

1903
MARCH 26.
MAY 6.

PRIVY
COUNCIL.

30 C. 814=7
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189.

[821] It is because the liability of the respondent Chatterjee is not under the settlement, but for a lump sum under the contract of 1867, that all in right of the lands, for which the lump sum is the rent, are necessary parties in any action for rent for chuk Khatali.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellant must pay the costs of the respondent Chatterjee.

Appeal dismissed.

Solicitors for the appellant : *Watkins and Lempriere.*

Solicitors for the respondent : *T. L. Wilson & Co.*

30 C. 822 (=7 C. W. N. 639.)

[822] CRIMINAL APPEAL.

BIRENDRA LAL BHADURI *v.* EMPEROR.* [27th April, 1903.]

Charges, misjoinder of—Defective charge—Appeal—Trial by jury—Forgery—Using as genuine forged document—Cheating—Criminal Procedure Code (Act V of 1898), s. 423—Penal Code (Act XLV of 1860) ss. 467, ⁴⁶⁷/₁₀₉, 468, ⁴⁶⁸/₁₀₉, 471 and ⁴¹⁷/₅₁₁—Indian Registration Act (Act III of 1877) s. 82.

It was alleged by the prosecution that the accused had forged the registration, endorsement and stamp on the back of a *kabala* by which he had sold certain lands to D, and that he had produced before a Sub-Registrar a forged mortgage-deed, whereby he purported to mortgage to D the identical lands sold under the *kabala*; it was also alleged that the accused had produced the said mortgage-deed before the Secretary of a Loan Office, in order to induce that office to grant him a loan. The accused was tried in one trial on charges under ss. 467, ⁴⁶⁷/₁₀₉ and 468, ⁴⁶⁸/₁₀₉ of the Penal Code with regard to the alleged forgery of the *kabala*; under s. 82 of the Registration Act, and ss. 467, ⁴⁶⁷/₁₀₉ and s. 471 of the Penal Code with regard to the mortgage-deed, and also on charges under ss. 471 and ⁴¹⁷/₅₁₁ of the Penal Code with reference to the attempt to cheat the Loan Office. The accused was convicted under ss. ⁴⁶⁷/₁₀₉, ⁴¹⁷/₅₁₁ and s. 417 of the Penal Code:—

Held, on appeal,

- (i) That as the alleged forgery of the *kabala* and the presentation of the forged mortgage-deed to the Secretary of the Loan Office could not be said to be parts of the same transaction, there had been a misjoinder of charges;
- (ii) That the charge to the jury was defective, inasmuch as it did not show what the facts of the case were, what the evidence adduced was, or what was the case for the accused;
- (iii) That inasmuch as the evidence on the record showed that there was a case which ought to be investigated by a jury, the accused should be retried.

[Dist. 11 C. W. N. 715=5 Cr. L. J. 484.]

APPEAL by Birendra Lal Bhaduri.

In this case the appellant agreed to sell to one Drobomayi Debi, the mother of one Peari Mohan Rai, certain lands at Jessore and it was also agreed that the purchaser should grant to the vendor a *putni* lease of the said lands. In pursuance of this agreement on the 28th January 1902 the appellant executed a [823] *kabala* or deed of sale, and certain sums of money were paid to him, and a considerable sum was paid in respect of a charge which existed on the lands in favour of the Jessore Loan Office. The *kabala* was made over to Hemanta Lal Ghose, a servant of the vendor, by

* Criminal Appeal No. 130 of 1903, against the order of J. Phillimore, District and Sessions Judge of Jessore, dated Dec. 20, 1902.

Prosanna Chunder Rai, the manager of Peari Mohan Rai, for registration ; a month later Hemanta Lal Ghose brought back the *kabala* which bore on its back what purported to be a registration stamp and an endorsement by the Sub-Registrar of Godkhali to the effect that it had been registered on the 18th February 1902.

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On the 1st February 1902, the appellant produced before the Sub-Registrar of Godkhali a mortgage-deed by which he purported to mortgage to the said Drobomayi Debi the identical property which he had sold to her under the *kabala*. The mortgage was registered on the 18th February, and an endorsement was subsequently placed on it to the effect that the mortgage-money was paid off ; this endorsement purported to be signed by the son of the mortgagee.

On the 3rd April the appellant applied to the Jessore Loan Office for a loan, and on the 4th April produced before the Secretary of that office the said mortgage-deed in order to show that the incumbrance had been discharged, and to induce the office to grant a loan. The matter, however, was not carried through, and no money was advanced.

It was alleged by the prosecution that the *kabala* had never been registered, and that the endorsement on it was a forgery ; it was also alleged that the mortgage-deed was a forgery, and that in fact no mortgage transaction had ever taken place.

The appellant was tried before the Sessions Judge of Jessore and a jury in one trial, on charges under ss. 467, $\frac{467}{109}$ and 468, $\frac{468}{109}$ of the Penal Code with regard to the alleged forgery of the *kabala* ; under s. 82 of the Registration Act, and s. 467, $\frac{467}{109}$ and s. 471 of the Code with regard to the mortgage-deed ; and under ss. 471 and $\frac{417}{511}$ of the Code with reference to the attempt to cheat the Loan Office.

The Sessions Judge charged the jury as follows :—

Seven separate charges have been framed against the accused Birendra Lal Bhaduri. It will be your duty to bring in a verdict of guilty or not [824] guilty upon each of these charges separately. It is my duty to explain the law to you ; it is your duty to decide facts.

Of the seven charges, two relate to the alleged forgery of the endorsement of registration on the back of the *kabala*. They were under sections 467 alternately with $\frac{467}{109}$ and $\frac{468}{109}$ alternately with 468 of the Penal Code. Three charges relate to the mortgage bond. They were under section 82 of the Registration Act, 467 with $\frac{467}{109}$ and 471 of the Penal Code. The other two charges relate to an attempt which the accused is said to have made in April to borrow money from the Jessore Loan Office ; they are under sections 471 and $\frac{417}{511}$ of the Penal Code. The charges under sections 467 and 468 have been added to alternative charges of $\frac{467}{109}$ and $\frac{468}{109}$ because there is no direct evidence as to who forged the documents.

(Section 415 read to jury.). That is the definition of cheating. If you find that the accused, by making the endorsement of registration on the *kabala*, intended to deceive Prosanna Babu into thinking that the *kabala* had been registered, and so to induce Prosanna Babu not to get that *kabala* registered then his intention was to cheat, provided he acted dishonestly (sections 463 and 464 of the Indian Penal Code read to jury). To constitute forgery, there must be these elements—(1) a document signed, (2) the signature must be made with the intention of causing it to be believed that it was signed or executed by a person by whom it was not signed or executed, and (3) the signature must have been made with intent to defraud. Unless there has been dishonesty, there is no forgery. (Sections 23 and 24 of the Penal Code read to jury.) As regards the *kabala*, the Sub-Registrar has denied that he made the endorsement. He has produced the stamps and seals of his office. You should notice that in the endorsement of presentation

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for registration on the *kabala*, the words "day of" have been written in the impression of the stamp they appear printed.

Then the article of the Stamp Act Schedule under which the *kabala* is said to have been stamped is 40 (b) over an erased 15, and you have heard the arguments based on this. If the endorsement was not made by the Sub-Registrar, who made it? On this there is no direct evidence. However there is Prosanna Babu's evidence that the accused left Pearl Mohan's office with Hemanta Lal Ghose, when he took the document for registration. Is it possible, if that was the case, that the endorsement could have been forged, unless the accused himself had made the endorsement or have conspired with Hemanta Lal to get it made; who, except the accused, had any motive to make it? If you find that the accused made the endorsement, you will have to consider if he acted dishonestly. If the accused had executed the *kabala* and had received the purchase-money, and if Prosanna Babu was entitled to get the document registered, then you should find that the accused's intention was to defraud, if his intention was to lead Prosanna Babu to take no steps to get the document registered. For registration would have extended the legal rights of a purchaser by enabling him to sue on the *kabala*.

If you find (1) that the *kabala* was not registered at Godkhali, (2) that the *kabala* has been executed by the accused, and that the accused had received the purchase-money, (3) that the evidence proves beyond all reasonable doubt that the accused either made the endorsement of registration on the *kabala* himself or engaged in a [825] conspiracy with Hemanta Lal Ghose for making it, and (4) that the accused's intention was to dishonestly prevent the *kabala* being registered by causing Prosanna Babu to believe that the *kabala* had been registered, then it is your duty to bring in a verdict of guilty against the accused under alternative charges 467 and $\frac{467}{109}$ of the Penal Code.

If you find him guilty under those sections, you should also find him guilty under sections 468 and $\frac{468}{109}$ in the alternative, if his intention was to cheat. If you do not find all those four facts proved, you should find the accused not guilty under those sections.

As regards the mortgage bond, you have the evidence of Prosanna Chunder Rai, Ram Chunder Bose, Surendra Nath Mozumdar, and Pearl Mohan Roy. Ram Chunder and Surendra deny having witnessed the signature of the document. If you find that (1) the accused executed the *kabala* on 28th January and received the purchase-money; (2) that he did not execute the mortgage-bond on 1st February in the presence of witnesses; (3) but that it was made subsequently without any negotiations with Drobomayi; (4) that it was made with the intention of causing it to be believed that the accused had not sold the property to Drobomayi, and with the intention of defrauding her of the property that she had purchased, then you should find that the mortgage-bond has been forged. If you find the document to be a forged one, you should find the accused guilty under sections 467 and $\frac{467}{109}$ of

the Penal Code, in the alternative. If you find it proved beyond all reasonable doubt that the accused either made the forged document himself or entered into a conspiracy with Hemanta Lal Ghose for making it, you should find him guilty under section 471 of the Penal Code, if you find that he presented it for registration, knowing that it was a forged document with intent to cause wrongful loss to Drobomayi. As regards s. 82 of the Registration Act (read to jury) the Sub-Registrar says the accused told him that he had executed the document.

'Executed' is defined thus as completed—execution of deeds is the signing, sealing, and delivering of them in presence of witnesses (Ameer Ali's Evidence Act, page 509). If the accused did before the Sub-Registrar state that he had executed the document, you are to consider whether he thereby made a false statement intentionally; if so, you should find the accused guilty under section 82 of the Registration Act.

As regards what took place at the Jessore Loan Office (illustration to section 415 of the Indian Penal Code read to jury), you should find accused guilty of attempting to cheat, if you find that he tried to raise money from the Jessore Loan Office in April by mortgaging a property which had been previously sold by him without disclosing the fact of the sale. If he fraudulently also showed to the Secretary the mortgage-bond on that date, if the mortgage-bond was a forged one, and he knew it to be so, he is also guilty of a second offence punishable under section 471 of the Penal Code.

If you find the evidence clearly establishes the guilt of the accused you should find him guilty; but if you have any doubts about the accused's guilt, you will find him not guilty.

[326] As regards his written statement (jury say they remember it, and do not wish it read through again), if the case is a false one got up on account of a dispute about commission payable to Peari Mohan's amla, how is it that one of the amla of Peari Mohan has been accused? How is it that Surendra, who says he has been dismissed from Peari Mohan's office, comes forward to support a false case got up by Peari Mohan's amla?"

The jury acquitted the appellant of the charges relating to the forgery of the *kabala*, but convicted him under s. $\frac{467}{109}$ of the Penal Code of forging the mortgage-bond, and also under s. $\frac{417}{511}$ of attempting to cheat the Loan Office, and under s. 471 of dishonestly using the mortgage-bond as genuine before the Sub-Registrar and the Secretary of the Loan Office with the knowledge that it was forged, but they acquitted him of the charge under s. 82 of the Registration Act.

Mr. Jackson (Babu Dasarathi Sanyal and Babu Gobinda Chandra Roy with him) for the appellant. The charge to the jury is no charge at all; it is impossible to gather from it what the case is about. The Judge nowhere points out any evidence which relates to any fact. There is an utter want of direction and there is also misdirection. The jury have found the appellant guilty of dishonestly using the mortgage bond before the Sub-Registrar and at the same time have found him not guilty of the charge under s. 82 of the Registration Act of making a false statement to the Sub-Registrar when he presented the bond for registration. The two findings are utterly inconsistent and shows that the jury did not understand the case. If the appellant used the bond dishonestly before the Sub-Registrar, he must have made a false statement. There is also a misjoinder of charges. The offences charged are complete and do not relate to one another, nor can it be said that they form one transaction. On the 1st February the appellant is alleged to have conspired to forge the mortgage-bond, and to have fraudulently used it as genuine before the Sub-Registrar on the 18th February. On the 27th February the appellant is alleged to have forged an endorsement on a different document, the *kabala*. Then he is alleged to have made a false statement to the Sub-Registrar on the 18th February; and lastly to have attempted on the 3rd April to cheat the Jessore Loan Company. The transaction with the Loan [827] Company was with a different set of people, and in no way related to any of the previous transactions. In trials by jury if there is, misdirection, the High Court may go into the facts to ascertain whether in its opinion there should be a retrial, and if it so finds, it must send the case back for retrial by jury and cannot try the case itself: *Queen-Empress v. Chatrahari Goala* (1), *Ali Fakir v. Queen-Empress* (2), *Biru Mandal v. Queen-Empress* (3), *Elahee Buksh* (4), *Wafadar Khan v. Queen-Empress* (5).

The Deputy Legal Remembrancer (Mr. Douglas White) for the Crown. The learned Judge has not laid the facts of the case before the jury at all. I am not prepared to say that there is no misdirection. With regard to misjoinder, the forging of the endorsement on the *kabala* and the forging of the mortgage bond formed part of the same transaction, the object being to deny the genuineness of the *kabala* and cheat Drobomayi Debi, then the forging of the mortgage-bond and its presentation to the Loan Office would also be one transaction, the question for

(1) (1897) 2 C. W. N. 49.

(2) (1897) I. L. R. 25 Cal. 230.

(3) (1897) I. L. R. 25 Cal. 561.

(4) (1866) 5 W. R. Cr. 80.

(5) (1894) I. L. R. 21 Cal. 955.

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your Lordships to decide is whether these offences are so related to one another in point of purpose as to constitute one continuous action; if your Lordships so decide, then these offences would be taken as to form parts of the same transaction: *Emperor v. Sherufalli Allibhoy* (1). The question remains as to whether your Lordships will order a new trial. There is a great deal of evidence which the other side has not been able to dispose of and which ought to go to a jury. Your Lordships have power to go into the facts in order to ascertain whether there is evidence which ought to be placed before a jury: *Jamiruddi Masalli v. Emperor* (2), *Wafadar Khan v. Queen-Empress* (3), and the decision of the Privy Council in *Subrahmania Ayyar v. King-Emperor* (4).

Mr. Jackson in reply. In an appeal from a jury trial your Lordships have no power to try the case, as that would be usurping the powers of the jury. Your Lordships are only empowered to go [828] into the facts for the purpose of ascertaining whether there should be a new trial, that is to say whether there is sufficient evidence to show that the accused is guilty, and that he ought to be retried *Elahee Buksh* (5), *Jamiruddi Masalli v. Emperor* (6).

HARINGTON AND BRETT, J.J. In this case Birendra Lal Bhaduri was tried before the learned Sessions Judge of Jessore, and a jury on 7 charges. Two of the charges were framed under sections 467, ⁴⁶⁷/₁₀₉ and 468, ⁴⁶⁸/₁₀₉ and relate to the alleged forgery of a certain *kabala*. Three of the charges relate to a registered mortgage bond, and are framed, one under section 82 of the Registration Act, one under 467, ⁴⁶⁷/₁₀₉ of the Indian Penal Code, one under 471 of the Indian Penal Code. The remaining two charges relate to an alleged attempt to cheat the Jessore Loan Office, and are framed under sections 471 and ⁴¹⁷/₅₁₁ of the Indian Penal Code. The jury acquitted the appellant of the charges relating to the forgery of the *kabala*, but convicted him under section ⁴⁶⁷/₁₀₉ of forging the mortgage-bond, and also under ⁴¹⁷/₅₁₁ of attempting to cheat the Loan Office, and under section 471 for dishonestly using the mortgage-bond as genuine before the Sub-Registrar and the Secretary of the Loan Office with the knowledge that it was forged. But nevertheless, they acquitted him of the charge under section 82 of the Registration Act. On behalf of the appellant it is argued that (i) the trial as held was bad for misjoinder of charges, (ii) that the summing up was defective.

Inasmuch as we think that the latter contention is well founded, as we are of opinion that after hearing counsel on both sides, and after perusing the record that the case is one which ought to be retried, we shall not deal with the facts, except in so far as it is necessary so to do for the purpose of dealing with the question of misjoinder.

The allegation made by the prosecution is that an agreement was made between the appellant Birendra on one hand and Drobomayi Debi on the other for the sale by the former to the latter of certain property, and that it was a term of agreement that the purchaser should grant to the vendor a *putni* lease of the [829] lands

(1) (1902) I. L. R. 27 Bom. 135.

(2) (1902) I. L. R. 29 Cal. 782.

(3) (1894) I. L. R. 21 Cal. 955.

(4) (1901) I. L. R. 25 Mad. 61

(5) (1866) 5 W. R. Cr. 80.

(6) (1902) I. L. R. 29 Cal. 782.

comprised in the agreement for sale. It is stated that on 28th January 1902 the appellant executed a *kabala* in pursuance of this agreement, and that certain sums of money were paid to him, and a considerable sum was paid in respect of a charge which existed on the property in favour of the Jessore Loan Office. The *kabala* was taken away by Hemanta Lal Ghose, a servant of the vendors, for registration; it was brought back about a month later by the same man, and it then bore on its back what purported to be a registration stamp, and an endorsement to the effect that it was registered on 18th February.

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It is alleged that this endorsement is a forgery, and that the *kabala* has never been in fact registered. It is in reference to this forgery that the first two charges were framed.

It is next alleged that on 1st February the appellant produced before the Sub-Registrar of Godkhali a mortgage-deed by which he purported to mortgage to Drobomayi Debi (the purchaser under the *kabala*) the identical land which had been sold under the *kabala* for the same sum for which the land had been sold under the *kabala*. This mortgage was actually registered on the 18th February, and at some period subsequent to the 18th February an endorsement was placed on it to the effect that the mortgage money was paid off, and this purported to be signed by Peari Lal, the son of the mortgagee.

It is alleged that this bond is a forgery, and that in fact no mortgage transaction ever took place. In respect to this transaction three charges have been framed, one under the Registration Act and the others under ss. 467, ⁴⁶⁷/₁₀₉ and 471, ⁴⁷¹/₁₀₉; on the 3rd April it is said that the appellant applied to the Jessore Loan Office for a loan, and on the 4th April produced before the Secretary of that office the mortgage-deed in question in order to show that the incumbrance was discharged, and so induce the office to grant a loan. For some reason or other the business did not go through, and the money was not advanced. It was in respect of his dealings with the mortgage-deed that the last two charges were framed.

In our opinion the objection that there has been a misjoinder must hold good. We cannot see how it can be said that the alleged forgery of the *kabala* and the presentation of the forged [830] mortgage-bond to the Secretary of the Loan Office can be stated to be parts of the same transaction.

On the facts stated for the prosecution it was open, we think, to the Crown to contend that the forgery of the endorsement on the *kabala* and the forging of the mortgage-deed formed part of one transaction of which the object was to enable the appellant to deny the genuineness of the *kabala*, with a good chance of success, should that question come into controversy in a law Court in any suit against him for his rent under the *putni*, or it might be contended that the forging of the mortgage-deed and the presentation of the forged deed to the Loan Office was one transaction in which the object was to cheat the Loan Office. But these transactions are distinct, and we do not think charges relating to the two different transactions can be lawfully joined in one trial.

The whole of the evidence has been placed before us and various reasons have been urged on which it is argued that we ought to accept the case set up by the defence. The charge to the jury does not shew what the facts were, what the evidence adduced was, or what the case of

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the defendant was. The case was not put to the jury as required by law or in such a way as to enable them to exercise their functions as jury men.

We have abstained from discussing the evidence, and we must not be understood to express any opinion on the facts of the case. On the ground that there has been a misjoinder of charges, and that the charge to the jury is defective, we set aside the conviction and sentence; but inasmuch as we are of opinion that on the evidence as it appears on the record there is a case which ought to be investigated by a jury, we direct that the appellant be retried according to law.

30 C. 831.

[831] APPELLATE CIVIL.

MACNAGHTEN v. RAMESHWAR SINGH.*

[1st and 2nd April and 11th June, 1903.]

Lease—Renewal of lease—Offer by lessor to renew lease without stating terms, effect of—Arbitration—Award—Valuation—Civil Procedure Code (Act XIV of 1882), s. 525.

In an agreement to lease there was a proviso to the following effect:—
“At the expiration of the period of the lease, in the event of a new lease not being given, the said lessor shall be at liberty to resume direct possession of the land demised, and to take over all the buildings then standing thereon at a valuation arrived at by three arbitrators”:

Held, that the mere offer on the part of the lessor to grant a new lease without any terms being mentioned could not operate as the giving of such lease within the meaning of the document.

Held, further, that if there was no matter in difference between the parties which could be referred to arbitration, the valuation made by three persons appointed by the plaintiff was not an award within the meaning of s. 525 of the Civil Procedure Code, and it could not therefore be filed in Court.

Collins v. Collins (1), *Leeds v. Burrows* (2) referred to; *In re Carus-Wilson and Greene* (3), *Chooney Money Dasse v. Ram Kinkur Dutt* (4) followed.

[Ref. 53 I. C. 288.]

APPEAL by E. R. Macnaghten, the plaintiff.

A certain plot of land had been leased to the plaintiff by the predecessor in interest of the defendant, Maharaja Rameshwar Singh of Darbhanga, for fifteen years from the 1st November 1884 to the 31st October 1899. The lease provided that the plaintiff might erect buildings on the land, and that in the event of a fresh lease not being granted at the expiration of the term, the lessor would be at liberty to resume direct possession of the land demised, and to take over all the buildings then existing thereon, at a valuation arrived at by three arbitrators, one of whom was [832] to be appointed by the lessor, another by the lessee, and the third by the two so appointed. By a further proviso in the lease it was stipulated that in the event of either party neglecting to appoint an arbitrator, the other party would be competent, after giving a month's notice in writing, to appoint all three arbitrators, and the decision of such arbitrators would be final against all the parties.

* Appeal from Original Decree No. 443 of 1900 against the decree of Har² Gobind Mookerjee, Subordinate Judge of Mozaffarpur, dated June 25, 1900.

(1) (1858) 26 Beav. 305.

(2) (1810) 12 East. 1.

(3) (1886) L. R. 18 Q. B. D. 7.

(4) (1900) I. L. R. 28 Cal. 155.