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in jail. They will be at once released. Durga Prasad Singh and Damodar Prasad are on bail. Their bail bonds will be discharged.

Appeal dismissed.

APPELLATE CIVIL.

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 December,
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Before Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

MANTOORA, MUSAMMAT AND ANOTHER (DEFENDANTS-APPELLANTS) v. THAKUR JAGMOHAN SINGH AND ANOTHER (PLAINTIFFS) AND OTHERS (DEFENDANTS-RESPONDENTS).*

Lease—Mortgagor's power to grant a perpetual lease—Lease impairing the security of the mortgagee—Mortgagor executing lease in favour of his wife after mortgagee has obtained sale from him, validity of—Evidence of witnesses—Trial Judge's verdict on evidence of witnesses, value to be attached to—Fraud—Circumstantial evidence how far sufficient to establish fraud.

Held, that a mortgagor cannot grant a perpetual lease so far as it impairs the security of the mortgagee and affects prejudicially his rights as such.

Where a perpetual lease of a portion of the mortgaged land was executed fictitiously and fraudulently by a mortgagor without the mortgagee's knowledge and consent in favour of his wife, *held*, that it was invalid as against the mortgagee who had obtained a sale deed of the entire mortgaged property from the mortgagor in full satisfaction of the mortgages held by him. *Qurban Ali and another v. Seth Raghubar Dayal and others* (1), and *Musanmat Bibi Saidunnissa v. Faiyaz Hasan and others* (2), relied on.

Held further, that when the issue is simple and the only question is which set of witnesses is to be believed, the verdict of the trial Judge, who has seen and heard the witnesses and

* First Civil Appeal No. 27 of 1930, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Rae Bareilly, dated the 17th of December, 1929.

(1) (1912) 15 O. C., 239.

(2) (1922) 9 O. L. J., 319.

considered their evidence carefully, should not be lightly disregarded. *Bombay Cotton Manufacturing Company Ltd.*, v. *Moti Lal Shivalal* (1), referred to.

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Held also, that circumstantial evidence is not only sufficient but in many cases it is the only proof that can be adduced to establish fraud. *Satish Chandra Chatterji v. Kumar Satish Kantha Roy* (2), referred to.

Messrs. *M. Wasim* and *Ganga Dayal Khare*, for the appellants.

Messrs. *A. P. Sen* and *P. L. Varma*, for the respondents.

RAZA and SRIVASTAVA, JJ.:—This is the defendants' appeal arising out of a suit brought by the plaintiffs, Jagmohan Singh and Onkar Singh, for a declaration that a perpetual lease executed by Sitla Din and Bindeshuri Prasad (defendants Nos. 3 and 4) in favour of their wives, Musammat Mantoora and Musammat Bibbo *alias* Sawitri (defendants Nos. 1 and 2 appellants), is fraudulent, fictitious and invalid as against them (plaintiffs).

The facts of the case, so far as it is necessary to state for the purpose of disposing of this appeal, are as follows:—

The lease in question purports to have been executed by the defendants Nos. 3 and 4 in favour of their wives defendants Nos. 1 and 2 in respect of 36 bighas 4 biswas 11 biswansis land in mohal Bhawani Bikh, village Khetaundhan, district Rae Bareli on the 24th of August, 1928. The lease was not presented for registration before the 6th of October, 1928. The plaintiffs held two mortgages and a decree in respect of the said mohal. The entire amount thus due to the plaintiffs from the defendants Nos. 3 and 4 was Rs. 88,500. The plaintiffs agreed to advance a further sum of Rs. 2,000 to the defendants Nos. 3 and 4. The defendants Nos. 3 and 4 executed a sale deed in favour of the plaintiffs in respect of the entire mohal Bhawani Bikh on the 9th

(1) (1915) L. R., 42 I. A., 110.

(2) (1923) 28 C. W. N., 327.

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of October, 1928. The sale deed was presented for registration on the same date.

The plaintiffs' case was that they got possession of the property comprised in the sale deed, but they came to know subsequently that the defendants Nos. 3 and 4 had fraudulently and fictitiously executed the lease in question in favour of the defendants Nos. 1 and 2. The present suit was filed on the 11th of May, 1929.

The claim was resisted by the defendants. The defendants Nos. 1 to 3 filed their written statement jointly. Their defence was that the plaintiffs were already aware of the execution of the lease in question when the sale of the mohal Bhawani Bhikh was settled with them. The value of the mohal was much more than the amount due to the plaintiffs on account of their prior mortgages and decree and therefore they accepted the sale of the entire proprietary rights of the mohal subject to the lease in question. The lease had not been registered till the sale was settled with the plaintiffs. The plaintiffs wanted to purchase the land comprised in the lease also and the price of that land was agreed at Rs. 8,000. The money was not ready with the plaintiffs and they took time to arrange for the same. They asked the defendants Nos. 3 and 4 to wait and postpone the registration of the lease in question. Eventually the plaintiffs could not manage to raise Rs. 8,000 and so the defendants Nos. 3 and 4 got the lease in question registered and the plaintiffs purchased the mohal subject to the rights of the defendants Nos. 1 and 2 under the lease. Thus according to the defendants Nos. 1 to 3 the plaintiffs were aware of the existence of the lease in question and had given their consent to the registration of the lease before the sale deed was executed in their favour on the 9th of October, 1928. They pleaded further that the declaratory suit was not maintainable as the plaintiffs were not in possession of the property in dispute.

It should be noted that the defendant No. 4, Bindschuri Prasad, is still a minor. His elder brother Sital

Din (defendant No. 3) had executed the lease in question and also the sale deed personally and as guardian of his minor brother (Bindeshuri Prasad). The transactions in debate were not admitted on his behalf by his guardian *ad litem* in the present suit, but they have been established against him. It has been found that the debt for which the sale deed was executed in favour of the plaintiffs was the ancestral debt binding on the defendant No. 4 along with the defendant No. 3. This finding has not been questioned in the appeal before us. The defendants Nos. 1 to 3 were the principal contesting defendants. This appeal has been filed in this Court on behalf of the defendants Nos. 1 and 2 alone (i.e., the wives of defendants Nos. 3 and 4 respectively).

The only point for determination in this appeal is whether the perpetual lease by which under-proprietary rights were created in favour of the defendants Nos. 1 and 2 was executed fraudulently and fictitiously without the knowledge and consent of the plaintiffs or whether it was executed with their consent and within their knowledge and they agreed to purchase the property subject to the terms of the lease. The learned Subordinate Judge found that the plaintiffs were not aware of the execution of the lease in question till some time after the execution of the sale deed. The defendants' story that the plaintiffs expressed their inability to pay Rs. 8,000 as compensation for the land comprised in the lease and that they permitted the defendants Nos. 3 and 4 to get the lease registered was found to be false. It was found that the defendants Nos. 3 and 4 had agreed to sell the entire mohal Bhawani Bhikh without any reservation for Rs. 90,500 and that they executed the lease in question stealthily, fraudulently and fictitiously and without the knowledge and consent of the plaintiffs. The lease was therefore held to be invalid as against the plaintiffs. It was also found that the plaintiffs are in possession of the property in dispute and hence the suit for declaration is maintainable.

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The finding of the learned Subordinate Judge that the plaintiffs are in possession of the property in dispute has not been questioned in the course of arguments before us. The plaintiffs have examined the tenants of the property covered by the lease in question. Their evidence shows that they pay rent to the plaintiffs. The evidence given by these witnesses stands un rebutted. The finding that the plaintiffs are in possession of the property and the suit for declaration is therefore maintainable must be accepted by this Court.

The vital point in the defendants' story is the *patta* affair. We have examined the record carefully. In our opinion the finding of the learned Subordinate Judge is unassailable on this point. The whole of the evidence on this part of the case has been carefully analysed by the learned Subordinate Judge in his judgment. We have gone through the evidence and we do not deem it necessary to subject it to further recapitulation and analysis. It is clearly established that the value of the whole mohal without any reservation was not more than Rs. 75,000. It is impossible to believe that the plaintiffs agreed to pay Rs. 8,000 for the land covered by the lease over and above the sum of Rs. 90,500 for which the sale deed was executed in their favour. The defendants' written statement shows that either there was to be a sale of the entire mohal for Rs. 88,500 plus Rs. 8,000, and in that case the lease was to be cancelled, or there was to be a sale of the mohal in lieu of Rs. 88,500 and the lands covered by the lease and the mortgaged property in villages Bewali and Badain were to be excluded altogether from the sale and the exemption was to be stated in the sale deed. The defendants' witnesses however state that in case the sum of Rs. 8,000 was not available to the plaintiffs the agreement was to sell the entire mohal subject to the under-proprietary rights created in favour of the defendants Nos. 1 and 2 under the lease. We find on examining the sale deed that nothing was exempted from sale and the vendee

did not purchase the property subject to the under proprietary rights created by the lease in question. No mention of the lease was made in the sale deed and nothing was exempted from sale. It is difficult to understand why the land covered by the lease in question was not exempted from the sale if it had been really agreed between the parties before the execution of the sale deed that that land would be exempted and the exemption would be specified in the deed. Sitla Din, defendant No. 3, states in his evidence that he cannot say why it did not strike him to exempt the *patta* land from the plaintiffs' sale and make the ladies or himself proprietor thereof. When he was further cross-examined on this point he made the following statement:—

“When the sale deed was read out to me at Salon I learnt that the *patta* land was not made *mustasna*. I asked the plaintiffs why they did not make it *mustasna*. They said that I was not a loser in any way as they would only charge Rs. 108 rent from our wives and that *muafi* given in villages are not mentioned in sales as made *mustasna*. By *mustasna* I meant reference to *patta* and I wanted to have this reference made in the sale deed. If I wished some bighas not to have been sold at all I would have asked the plaintiffs to take out that land from the sale. I cannot say why it did not strike me to gift away the *patta* land to the ladies and to get it exempted from the sale.”

He had made the following statement in his examination-in-chief in this connection:—

“The sale deed was already written. Plaintiffs asked me to sign. I asked him to read out the deed to me and Sher Bahadur read out the deed to me. I asked the plaintiffs why the *patta* land was not exempted. Plaintiffs said that they were entitled to

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receive rent and exemption was not necessary to be written and there was no necessity to exempt the land of *patta* as the *patta* rights were under-proprietary rights. I was not satisfied and I insisted on having the exemption made specific. Sher Bahadur and Baijnath Shukul and plaintiff No. 2 persuaded me that exemption was not needed specifically to be mentioned. The deed was then registered. I signed the deed."

It should be noted that what the defendant No. 3 states now in his evidence, has nowhere stated in the written statement. The evidence given by Onkar Singh, plaintiff No. 2 (P. W. 8) and Gaya Prasad (P. W. 6) (one of the attesting witnesses to the sale deed) shows clearly that the defendants' story is untrue. The sale deed was read out to Sitla Din, defendant No. 3 and he signed it without raising any objection. Onkar Singh plaintiff No. 2 categorically denies in his evidence the defendants' allegations relating to the *patta* affair. He says :—

"It is incorrect that we were aware of the *patta* in suit. We would not have accepted the sale if we had learnt of the *patta*. It is incorrect that we wanted to purchase the *patta* land in lieu of fresh advance of Rs. 8,000 more. It is incorrect to say that we postponed the registration of *patta* till we received money from Bengal which we had sent for . . . We never said that the *patta* be registered and that money was not coming from Bengal. It is incorrect to say that when the deed was read out at registration, defendant No. 3 reminded me of the *patta* and wanted its reservation, but that I said that it was not *matahti*, but *patta* land and so reservation was not necessary."

The lease in question is said to have been written out by one Abdul Qawi at Salon on the 24th of August. Abdul Qawi has not been examined by the defendants. The witnesses who have been examined to prove the execution of the lease are not independent witnesses. Though the lease is said to have been executed at Salon on the 24th of August, 1928, before there were any negotiations with the plaintiffs about the sale of the mohal. It is noticeable that it was not presented for registration at Salon before the 6th of October, 1928. The delay in registration is not satisfactorily explained. It appears, as observed by the learned Subordinate Judge, that the registration of the lease was delayed "to avoid plaintiffs' scrutiny at the registration office and his suspicion". If the defendants Nos. 3 and 4 really wanted to provide for their wives, a gift would certainly have been more beneficial to the ladies. As observed by the learned Subordinate Judge: "the object in executing a *matahti patta* was to secure a double purpose. It created no obstacles in the execution of the sale deed in respect of superior proprietary rights and at the same time it secured the highest benefit possible to the family. The purchasers could easily be duped in this way if only the matter could be arranged tactfully." The matter was arranged tactfully and thus the lease in question came into existence. Though it purports to have been executed at Salon on the 24th of August, 1928, it was presented for registration there on the 6th of October, 1928, only two or three days before the execution of the sale deed. The sale deed was executed on the 9th of October, 1928, and presented for registration at Salon on the same date. It should be noted that the 7th of October, 1928, was Sunday. The learned Subordinate Judge has discussed all the important questions relating to the lease in his careful and detailed judgment. We entirely agree with him. We think the learned Judge approached his examination of the case from the right point of view and that he came to a correct conclusion

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upon the evidence. We should like to note that circumstantial evidence is not only sufficient, but in many cases it is the only proof that can be adduced to establish fraud. "Charges of fraud and collusion must no doubt be proved by those who make them—proved by established facts or inference legitimately drawn from those facts taken together as a whole. Suspicious and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravell-ed and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape." See *Satish Chandra Chatterji v. Kumar Satish Kantha Roy* (1). The learned Subordinate Judge had seen and heard the witnesses. He has considered their evidence carefully. We are not prepared to disagree with his finding on the point under consideration. When the issue is simple and the only question is which set of witnesses is to be believed, the verdict of the trial Judge should not be lightly disregarded. See *Bombay Cotton Manufacturing Company, Ltd. v. Moti Lal Shivalal* (2). We hold, agreeing with the learned Subordinate Judge, that the lease in question was executed by the defendant No. 3 dishonestly, fraudulently and fictitiously. The plaintiffs were not aware of the execution of the lease till some time after the execution of the sale deed. They never gave their consent to the execution or registration of the lease.

The appellants' learned counsel has argued that the lease in question should not be held invalid as against the defendants Nos. 1 and 2 as they were not parties to the fraud. This plea was not raised in defence, though it was argued in the lower court. It is not satisfactorily proved that the ladies (defendants Nos. 1 and 2) ever pressed for provision being made for their maintenance. It has been found that the lease in question

(1) (1923) 28 C. W. N., 327 (P. C.). (2) (1915) L. R., 42 I. A., 110 :
L. L. R., 39 Bom., 386.

was executed fraudulently in their favour and the transaction was fictitious. There was no money consideration for the lease. The written statement was filed jointly on behalf of the defendants Nos. 1 to 3 in this case. The ladies never got possession of the property in suit. The plaintiffs already held valid mortgages in respect of the entire mohal before the sale deed was executed in their favour. The defendants Nos. 3 and 4 (mortgagors) could not execute any valid perpetual lease in respect of the property in suit in favour of their wives, defendants Nos. 1 and 2 on the date on which the lease in question is alleged to have been executed by them. A mortgagor cannot grant a perpetual lease in so far as it impairs the security of the mortgagee and affects prejudicially his rights as such. See *Qurban Ali and another v. Seth Raghubar Dayal and others* (1) and *Musammât Bibi Saidunnisa v. Faiyaz Hasan and others* (2). The lease in question was thus invalid as against the plaintiffs on the date on which it purports to have been executed. When the lease in question was executed under the circumstances mentioned above, it cannot be held to be valid as against the plaintiffs after they obtained the sale deed from the mortgagors (defendants Nos. 3 and 4) in full satisfaction of the mortgages held by them. We are not therefore prepared to disagree with the finding of the learned Subordinate Judge on this point also.

The result is that the appeal fails and must be dismissed. Hence we dismiss the appeal with costs.

Appeal dismissed.

(1) (1912) 15 O. C., 239 : 2 O. L. J., 276. (2) (1922) 9 O. L. J., 319.

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