

have been inclined to make a decree in favour of the plaintiff for the sum claimed under schedule 'A' of the plaint; but as regards the plaintiff's claim under schedule 'B' of the plaint, I am of opinion that the plaintiff was not entitled to succeed. The evidence shows that he did not "build up" the cases as agreed upon. His own letters to the Manager show that a good deal of work was left undone, and he left the work himself and not that the works were taken away from him, and it is further shown that on account of negligent work the defendant had to suffer loss. It is, however, not necessary to go into these points in view of the fact that the plaintiff is not entitled to maintain the suit on the basis of the agreement set up by him.

I would, therefore, decree the appeal, set aside the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs throughout.

ALLANSON, J. I agree.

*Appeal decreed.*

## APPELLATE CRIMINAL.

*Before Mullick and Wort, J.*

ZAHURI SAHU

*v.*

KING-EMPEROR.\*

*Evidence Act, 1872 (Act 1 of 1872), section 73—Thumb-impression of accused, power of court to order taking of—refusal of accused to give thumb-impression, inference from—Identification of Prisoners Act, 1920 (Act XXXIII of 1920), section 5.*

Where a person charged with having made a false claim on a handnote denied that he had filed the suit in question but declined to allow his thumb-impression to be taken in

\*Criminal Appeal no. 25 of 1927, from a decision of S. B. Davis, Esq., I.C.S., Sessions Judge of Monghyr, dated the 2nd February 1927.

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court for comparison with the thumb-impression upon the plaint in that suit, *held*, that the court was entitled to ask the accused to allow his thumb-impression to be taken for the purpose of comparison and to draw an inference adverse to him on his refusal to give his thumb-impression.

*Banwari Hajam v. King-Emperor* (1), distinguished.

*King-Emperor v. Tun Hlaing* (2), followed.

The facts of the case material to this report are stated in the judgment of Mullick, A. C. J.

*M. K. Mukharji*, for the appellant.

*C. M. Agarwala*, Assistant Government Advocate, for the Crown.

MULLICK, J.: Agreeing with all four assessors the learned Sessions Judge of Monghyr has sentenced the appellant Zahuri Sahu to rigorous imprisonment for eighteen months for an offence under section 471 of the Indian Penal Code. Agreeing with three of the assessors the learned Judge has sentenced the appellant to rigorous imprisonment for eighteen months and a fine of Rs. 100 for an offence under section 209 of the Indian Penal Code; the terms of imprisonment are to run concurrently.

It is found by the learned Judge that on the 20th November, 1925, Zahuri instituted a suit in the Court of the Small Cause Court-Munsif at Begusarai upon a hand-note against one Badri Gope. Badri Gope contended that the hand-note was a forgery and that the thumb impression on it was not his thumb impression. The hand-note was sent to a fingerprint expert together with the admitted impressions of Badri's thumb in both hands. The expert found that the impression upon the hand-note did not tally with those taken for Badri. When the Small Cause Court case came on for trial, Zahuri absented himself and the suit was dismissed for default. Thereafter Badri applied for the prosecution of Zahuri and

(1) (1022) I. L. R. 1 Pat. 242.

(2) (1923) I. L. R. 1 Rang. 759, P. B.

notice was issued upon him to show cause why he should not be prosecuted. Zahuri did show cause and his defence was that he had never filed the plaint nor the hand-note and that the thumb impression on the verification to the plaint was not his. The Munsif directed a prosecution nevertheless with the result that Badri was tried in the Session Court at Monghyr and was convicted and sentenced as stated before.

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Now the case seems to be proved beyond doubt. It is established by the evidence of the finger-print expert that the hand-note is a forgery and that Badri never put his thumb impression on it. The expert deposes that Badri's thumb impression is of a different type to that found upon the hand-note and that the number of deltas also differ.

The substantial question in this case is whether the defence that Zahuri never appeared in the Civil Court at all and that some other person impersonated and caused a plaint to be filed in the Small Cause Court can be accepted. Upon this point we have the evidence, first of all, of Jageshwar Prasad, who was the pleader who filed the plaint, and his clerk, Ajodhya Prasad, who caused the plaint to be prepared and verified; then there is also the evidence of the pleader Babu Baidyanatheswar Prasad who appeared for Zahuri in the miscellaneous proceedings in which he was called upon to show cause against his prosecution. Babu Jageshwar admits that he had never seen him before the day on which Zahuri came to file the plaint, but he had opportunities of seeing this man in the course of a civil suit and he deposes that Zahuri was the man who brought the hand-note. Ajodhya Prasad similarly had many opportunities of seeing Zahuri and he too deposes that Zahuri was the man who brought the hand-note and that the verification upon the plaint was drawn up by some one under Zahuri's instructions. He himself did not see the verification drawn up nor the thumb impression put upon the verification. He

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says he told Zahuri to get it done. Zahuri was asked in court whether he was willing to give his thumb impression for comparison with the thumb impression upon the plaint and he declined. I think, in these circumstances, it is open to the court to draw an inference adverse to him.

MULLICK, J.

Our attention has been drawn to *Banwari Hajam v. King-Emperor* (1) in which there are observations by one of the Judges constituting the Division Bench to the effect that it is improper to take forcibly a thumb impression from an accused person in a criminal proceeding. The decision, however, did not turn upon that point, and the question whether it is proper or not to ask the accused to give his thumb impression was not clearly raised. On the other hand, it was decided by a Full Bench in the High Court at Rangoon in *King-Emperor v. Tun Hlaing* (2) that the court has power under section 73 of the Indian Evidence Act to direct an accused person, present in court, to make his finger impression for the purpose described in that section and that section 342 of the Code of Criminal Procedure relates only to the oral questioning of the accused.

Section 5 of Act XXXIII of 1920 which is an Act to authorise the taking of measurements and photographs of convicts and others lays down:

“If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photographs to be taken, as the case may be, by a police officer.”

In my opinion there was quite sufficient legal authority for the court to ask the accused person whether he would consent to have his thumb impression taken for comparison with the thumb impression

(1) (1922) I. L. R. 1 Pat. 242. (2) (1923) I. L. R. 1 Ban. 758, F. B.

upon the plaint. But this is not all. Babu Baidyanatheswar Prasad, the Vakil who appeared for the accused in the miscellaneous proceedings, deposes that the accused was the man who came to answer the notice issued by the court. There the accused denied that he was the person who had filed the hand-note or the plaint. Babu Baidyanatheswar had several opportunities of seeing the accused and his evidence cannot be lightly brushed aside.

The result is that, in my opinion, the assessors were fully justified, upon the evidence, in believing the case for the prosecution and the learned Sessions Judge's order must, therefore, be affirmed. The conviction under section 209 of the Indian Penal Code for making a false claim fraudulently and under section 471 of the Indian Penal Code for dishonestly using as genuine a forged hand-note, is upheld. There is no doubt that the accused being himself the plaintiff knew of the fraudulent nature of the claim and of the fraudulent nature of the hand-note. In these circumstances the convictions under both sections are correct and the sentences are not unduly severe.

The appeal is dismissed.

WORT, J. I agree.

### APPELLATE CRIMINAL.

*Before Mullick and Wort, J.J.*

GHANSHYAM SINGH

*v.*

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*Criminal Trial—Burden of proof—counter case capable of precise proof but not supported by evidence—mere discrepancies insufficient to rebut evidence on oath—Penal Code,*

\*Criminal Appeals nos. 35 and 39 of 1927, from a decision of Rai Bahadur J. Chatterji, Sessions Judge of Saran, dated the 19th of February 1927.