-LAH KHAN AND OTHERS (PLAINTIFFS).\*

*Practice—Issue raised by Court which was not raised by parties.*

The plaintiffs in a suit denounced in the plaint their two signatures to a sale-deed as forgeries, and never alleged that they witnessed it under pressure. The Court of first instance found them to be genuine, and the lower appellate Court, while agreeing with the Court below in its findings upon the question of the genuineness of the signatures, observed that they were obtained under pressure, and so reversed the decree of the Court below. On second appeal to the High Court,

*Held* that Courts are not to raise important and serious issues in a case for the parties when they have not raised it themselves by their own pleadings in the cause.

SALAMAT-ULLAH Khan, Wali-ullah Khan, and Sakhawat-ullah Khan were three brothers owning jointly several zamindari villages and other lands and houses. By a partition and division between the brothers by means of an arbitration award, all their joint property was divided between them, and each brother became separate and undivided owner of the zamindari village land and houses allotted to him, and the award further provided that in case of sale or transfer by any of the parties of the property so acquired by him in severalty, the other parties should have a right of pre-emption. By this partition mauza Bahori, tahsil Pawayan, was allotted to Wali-ullah Khan, the defendant, and his name was recorded in the revenue papers as proprietor of the said mauza.

By a sale-deed dated the 6th March, 1885, Wali-ullah Khan conveyed 5 biswas out of the entire 20 biswas of the said mauza and another plot of land which he also held in severalty, to Muhammad Ittikhar-ullah Khan in the sum of Rs. 2,000, and the plaintiffs, who each the sons of Salamat-ullah Khan, signed the deed as witnesses.

The plaintiffs then brought this action to enforce their right of pre-emption in respect of the aforesaid sale, alleging also at the same time that they were not among the witnesses to the sale-deed and that the signatures purporting to be theirs on the deed were not genuine.

The defendants contested the suit on various grounds, and maintained that the signatures on the sale-deed purporting to be those of the plaintiffs as witnesses thereto were genuine.

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\* Second Appeal No. 1643 of 1886 from a decree of H. P. Mulock, Esq., District Judge of Sháhjahánpur, dated the 26th July, 1886, reversing a decree of Maulvi Mirza Abid Ali Khan, Subordinate Judge of Sháhjahánpur, dated the 11th March, 1886.

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The Subordinate Judge of Sháhjahánpur, who tried the suit in the first instance, fixed several issues for determination arising out of the material allegations of the parties, and one of them was, "Were the signatures to the sale-deed affixed by the plaintiffs themselves, or had the defendants forged them without the knowledge of the plaintiffs, and how will these signatures affect them?" Finding in favour of the defendants upon this issue as well as on the several other issues in the case, he dismissed the suit. On appeal by the plaintiffs to the District Judge, that officer upon this particular issue found as follows:—"I also agree with the Subordinate Judge that the plaintiffs did really sign the deed of sale or gift, or whatever it may be considered to be. It has been held—*Rajlakhi Debi v. Gokul Chandra Chowdhry* (1), that the mere attestation of a deed of sale by a relative does not necessarily import his concurrence. In this case the defendant, uncle of the plaintiffs, no doubt used his family influence to obtain the signature of the plaintiffs to his deed of sale, and I see every reason to believe that such signatures were obtained under compulsion and with no real intention or concurrence in the transaction or of waiver of any right. The plaintiffs did not intend to surrender any right when they signed the deed, and it was simply, to my mind, to relieve themselves from the importunities of their uncle that they affixed their signatures to the deed." On the other issues in the case he found in favour of the plaintiffs and decreed their claim, but without costs.

On second appeal to the High Court by the defendants, it was contended, among other things, that the finding of the District Judge, that the plaintiffs signed the sale-deed as witnesses under compulsion, was opposed to their own statement in their plaint wherein they denounced their signature as forgeries.

Mr. G. E. A. Ross, the Hon. Pandit Ajudhia Nath, and Mir Zahur Husain, for the appellants.

The Hon. T. Conlan and Mr. W. M. Colvin, for the respondents.

EDGE, C. J., and TYRRELL, J.—This is a pre-emption suit. The plaintiffs, who claim a right of pre-emption, had signed the sale-

(1) 3 B. L. R., P. C., 57; 12 W. R., P. C. 47; 13 Moo. I. A., 209.

deed as witnesses. As to that part of the case their allegation in the plaint was that they had not signed the sale-deed, and that their signatures were forgeries. The Subordinate Judge and the District Judge found that the signatures of the plaintiffs to the sale-deed were their genuine signatures. The Subordinate Judge found that the plaintiffs knew to what the sale-deed related, and he dismissed the suit. The District Judge allowed the appeal on the finding that the plaintiffs had witnessed the deed in question under pressure. There was no such issue raised on the pleadings in the case, and no such issue was before the District Judge. The simple issue on this point was—were those signatures the genuine signatures or not of the plaintiffs? The plaintiffs did not allege in their plaint that they had signed the sale-deed under pressure or that they did not know what the contents of the sale-deed were. The issue which the District Judge found in their favour was a very serious issue, and of that class of issues, which, in our opinion, the Privy Council has more than once pointed out, should not be raised by the Judge for the parties when they had not raised it themselves. In the Privy Council case referred to by the District Judge—*Rajlakhi Debi v. Gokul Chandra Chowdhry* (1), the mere proof of the signature of a witness to the document was, we think properly, if we may say so, held to be no evidence that he knew what the contents of the document were. On the findings on the issue raised by the parties by their pleadings, to which we have referred, the plaintiffs had no cause of action. The appeal is allowed, and the suit is dismissed with costs.

*Appeal allowed.*

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

ZALIM GIR (DEFENDANT) v. RAM CHARAN SINGH (PLAINTIFF).\*

*Mortgage—Payment by mortgagees by conditional sale of prior mortgage—Decree obtained by intermediate simple mortgagees for sale—Mortgage by conditional sale foreclosed—Intermediate simple mortgagee not entitled to sell without paying first mortgage.*

B made two mortgages, dated respectively the 10th October, 1871, and 10th October, 1872, of his zamindari property in favour of P. On 27th January, 1874, B

\* Second Appeal No. 339 of 1887 from a decree of G. J. Nicholls, Esq., District Judge of Gházipur, dated the 31st January, 1887, reversing a decree of Munshi Kulwant Singh, Subordinate Judge of Gházipur, dated the 1st April, 1884.

(1) 3 B. L. R., P. C., 57; 12 W. R., P. C., 47; 13 Moo. I. A., 209.

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