

Before Mr. Justice Norman and Mr. Justice E. Jackson

1869
July 19.

BHAJU SING (PLAINTIFF) v, KAIFNATH TEWARI AND ANOTHER
(DEFENDANTS.)*

Evidence—Discrepancies in Statements.

Discrepancies in an account of what took place in a conversation are not a sufficient ground for disbelieving statements made by different witnesses. The manner in which evidence is to be dealt with, discussed.

Mr. R. E. Twidale and Baboo Hemchandra Banerjee for appellant.

Baboo Debendro Narayan Bose for respondents.

The Judgment of the Court was delivered by

NORMAN, J.—This is a suit for pre-emption. The first Court found that certain preliminaries required by Mahommedan law had not been proved.

The lower Appellate Court, on appeal, tried the case in a manner which we did not consider satisfactory. The only question of fact tried by the Judge was, whether the ceremony, which is called *talubimohasibat*, was duly performed. This is the declaration by the party claiming pre-emption of his intention of becoming the purchaser, and is a declaration which he must make immediately on hearing of the sale. The Judge does not consider at all whether the *ialubi ishteshahad*, or affirmation by witnesses, of such intention on his part in the presence of the seller and witness, was really made.

We were of opinion that the appeal has not been properly tried by the Judge. In order to determine whether or not the first Court had come to a right conclusion, it was his duty to have looked into the whole of the evidence, and not to have fixed his attention on one single isolated and comparatively unimportant issue.

* Special Appeal, No 158 of 1869, from a decree of the Officiating Judge of Purnea, dated the 27th August 1868, affirming a decree of the Subordinate Judge of that district, dated the 14th April 1868.

Because it appeared to him that there were some discrepancies in the evidence of witnesses who spoke as to the circumstances under which the declaration of the intention to purchase was made, the Judge was not justified in disbelieving the whole of the plaintiff's case. We are of opinion that there were no such discrepancies in the evidence as the Judge supposed. If certain persons present at a particular conversation give different accounts of the exact words used, it does not follow that the Judge is justified in assuming that no such conversation took place at all. Different men have different power of observation; the powers of memory differ widely in different persons and no two men repeating a conversation which took place some time previously (unless before coming into Court they have concerted together) are likely to repeat the conversation in the same words. The substance of what was said is all that is necessary; that the plaintiff on hearing of the sale declared his intention to purchase; and this right to purchase is clear on the evidence of the witnesses. But the Judge says, because the first witness was not present when the money was fetched, therefore there is some discrepancy between his testimony and that of the other witnesses. But the explanation of this first witness in not staying until the money was brought out does not seem difficult. He was a neighbour who had gone and told the plaintiff Bhaju Sing of the sale, and it is quite probable that after telling him of the sale, he having no further business with him, may have gone away before the money was brought out, especially as it would necessarily take some considerable time to count a large sum like rupees 2,500 and bring it out from the interior of the house.

Digamber Sing and Harak Dutt, who stayed and saw the money brought out, are both of them servants of the plaintiff Bhaju Sing.

The Judge assumes that there is some contradiction in their evidence and that of Kumar Sing, because Digamber Sing says that when Kumar Sing had been told by the plaintiff of the sale, he asked him the price, and he said it was rupees 2,501. Now Kumar Sing says that he informed Bhaju Sing of the fact of the sale of the property, and he does not say anything about the price. But there is no contradiction in the statement made

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1869 by Kumar Sing and Digamber Sing. In telling a man of a sale, BHAJU SING the narrator does not usually confine himself to a bare statement
 v. KAIFF ATH that A and B have bought of C and D without any mention of
 TILWARI the price of which the sale has been effected. Whether the price is mentioned in the first instance in answer to a question, is perfectly immaterial. But with reference to the evidence of the witnesses, the Judge says: "Although the plaintiff has called
 " three witnesses to prove that on hearing of the sale he at once
 " stated his intention to purchase as being his right, these
 " witnesses were asked by the Court whether what they described
 " as being the plaintiff's action on the occasion, was exactly
 " what had occurred, and they said that what they stated was
 " exactly what had happened; Kumar Sing says, that 'I brought
 " the news of the sale to plaintiff, on hearing it he stood up
 " and said the right of pre-emption is mine. I have purchased—
 " I have purchased—I have purchased;' and after saying so, he
 " continued 'take notice I am just now going with money to
 " pay Chatter Nath Jha.' This witness also states, that at the
 " time he brought the news, Harak Dutt, Jhumak Gorait,
 " Nanda Das, and many others were present. The next witness
 " is Harak Dutt: he says the plaintiff on hearing of the sale said
 " 'that right and interest is mine. I will pay its value, th at right
 " accrues to me;' that plaintiff thus got up, went and brought
 " rupees 2,500 from inside his house (a fact not stated by Kumar
 " Sing) and returning said, "be you witness, I will take this money
 " and give it to Chatter Nath Jha in Rupulio.' The third witness,
 " Digamber Sing, states that when plaintiff heard of the sale,
 " he asked Kumar Sing 'what was the sale price.' Kumar
 " Sing replied, rupees 2,501, and that after hearing this plaintiff
 " said 'I have purchased—I have purchased—I have purchased;'
 " that he then went and brought out rupees 2,500 and said, 'you
 " will be witness, and see that I am carrying money which I have
 " counted to Chattar Nath Jha.' Now, although it need not be
 " necessary for a person to make the *talubimohasib* in the
 " presence of witnesses, yet it is absolutely necessary that he
 " should prove his having made it. The evidence of the above
 " three witnesses does not satisfy me that such has been done
 " in this case. None of the witnesses agree as to what plaintiff

“ said, and their stories are at variance ; and if the evidence of the
 “ witness Digamber Sing is to be believed, the plaintiff did not
 “ make his claim immediately on hearing of the sale, but first
 “ enquired as to the price at which the property had been sold,
 “ and after hearing that, made his claim. This witness also, when
 “ asked as to who was present at the time, said that Harak
 “ Dutt, Nanda Das, Narayan Khenda, and himself were present
 “ and no one else, which story is quite different from what
 “ Kumar Sing states, for he said there were many people
 “ present. In my opinion the evidence of these witnesses cannot
 “ be relied on, and as the fact as to whether the plaintiff performed
 “ the preliminary ceremony of *talubimohasibat* depends on the
 “ credibility of the evidence, I find that the performance of that
 “ ceremony by him has not been proved.”

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The Judge supposes there is a contradiction in the evidence of these witnesses who speak to the different witnesses who were present. The plaintiff was holding *cutcherry*, and people were going in and out, and whether one man observed the presence of persons whom another did not see, is a matter which does not tend to throw discredit on the testimony of one or the other.

Dissatisfied with the trial by the lower Court, and finding that a remand would be inconvenient, as the Judge who tried the case has been removed to another district, we called up the case before ourselves, and tried it as a regular appeal. Having done this, we found no difficulty in coming to a conclusion as to whether or not the plaintiff's witnesses are worthy of credit.

There is a point, and a most important point, on which the defendant might have contradicted the plaintiff. The plaintiff and his witnesses say that he brought 2,500 rupees on an elephant, and went with the money to the *cutcherry* of the vendor, the defendant Chattar Nath Jha. The evidence of plaintiff's witnesses on this point is uncontradicted, and we start with the important and admitted fact that the plaintiff went to the defendant Chattar Nath Jha, and made affirmation by witnesses of his intention to purchase in the presence of Chattar Nath Jha, the seller, and gave the best possible proof of the *bona fides* and reality of that intention by his taking the money along with

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him. How came he to go? He must have been told of the sale and of the price at which the sale was effected. Plaintiff's witnesses give a clear and satisfactory account which explains the plaintiff's presence in defendant's (Chattar Nath Jha's) *cutcherry* on that day. There is no contradiction to that account. It is not stated that the sale was notorious, and must have been known to the plaintiff long before. Could the plaintiff have come? Is it in the nature of things possible or probable, that he would have come with this large sum of money without stating, without letting those about him know what he was going to do? I apprehend that even if there were no evidence on the record on this point, it would be very difficult to understand how a reasonable man could believe that such a statement was not made.

The result is, in our opinion, that the circumstantial evidence and the fact deposed to, corroborate in the strongest way the statement of the witness, that Bhaju Sing was informed by Kumar Sing of the sale, and that on hearing of it he started with the money to enforce his right of pre-emption.

The result is that, in our opinion, the decree of the lower Appellate Court cannot be supported; that the plaintiff has fully proved his case, and is entitled to a decree declaring his right to pre-emption; and we order and decree that on bringing the money into Court, namely rupees 2,501, without interest, within twenty one days after the date of this decree, the defendants do deliver over the land to the plaintiff, and that they pay to the plaintiff his costs of suit in all the Courts.