RAMGOPAL AND ANOTHER (PLAINTIFFS) *v.* SHAMSKHATON AND OTHERS (DEFENDANTS).

*P. C.** 1892 *June 24 and July 23.*

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

Second appeal—Civil Procedure Code (Act XVI of 1882), ss. 584 and 585—Findings of fact distinguished from inferences or conclusions of law—Inference of law which the facts found were insufficient to justify.

It is well settled that a Court of second appeal, for the purpose of considering the weight of the evidence, is not competent, according to sections 584 and 585 of the Civil Procedure Code, to entertain a question as to the soundness of a finding of fact by the Court below. The first Court's decision as to the effect of the evidence must stand final as to the facts. But the soundness of conclusions may involve matter of law and may be questioned by a Court of second appeal.

A conclusion was drawn by an appellate Court affirming the judgment of the first Court, that the defendant had accepted as a binding obligation upon him a mortgage executed by his mother, with whom he was a sharer by inheritance on the property charged. A higher appellate Court, on a second appeal, decided that these conclusions were not warranted by the facts found, and reversed that judgment. *Held*, that the third Court had not exceeded its powers under the above sections by reversing the decision of the Court below.

The expression "specified law" used in clause (*a*) of section 584, first introduced into the Code by the Act of 1877, means "specified" in the memorandum or grounds of appeal."

Durga Chowdhrani v. *Jewahir Singh Chowdhri* (1) followed.

APPEAL from a decree (30th November 1887) of the Judicial Commissioner, reversing a decree (25th April 1887) of the Commissioner of the Nerbudda Division, affirming a decree (4th December 1886) of the Deputy Commissioner of Hoshangabad.

The suit was brought by the appellants against Daud Rao, since deceased, as co-defendant with his mother Mussamat Shamskhaton, to recover Rs. 9,390, principal and interest due on a mortgage, and in default of payment for foreclosure. The property mortgaged was mauza Bilawada, in the district of Hoshangabad, which was formerly held as a "*muafi*," or mauza free from

* *Present*: LORDS HOBHOUSE, MORRIS, and HANNEN, SIR R. COUCH, and LORD SHAND.

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assessment to the revenue, by Surji Rao, a Mahomedan, who was the husband of Shamskhaton and father of Daud Rao. Surji died in 1864, having in his lifetime executed a prior usufructuary lease of the *muafi* plot to Seth Jiwan Ram, father of the appellants. In 1865 the *muafi* was resumed and Bilawada was assessed to the revenue. The widow and son being the only heirs or sharers of Bilawada, dakhil kharij was entered in her name, and she alone on the 4th July 1871 executed the mortgage which was the subject of the present suit, brought on 28th July 1886. Her execution was found as a fact by the Courts below, and no question remained as to her liability. But Daud Rao, who was at the date of the mortgage entitled to seven-eighths of Bilawada, his mother being entitled to the remaining one-eighth, defended the suit on the ground that he had neither executed the mortgage nor consented to its being executed. It had been made during his absence while he was at Nagpur, as he alleged. On his return, according to his statement, he had at once sued his mother for partition, and had obtained a decree, dated 28th March 1875, for his share by inheritance of Bilawada. Daud Rao was now represented by his widow, Jiya Bai, and by his sons, Mahomed Rao and Azam Rao, minors under her guardianship.

The question on this appeal was whether the Judicial Commissioner had acted within his appellate powers in reversing the decree of the lower Court of appeal, which had affirmed the decree of the Court of first instance in favour of the plaintiffs and against Daud Rao.

The issues and the findings thereon are stated in their Lordships' judgment. The Deputy Commissioner, as the Court of first instance, found as a fact that Daud Rao was fully aware of the execution of the deed of mortgage of 4th July 1871 by his mother, and that he had admitted his liability for the debt; as the Court said, "the mortgage was known to and accepted by Daud Rao." This was affirmed by the Commissioner, who also considered that the mortgage constituted a charge on Bilawada. On a second appeal to the Judicial Commissioner a different view as to the effect of Daud Rao's knowledge of the mortgage was taken. The third Court affirmed the decree of the Court below against Shamskhaton and her share in Bilawada, but

reversed that decree (as to a sum of Rs. 500 which Daud had agreed to pay as having been a debt due by his father) on Daud Rao's appeal, and dismissed the rest of the money claim and the foreclosure suit as against him.

Mr. *R. V. Doyne*, for the appellant, argued that under the 584th and 585th sections of the Civil Procedure Code, the Judicial Commissioner had no authority to reverse the decision of the lower Appellate Court. The third Court had dealt with the appeal in all respects as if it had been a first appeal, differing from the lower Appellate Court's findings upon the evidence. The Judicial Commissioner's reason was that the evidence was not in his opinion sufficient to justify the conclusion.

Reference was made to *Pertap Chunder Ghose* v. *Mohendranath Purkait* (1), *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (2), *Nivath Singh* v. *Bhikki Singh* (3), *Ramratan Sukal* v. *Nandu* (4), *Lachmeswar Singh* v. *Manowar Hossein* (5).

The decision from which this appeal was preferred was, supposing it to have been within the jurisdiction of the Judicial Commissioner, contrary to the evidence. Even if the defendant Daud Rao had not been bound by the acceptance found to have been made by the two Courts, his subsequent receipt of all the benefits that resulted from the raising the mortgage money, and his taking possession of the greater share of the property mortgaged, required to have the proper effect given to such acts on his part, if the appellants were not restored to the original position of Seth Jiwan Ram under the usufructuary lease.

The respondents did not appear.

On a subsequent day their Lordships' judgment was delivered by

SIR R. COUCH.—This is an appeal from the decision of the Judicial Commissioner of the Central Provinces in a suit brought by the appellants against the first respondent and Daud Rao, the father

(1) I. L. R., 17 Calc., 291; L. R., 16 I. A., 233.
(2) I. L. R., 18 Calc., 23; L. R., 17 I. A., 122.
(3) I. L. R., 7 All., 649.
(4) I. L. R., 19 Calc., 249; L. R., 19 I. A., 1.
(5) I. L. R., 19 Calc., 253; L. R., 19 I. A., 48.

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of the other respondents, in the Court of the Deputy Commissioner, Hoshangabad. The plaint stated that the defendant Shamskhaton, the mother of Daud Rao and widow of Surji Rao, on the 4th July 1871 executed a mortgage for Rs. 4,000 of mouzah Bilawada in favour of the plaintiffs and their deceased father. The 4th paragraph was as follows:—"On 29th March 1875 the defendant No. 2 (Daud Rao), having filed a regular suit, obtained a decree for 14 annas share in the said village. He is in possession (of the said village) and lives jointly. But he is bound to repay the sum for which the deed has been executed. Defendant No. 2 has ratified the deed. Hence he is made a party to the suit." The plaint then stated that the money due from the defendants was Rs. 4,000 on account of principal and Rs. 5,390 on account of interest, and prayed that the defendants should be ordered to pay Rs. 9,390, with interest from the institution of the suit, and in default of payment that the mortgage should be foreclosed and the plaintiff be put in possession of the village. The defence of Daud Rao was that at the time of the execution of the mortgage he was absent from home in the service of the Raja of Nagpur, and knew nothing of the transaction; that when he returned from Nagpur and heard that a deed had been obtained by the plaintiffs from his mother by fraud, he at once sued his mother, and had his share of 14 annas in the village separated; and that there was no consent on his part to the deed. The defence of Shamskhaton was that the deed was obtained by fraud.

The issues framed were—"1. Was the deed for Rs. 4,000 fraudulently executed? 2. Did defendant No. 2 ratify the deed of mortgage executed by defendant No. 1? 3. Is defendant No. 2 liable for the debt incurred by defendant No. 1?" Evidence was given on both sides. The Deputy Commissioner, in his judgment delivered on the 4th December 1886, found the first issue for the plaintiffs. On the second issue, after stating the evidence applicable to it, he said—"From the above evidence I hold that defendant No. 2 was fully aware of the execution of the deed of mortgage by his mother, Mussamat Shamskhaton, and admitted his liability for the debt, and thus ratified the deed of mortgage. I therefore find the second issue in favour of plaintiffs." The ground of his holding that the defendant No. 2 had admitted his liability

for the debt on the mortgage is the construction which he put upon a passage in a judgment of the Deputy Commissioner, dated the 7th July 1875, in a suit between the plaintiffs and defendants upon a bond executed by both defendants, in which the Deputy Commissioner says that in a bond for Rs. 42, which had been produced in Court, reference is made to two other documents, which reference is equivalent to an admission of liability. The bond thus referred to, which was executed by Daud Rao in favour of Jiwan Ram, and is dated the 9th August 1872, contains the following passage:—"Besides this there are two separate deeds of previous dates; one is the mortgage deed of village, and the other is a bond. The money due under them is also duly repayable." Here it is to be observed that whether this is an admission by Daud Rao of liability under the mortgage depends upon the construction of these words, especially the word "repayable." They may and would ordinarily mean repayable by the party liable to pay.

There was no finding on the third issue, and a decree was made against both defendants directing them to pay Rs. 9,390 with costs of suit within six months from its date, failing which they were to be absolutely debarred from redeeming the mortgage. From this decree the defendants appealed to the Commissioner of the Nerbudda Division. His judgment was delivered on the 25th April 1887. He affirmed the finding of the Deputy Commissioner on the first issue. As to the second, he said that the evidence upon which the first Court held the ratification to be proved was,—

1. The admission of defendant No. 2 that he became aware in August 1872 of the existence of the mortgage deed.
2. A letter marked (I) written by him, asking the plaintiffs not to sue on the deed.
3. A copy of the judgment of the Deputy Commissioner, dated the 7th July 1885.
4. A copy of the bond marked (L) for Rs. 42.
5. The fact of the defendant No. 2 at first allowing his mother to retain the whole of the family property, and then receiving seven-eighths of it from her.

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He rejected the letter marked (I) as not proved to be genuine, and said the judgment of the Deputy Commissioner proved two things—"(1) That in July 1875 defendant 2 was made liable on a bond executed by defendant 1 alone. (2) That the original of bond (L) was then produced," and that the statement in it showed that the mortgage deed was "known to and accepted by defendant No. 2." A finding that the bond showed that the mortgage deed was accepted by the defendant as a binding obligation upon him would be an inference of law, an inference which, in their Lordships' opinion, is not a just one from the facts which the Commissioner held to be proved. The knowledge of the mortgage, and saying that the money due upon it was repayable, do not amount to an agreement by him to be bound by it. As the mortgage did not purport to be made in any way on behalf of Daud Rao, it was not a case for ratification. A new agreement or obligation was necessary to bind him. The judgment of the Commissioner then proceeds to say—"Lastly, there is the conduct of defendant 2 in allowing defendant 1, notwithstanding that she was entitled to only one-eighth of the property, to take possession of the whole of the property, with the exception of Rs. 1,400; all the rest of the Rs. 4,000 entered in the mortgage debt was on account of the former proprietor's debt and the Government revenue of the mortgaged village. The mortgage deed, therefore, constituted a charge on the village, which defendant 2, as the owner, was liable to pay." Here the fact found is the conduct of Daud Rao. That there was a charge on the village which he as owner was liable to pay is an inference of law, and it is one which the fact found is not sufficient to justify. Mr. Doyne, in support of this part of the judgment, referred to the previous mortgage by Surji Rao, which is marked (E) in the record. But at the head of it are the words "Rejected—Not proved," with the initials of the Deputy Commissioner, and therefore he could not be allowed to use it. The Commissioner confirmed the decree of the first Court, with costs of the appeal.

Daud Rao then appealed to the Judicial Commissioner of the Central Provinces, and the first question for consideration is whether the Judicial Commissioner had power to entertain the appeal. Section 584 of the last Civil Procedure Code (Act XIV

of 1882), which is applicable to the Court of the Judicial Commissioner, says that "unless when otherwise provided . . . . from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds (namely)—(*a*) the decision being contrary to some specified law or usage having the force of law; (*b*) the decision having failed to determine some material issue of law or usage having the force of law; (*c*) a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits." Section 585 says that "no second appeal shall lie except on the grounds mentioned in section 584." The effect of these sections has been stated in several judgments of this Committee. It will be sufficient to refer to the last of them, *Ramratan Sukal* v. *Nandu* (1), where it is said "It has now been conclusively settled that the third Court, which was in this case the Court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final." The present case does not come within that rule. The facts found need not be questioned. It is the soundness of the conclusions from them that is in question, and this is a matter of law.

Their Lordships think it is proper that they should notice a construction which has been put upon section 584, in a case in the High Court at Allahabad, *Nivath Singh* v. *Bhikki Singh* (2) where it is said by the learned Chief Justice that by "specified law" in clause (*a*) is meant "the statute law," and by "usage having the force of law" is meant "the common customary law of the country or community." Their Lordships cannot approve of this construction. Usage having the force of "law" means a local or family usage as distinguished from the general law, of which there are many instances, and "law" is not to be limited in its meaning to statute law. This is shown by clause

(1) I. L. R., 19 Calc., 249; L. R., 19 I. A., 1.

(2) I. L. R., 7 All., 649.

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(*b*), where the words must be intended to mean the same as in (*a*). In the corresponding provision in the first Civil Procedure Code (Act VIII of 1859) as to special appeals (which they are there called), the words are "contrary to some law or usage having the force of law." The meaning of law and usage there is clear, and there is no reason for thinking that the words were intended to have a different meaning in the Act of 1882 or in the Civil Procedure Code of 1877, where the word "specified" is first introduced. In the judgment of this Board in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1) it is said that "specified" in subsection (*a*) means "specified in the memorandum or grounds of appeal;" and their Lordships adhere to this opinion.

The Judicial Commissioner reversed the decree of the Commissioner as regards Daud Rao and his share, and made a decree against him for seven-eighths of Rs. 500 only (a debt of his father Surji Rao, of which he has agreed to pay his share), with costs proportionately in all Courts. The Judicial Commissioner went fully into the facts of the case, and said that in his opinion the evidence was not sufficient to justify the conclusion of the lower Appellate Court, and that it could not be held on that evidence that the defendant Daud Rao was bound by the mortgage executed by his mother. The judgment is substantially upon the question of law. Their Lordships, taking the facts to be as found by the first Appellate Court, approve of it, and being of opinion that it was competent for the Judicial Commissioner to hear the appeal, they will humbly advise Her Majesty to affirm his decree and to dismiss this appeal.

Appeal dismissed.

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

C. B.

(1) I. L. R., 18 Calc., 23; L. R., 17 I. A., 122.