

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Agha Haider.

1927

Sept. 26.

MUSSAMMAT BAKHTAN (DEFENDANT) Appellant

versus

GHULAM ILASSAN (PLAINTIFF) }
 MUHAMMAD AND ANOTHER } Respondents.
 (DEFENDANTS)

Civil Appeal No. 2593 of 1923.

Civil Procedure Code, Act V of 1908, Order XLIII, Rule 1 (w)—Appeal from an order granting review—Order XLVII, Rule 7—effect of—onus of proof—that deed in suit was fictitious—finding of fact—Second appeal—whether to be treated as a Revision.

The defendant executed a deed of sale purporting to convey certain *kothis* to her brother but continued in possession for nine years, and then in a suit instituted by her brother pleaded that the whole transaction was fictitious; made to deprive her first husband's collaterals of the property.

Held, that the lower Appellate Court had rightly placed the *onus* (of proving that the deed was not genuine) upon the defendant; and the finding of that Court that it was not a fictitious transaction being one of fact, the High Court was precluded from examining it in second appeal.

Ram Chand v. Harnam Singh (1), and *Bhagwan Das v. Mst. Ram Bai* (2), distinguished.

Held also, that the powers of the Appellate Court under Order XLIII, rule 1 (w) of the Code of Civil Procedure to hear an appeal from an order under rule 4 of Order XLVII granting an application for review, are limited by rule 7 of Order XLVII and that under the circumstances of the case the Second Appeal should not be treated as a Revision.

Chhajju Ram v. Neki (3), referred to.

(1) 68 P. R. 1900.

(2) 58 P. R. 1914.

(3) (1922) I. L. R. 3 Lah. 127 (P.C.).

Second appeal from the decree of Mian Ahsan-ul-Haq, District Judge, Mianwali, dated the 15th October 1923, reversing that of Lala Kanwar Bhan, Subordinate Judge, 4th class, Mianwali, dated the 4th July 1923, and granting plaintiff possession.

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NIAZ MUHAMMAD, for Appellant.

S. R. LAUL, for Respondents.

JUDGMENT.

BROADWAY J.—It appears that one *Mussammat Bakhtan* executed a deed of sale in favour of her brother Ghulam Hassan on the 15th of February, 1914. The property conveyed consisted of a house. On the 27th of March, 1923, Ghulam Hasan sued his sister and her second husband and his son for possession of the house, alleging that subsequent to the sale he had obtained possession of the property bought but had permitted his sister to continue to live in it. *Mussammat Bakhtan* pleaded that the house had belonged to her first husband from whom she had obtained it, that she had been induced by her brother, the plaintiff, to execute this deed of sale in his favour in order to deprive her first husband's collaterals of the property and that the deed of conveyance had never been acted upon and was purely fictitious. The trial Court dismissed the plaintiff's suit, holding that the transaction was a fictitious one. Ghulam Hasan appealed to the District Judge, and the learned District Judge took a contrary view, holding that *Mussammat Bakhtan* had failed to prove that the transaction had been fictitious. He accordingly decreed the plaintiff's suit for the property claimed, excluding from the decree, however, one small *kothi*.

Mussammat Bakhtan then preferred a second appeal to this Court which came up for hearing as a

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motion before a Division Bench on the 10th of December, 1923. On this date Mr. Niaz Muhammad for the appellant stated that the lower appellate Court had reviewed its judgment and asked for time to file an amended memorandum of appeal. Time was allowed, and in due course an amended memorandum of appeal was filed, containing certain additional grounds.

Before us to-day Mr. Niaz Muhammad has urged that the decision of the lower appellate Court was open to attack in second appeal on the ground that the *onus* had been wrongly placed on the appellant to prove that the transaction was a fictitious one. He placed reliance on *Ram Chand v. Harnam Singh* (1), *Bhagwan Das v. Mussammat Ram Bai* (2). Those cases proceeded on their own particular facts. There can be no doubt, that having regard to the fact that *Mussammat Bakhtan* executed the deed of sale, the *onus* lay on her to prove that the transaction was a fictitious one. The finding of the learned District Judge that it was not a fictitious transaction is one of fact which we are precluded from examining in second appeal.

This would dispose of the case before us but for the fact that the matter has been complicated by the learned District Judge's action in granting the application for review referred to above. This application related to the exclusion of the *kothi* from the decree. It was entertained by the learned District Judge and granted. Mr. Niaz Muhammad has attacked this action of the learned District Judge and has urged that the review had been wrongly granted. As a matter of fact the appeal before us

(1) 68 P. R. 1900.

(2) 58 P. R. 1914.

is one against the final decree as prepared after the review had been allowed. Therefore, the finding as to the fictitious nature of this transaction covers this *kothi*. No doubt it is competent for a party aggrieved to appeal against an order allowing review under the provisions of Order XLIII, rule 1 (w) of the Civil Procedure Code. It seems to me, however, that the powers of an appellate Court are limited by rule 7 of Order XLVII of the Civil Procedure Code. Mr. Niaz Muhammad has been asked to state whether the order on review contravened the provisions of rule 2 or rule 4 of Order XLVII and was constrained to admit that neither of these two rules had been contravened. In these circumstances it appears to me that we are not empowered to interfere with the order passed on review in this appeal.

It was then contended that, inasmuch as the order was passed without jurisdiction having regard to the decision of Their Lordships of the Judicial Committee in *Chhajju Ram v. Neki and others* (1), this appeal might be treated as a revision. Speaking for myself, it seems to me that the learned District Judge's action in dealing with this application for review was unsatisfactory, but at the same time I am not prepared to treat this part of the appeal as a revision in this particular case because it appears that the *kothi* was definitely claimed in the plaint and not specifically referred to in the written statement filed by the appellant. The appellant's defence was that the entire transaction was fictitious. She did not elect to differentiate between any portions of the properties claimed by the plaintiff.

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I would, therefore, dismiss this appeal, but in the circumstances leave the parties to bear their own costs.

AGHA HAIDAR J.

AGHA HAIDAR J.—I agree.

N. F. E.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Fforde.

ABDUL WAHID—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 703 of 1927.

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Indian Arms Act, XI of 1878, section 20—not confined to import or export of arms—Concealment—on Railway platform.

Held, that it is a question of fact whether a person found in possession of a concealed weapon is carrying the weapon in such a way as to indicate an intention to hide the article from the classes of persons referred to in section 20 of the Arms Act.

Held further, that the section is not confined to cases where the import or export of arms is attempted ; but that the fact that a person is concealing a weapon while he is on a railway platform must indicate an intention to conceal that weapon from *inter alia* railway officials who are about that platform.

Chet Singh v. The Crown (1), followed.

Appeal from the order of Chowdhry Daya Ram, Magistrate, 1st class, Kasur, District Lahore, dated the 20th June 1926, convicting the appellant.