

Chandan Mal Vs. Rawat Mal

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Court : Rajasthan

Decided On : Aug-06-1979

Reported in : 1979WLN530

Judge : M.C. Jain, J.

Appeal No. : S.B. Civil Second Appeal No. 14 of 1968

Appellant : Chandan Mal

Respondent : Rawat Mal

Advocate for Def. : Shri. H.M. Parekh

Advocate for Pet/Ap. : Shri. G.R. Singhvi

Disposition : Appeal allowed

Judgement :

M.C. Jain, J.

1. This is a defendant's appeal the against the judgment & preliminary decree passed by the District Judge, Balotra, Shri B.C. Qjha on 30-9-67 modifying the preliminary decree passed by Shri R.L. Gupta, Civil Judge, Balotra on 30-1-67 in Civil Suit No. 146/1956 for the sale of the mortgage property. The Civil, Judge passed the preliminary decree for Rs. 400/- as principal amount and Rs. 262/- on

account of interest, in all for Rs. 661/-, whereas the learned District Judge disbelieving the plea of payment of Rs. 2,100/- towards principal and Rs. 330/- towards interest, decreed the plaintiff's suit in toto for a sum of Rs. 2,500/- as principal amount & Rs. 800/- as interest total Rs. 3300/-.

2. The case has a chequered career or history. In order to appreciate the point of controversy arising in this appeal, it would be necessary to state a few facts in chronological order.

3. The plaintiff Rawatmal instituted a suit for sale of the mortgage property in the Court of Civil Judge, Balotra on 22-5-56 alleging that the defendant Chandanmal mortgaged his house described in para 1 of the plaint on Kartik Sudi 14, Samvat 2606, corresponding to 23-11-56 for a sum of Rs. 2,506/- with interest @ 9% per annum. The defendant executed a rent note in favour of the plaintiff and under the terms of mortgage deed, the mortgage amount was to be paid by 25-11-53. The defendant did not pay the mortgage amount as also interest after Baisash Sudi 14, Samvat 2009. The plaintiff claimed a sum of Rs. 2500/- as principal amount and Rs. 800/- as interest and prayed for a preliminary decree for the sale of the mortgage property.

4. The defendant admitted the execution of the mortgage deed. His main defence was that on Posh Sudi 13, Samvat 2012 corresponding to 25-1-56 he paid a sum of Rs. 300/- towards interest and a sum of Rs. 2,100/- towards principal to the plaintiff at Balotra and obtained a receipt Ex. A-1 for Rs. 2,400/- and he also pleaded that sum of Rs. 50/- was paid at the instance of the plaintiff on 24 6 54 to Shri Narsingh Raj Bharsali, Advocate.

5. In the rejoinder, the plaintiff denied having received a sum of Rs. 2,400/- and he also denied the execution of the receipt Ex. A-1. He alleged that on this date, he was not at Balotra. For a sum of Rs. 50/-, he stated that he did not authorise the defendant to pay that amount to Shri N.R. Bhansali.

6. The trial court framed the necessary issues & recorded the evidence of both the parties. The defendant examined DW 1 Ghewanhand, attesting witness to Ex. A-1, DW 2 Kanmal, a witness in whose presence Ex. A-1 is said to have been executed

DW 3 Naraindas as an indentifier of the writing of the plaintiff Rawatmal, DW 4 N.R. Bhansali, Advocate and DW 5 Chandanmal defendant.

7. In rebuttal, the plaintiff Rawatmal examined himself as PW 1 and produced Ranmal PW 2, Ghisulal PW 3, Lachiram PW 4, Rughrathma) PW 5 & Bhimraj PW 6. Shri L.N. Purohit, the then Civil Judge after hearing the arguments decreed the plaintiff's suit for a sum of Rs. 400/- as principal amount and Rs. 262/- as interest and passed a preliminary decree for this sum on 22-7-58 The plaintiff went in appeal before the District Judge Shri Gopalmal Mehta, District Judge, Balotra, (as he then was) dismissed the appeal and affirmed the judgment & decree of the Civil Judge on 2-2-59. The plaintiff then preferred a second appeal in stood appeal, the case was remanded to the learned District judge, Baittia in the following terms on 4-12 64;

Accordingly, I allow the appeal, set aside the judgment of the learned District Judge of Balotra dated February 2, 1959 and send the case back to the learned District Judge with the direction that he should allow the plaintiff an opportunity to cross-examine Ghewarchand DW 1 and then to dispose of the appeal afresh according to the law It may be made clear that there will be no occasion for the recording of any further evidence by way of rebuttal because Ghewarchand's statement was already on the record before the plaintiff was called upon to lead his evidence. The costs of this appeal shall abide the final result. The parties are directed to appear in the court of the learned District Judge, Balotra on January 15, 1965.

After remand of the case to the District Judge, the plaintiff cross-examined the defendant's witness DW 1, Ghewarchand on 9-3-65. During the course of arguments of appeal on 24-4-65, counsel for the parties made a request to the court that they may be allowed to examine a hand writing expert and they also submitted a joint application in which it was stated that the opinion of expert may be called in respect to the receipt Ex. A-1 and in case the report of the expert goes against the plaintiff, the plaintiff will withdraw his appeal and in case, the report of the expert comes in favour of the plaintiff, the plaintiff will produce the expert at his expense for cross-examination by the defendant-respondent. The learned District

Judge on this application sent the disputed receipt Ex. A-1 and specimen and admitted writing to expert Dewan K.S. Puri for his opinion. The report of the expert was favourable to the plaintiff. So the defendant expressed that he may also be allowed to obtain the opinion of another expert. The photo prints were sent by the defendant to, his expert Shri H.L. Bhadwar. The report of Bhadwar was also received, which was in favour of the defendant. The parties wanted to examine both the experts. The learned District Judge on 14-7-66, instead of recording the statements of both the experts, reminded the case after setting aside the judgment and decree of the learned Civil Judge with a direction that the Civil Judge after recording the statements of the experts, shall give fresh judgment. After remand of the case by the District Judge, Balotra the Civil Judge. Balotra recorded the statements of the experts and after hearing both the parties, passed a preliminary decree on 30-1-67 for the same amount as was passed earlier on 22-7-58. The plaintiff then preferred an appeal. The learned District Judge, Balotra Shri B.C. Ojha accepted the plaintiff's suit in toto reversing the finding regarding payment of Rs. 2 400/- and Rs. 50/-. Dissatisfied with the judgment & decree of the learned District Judge, the defendant Chandanmal has preferred this appeal.

8. I have heard Shri H.M. Parekh, learned Counsel for the defendant appellant and Shri Gopal Raj Singhvi for the plaintiff-respondent.

9. Shri Parekh first of all contended that the entire proceedings after recording of cross-examination of DW 1 Ghewarchand are void and without jurisdiction as the same are contrary to the terms of the remand order of this Court. The order of remand by this Court was peremptory in nature and the District Judge could not go beyond the direction given by this Court. It was wrong on his part to have allowed the parties to bring on record the reports of the handwriting experts and to get them examined. The parties by their consent could not confer jurisdiction on the District Judge for taking on record any material in disregard of the direction given by this Court. Shri Parekh in support of his contention placed reliance on a Bench decision of this Court in *Roop Kishore and Ors. v. Jug Raj*. ILR 1953 3 Raj. page 988 and a Bench decision of Andhra Pradesh High Court in *Balaswaraswami Vatu and Anr. v. Mallidi Doroyyi and Ors.* AIR 1972 Andhra Pradesh 250.

10. Shri G.R. Singhvi, learned Counsel for the plaintiff respondent, on the other hand submitted that on the date of the examination of DW 1 Ghewarchand, the plaintiff and his counsel were not present and so the statement of Ghewarchand was recorded by the trial court in the absence of the plaintiff & his counsel and the court itself cross-examined the witness. When the plaintiff raised this contention in second appeal, this Court accepted the contention and remanded the case back to the learned District Judge for disposal of the appeal afresh according to law after setting aside the judgment of the District Judge dated 2-2-59 and a direction was given that the District judge shall allow the plaintiff an opportunity to cross-examine Ghewarchand DW1. The parties after cross-examination of the witness, submitted a joint application, in which the parties agreed that the receipt Ex. A-1 may be sent for opinion of the handwriting expert and in case the opinion goes against the plaintiff, the plaintiff will withdraw his appeal else he will submit the expert for cross examination It was in pursuance of his agreement of the parties that the disputed receipt Ex. A1 was sent for the opinion of the expert. When the appeal was sent for fresh disposal according to law and when parties consented to a particular course on action by agreement, it was within the competence of the learned District judge to have acted accordingly and the District Judge was possessed of all the powers as a court of appeal. Shri Singhvi urged that by the remand order of this Court, future course of proceedings was not in any way restricted and the court could act according to the exigencies of the case or in accordance with the situation, which may subsequently come up during the pendency of the appeal. He urged that there may be supervening factors and subsequent events, which have to be taken notice of and by remand order, it cannot be said that any restrictions were placed by this Court On the ?exercise of the powers by the first appellate court which was seized of the matter of had session over the case. Shri Singhvi also supported his contention by reference to a Bench decision of the Allahabad High Court in Kesho Ram v. Board of Revenue U.P, Allahabad and Ors. AIR 1972 Allahabad 360. He also contended that the defendant is now estopped from challenging the proceedings conducted by the learned District Judge to which he was agreeable.

11. In the light of the rival contentions of the learned Counsel, the question arises, was it legal on the part of the learned District Judge so have allowed the parties to

adopt the course of action which they chose to adopt by moving an application on 24-4-66? It may be that parties may agree that the appeal may be disposed of in a particular manner on the basis of any agreement arrived at between the parties, say the appeal could have been disposed of on special oath or say the appeal could have been disposed of if the parties would have agreed that in case the opinion of the expert goes in favour of the plaintiff, the plaintiff's suit may be decreed in toto, or if it goes in favour of the defendant, the plaintiff's suit be dismissed to the extent of the disputed amount of the receipt are, in the present case, the parties went beyond the direction given by this Court. The parties could not agree to adduce further evidence and it was beyond the jurisdiction of the court to have allowed the parties to adduce expert evidence. It would amount to acting contrary to the direction given by this Court. The plaintiff had no opportunity to adduce any evidence in rebuttal after cross-examination of DW 1. If he had no opportunity to adduce any evidence in rebuttal, he could not place the testimony of his expert on record and consequently, the defendant, too had no right to have adduced the evidence of his expert. The position may be different when the appellate court after such a peremptory order of remand is faced with a situation requiring to act under Order 41 Rule 27(1)(aa) CPC. The position may also be different when any subsequent event takes place of which the court is required to take notice of, or there may be any other supervening factor whereby the course of action is controlled like change in law, whereby it may not be possible to abide by the direction in the order of remand. In the present case, recording of the evidence of the experts certainly conflicts with the direction given by this Court and such a course of action was not permissible even with the consent of the parties. The parties could agree when their agreement does not run contrary to the direction given by the superior court.

12. Kesbo Ram's case, cited by Shri Singhvi does not help him. In this case, there was a change in law after the order of remand. In that connection, it was observed that the view taken by the Board would remain good law only so long as the provisions remain in existence but if they were repealed in a way as if they had never been enacted, the substratum of the Board's order would disappear; and the court to which the suit had been remanded would be entitled to decide the merits of the case in view of the legal position then obtaining and the subordinate court

could take note of the law.

13. In Roop Kishore's case, the appellate court remanded the case on 27-9-51 with a direction to allow amendment of the plaint within the month from the date of receipt of the record. The record reached the trial court on 27-10-51. No notice was given to the parties about the receipt of the record. The case was taken up on 10-1-52 on motion of the defendant in the presence of the parties. The defendant objected that one month allowed for amendment having expired, the case be consigned to record room. The plaintiffs however, contended that they were entitled to file amended plaint within one month from 10-1-52 when they received, information about the reaching of the record. The trial court dismissed the suit but art application for extension of time was moved to the District Court. But the same, was dismissed in default. The contention was advanced that the trial court was empowered to extend the time but this contention was not upheld and it, was observed that when time is granted for the doing of a thing by a superior court and embodied in the decree of that court, it is not open to a court subordinate thereto to extend the time. It may be stated that; she point involved before me is some what different In the present case, there is no, question of any time limit placed by the appellate court No doubt a restriction, was imposed on the plaintiff to adduce any evidence in rebuttal in the present case. The question is whether the court could bypass this direction if the parties to the his choose to do so.

14. The other case on which reliance has been placed by Shri Parekh lays down that when appellate court comes to a conclusion on a question of fact and remands the case for further inquiry, the lower court has to act within the limits of the remand order. It cannot reopen the findings of the appellate court if it does, it exceeds the limits of its jurisdiction. In that case, the Assistant Settlement Officer held that the tenants were the ryots and so directed issue of patta. The decision was questioned by the deities and not by the Government. The Tribunal in appeal set aside the finding and directed a fresh enquiry. There was no challenge to the finding by the Government. It was observed that the scope of the remand was very limited and the function of the settlement officer was to determine in terms of the remand, whether the deities or the tenants are to be the grantees of the patta. There was no warrant for reopening the settled issue that a patta could be

granted. It was held that the Assistant Settlement Officer exceeded the limit of his jurisdiction which was to conform to the limits of the orders of remand. The observations made in that case undoubtedly support the submission of Shri Parekh.

15. I may also refer to a decision of the Karnataka High Court, which has a direct bearing on the controversy which has arisen before me. In *K. Veerabassappa v. The Court of District Judge at Chitradurga and Ors.* A.I.R. 1979 Karnataka 40, an application for eviction was made before the Munsif on the ground of premises being required for running the business. The tenant denied the plea of bonafide requirement and, did not raise any objection as to the maintainability of the application. On evidence, the Munsif ejected the application and the same was affirmed by the District, judge. The petitioner preferred a revision petition, in which it was contended, that the relief of eviction was refused on the ground that the upstairs/1st floor was suitable for his occupation. This finding has been arrived at without affording him any opportunity to establish whether it was suitable or unsuitable for his occupation. Therefore, the finding was vitiated. This plea of the petitioner was accepted by Nesargi, J. and he remanded the case to the court of Munsif for disposal afresh according to law after giving opportunity to both the sides to adduce evidence only in regard to the suitability or unsuitability of the area available in the first floor of the schedule premises to run the business of the petitioner-landlord. After remand of the case, the tenant moved an application for amendment & for adding the plea as to the maintainability of the application for eviction. The amendment sought was that under a registered partition deed, the schedule premises had fallen to the share of the one of the sons of the petitioner. Therefore, he had no right to maintain his application for eviction. Amendment was allowed by the Munsif & the Munsif considered himself free to consider the maintainability of the application for amendment. The learned Munsif upheld the plea of the tenant that the application is not maintainable and that the upstairs portion of the premises was suitable and he also found that upstairs portion of the premises was suitable for locating the landlord's office and question of greater hardship was decided in favour of the tenant. The petitioner, then went in revision, before the District Judge. The District Judge dismissed the same. He however, disagreed with the finding regarding suitability of the upstairs portion of the

premises. He further upheld the finding on the maintainability of the application. The petitioner-landlord then preferred a writ petition against, the District Judge. The question that arose for consideration was whether the Munsif could act beyond the direction given by the High Court in the revision petition, when the plea of maintainability of the petition was available to the tenant, when he submitted his objections statement. Justice K.S. Puttaswamy observed as under:

A remand was necessitated on only one issue viz., the suitability or unsuitability of the upstairs portion as the Courts below had decided that issue, contrary to the, principles of natural justice and without evidence on record. If the Courts below on the earlier occasion had not, committed such a mistake and there was evidence to finally decide the case, this Court would have finally decided the matter one way or the other and the disability of this Court on that occasion cannot be made a ground to defeat the just claim of the petitioner as has happened now on altogether a new ground. We should also remember that it was open to the respondent to urge for an open remand and for this Court to make an open remand so as not to the the hands of the learned Munsif. In the absence of any other legal proceeding by the respondent, the restricted order of remand of this Court has become final, binding and conclusive and it is not open to any of the parties or for any Court to enlarge the scope of the remand order that too by side wind (window) as has happened in this case. In my considered opinion, if such a course is permitted, it is destructive of all judicial discipline and will strike at the very root of the efficacy &, binding nature of an order of a superior Court on the parties to a dispute & the necessity of a subordinate Court to faithfully implement an order of the superior Court By this I should not be understood as stating that in a remand case, a subordinate court cannot, allowed an application for amendment at all or that an order of remand should be implemented even without reference to any change in law or any other valid circumstances which can neither be predicted nor exhaustively catalogued. In ray opinion, this was not one such and therefore the restricted order of remand should have been faithfully implemented by the learned Munsif.

In K. Veerabasappa's reliance was placed on the observations made by their Lordship of the Supreme Court in Bhopal Sugar Industries Ltd v. Incometax, Officer, Bhopal AIR 1961 Sc 182. It was observed that the Supreme Court firmly

laid down two legal principles, one it, it is an imperative duty of a subordinate court or an authority to implicitly give effect to a remand order of a superior court or an authority and the other is that it is nor open to any court or authority to examine the validity of a remand order that has become final in any other legal proceedings and in this connection it was also. Observed that refusal to carry out the directions; of a superior tribunal is in effect a denial of justice, and is further more destructive of one of the basic principles in the administration of justice based as it is to this country on hierarchy of courts. It was further observed that if the subordinate tribunal refuses to carry out the direction given to it by? a superior tribunal in the exercise of its appellate powers, she result will be chaos in the administration of justice.

16. In the light of he principles enunciated by their Lord his of the Supreme Court & in the light of the propositions laid down in the Karnataka case, so far as the case in hand is concerned, I am-clearly and firmly of the opinion that the learned District judge exceeded the limits of his jurisdiction and it was not competent for him to have allowed the parties to lead further evidence. Even the defendant could not be allowed to act contrary to the direction given by this Court which is peremptory in its nature. The first appellate court could, have acted in any other manner which may not in any case come in conflict with the direction given by this Court. He come to have disposed of the appeal in accordance with the against of the parties but bunging any other evidence on record of the plaintiff in rebuttal or otherwise of the defendant would be contrary to the direction given by this Court. The result necessarily is that the patties are precluded him pressing into service the evidence of both the experts.

17. Now, I proceed to consider the merits of this appeal.

18. Shri Parekh vehemently contended that the finding of the teamed District Judge on payment of Rs. 2.400/- is not based on evidence and a based on surmises conjectures and such as finding is not binding on this Court. He urged that previously the trial court as well as the District Judge, both, found in favour of the defendant that sum of Rs. 2,400/- was paid by She defendant to the plaintiff and the receipt Ex. A-1 is a genuine receipt executed by the plaintiff. After remand

by the District Judge, Shri R.L. Gupta, Civil Judge (as he then, was), again found in favour of the defendant. The learned District Judge, discarded the defendant's, evidence and considering the circumstances of the case held that it is improbable to believe the plea or version of the defendant. The learned Counsel carried me through the judgments as well as the evidence on record and urged that it is a fit case where the finding arrived at by the District Judge should be reversed. He urged that the appellate court should be slow to interfere in the finding of fact arrived at by the trial court and when it wants to reverse the findings, the appellate court is required to discuss the reasons given by the trial court in Support of its finding. In this connection, he placed reliance on some case law. He urged that in the present case, the learned District Judge proceeded to dispose of the appeal without regard to the principles enunciated in this behalf. He also urged that even if the opinions of the handwriting experts are taken into consideration, the reasoning given by Shri Bhadwar in support of his opinion is more convincing and assistance can be taken by the Court for appreciating the evidence of defendant. He also contended that there is only one attesting witness of the receipt Ex. A-1, who is Ghewarchand DW 1. Not a single question has been put to this witness in cross-examination on the question of payment of Rs. 2,400/- and execution of the receipt. In such a state of cross-examination, the fact of payment of Rs. 2,400/-, and execution of the receipt has to be accepted as it goes unchallenged.

19. Shri Singhvi, on the other hand, submitted that after appreciations of the evidence, the learned District Judge arrived at the findings and it is a finding of fact not liable to be interfered with in second appeal.

20. Before dealing with the contentions of the learned Counsel, it would be proper to refer to case law. On appreciation of evidence in appeal. In *Sarju Prasad Romdeo Sahu v. Jwoleshwari Pratap Narain Singh and Ors.* A.I.R. 1951 S.C. 120, their Lordships of the Supreme Court observed as under:

Where the question for consideration for the appellate Court is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of

observing the manner in which they disposed in Court This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to when the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact.

The appellate Court is wrong in thinking that it would detract from the value to be attached to a trial Judge's finding of fact if the Judge does not expressly based his conclusion upon the impressions he gathers from the demeanor of witnesses. The duty of the appellate Court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial Court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the Court, outweighs such finding.

21. In *Keshulal v. Ram Dayal* 1960 RLW 595 this Court observed:

If the lower appellate Court proceeds to reverse the findings of the trial Court without paying attention to those material and vital aspects of the case, which had to be considered in determining the points at issue, the decision of the lower appellate Court cannot be sustained in second appeal. Such a decision is not accordance with law.

22. In *Sumermal v. Hukma* 1964 RLW 7, it was observed as observed:

When material evidence both oral and documentary in the case was not considered by the Judge in first appeal and the evidence of witnesses was misread it will be open to this Court to make a fresh appraisal of the evidence and the arrive at its own Conclusion.

23. In *Slate v. Bholal Singh* AIR 1969 Raj. 219, it was observed:

When a party declines to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believes that the testimony given could not be disputed at all. This is the rule of essential justice.

24. It is to be seen whether in the present case the learned District Judge kept in view the principles of appreciation of evidence to be followed by the first appellate court, and whether the finding has been arrived at on appraisal of evidence or they have only been arrived at on the basis of surmises & conjectures. Having read the judgments of the trial court & the appellate court prior to the remand by the District Judge on 14-7-66 & having read the judgment of the Civil Judge dated 30-1-67 & having perused the evidence on record, I am firmly of the view that the learned District Judge in his judgment under appeal has not appreciated the evidence on record in the light of the principles of appraisal of evidence referred to above. The defendant's case is that he paid a sum of Rs. 2,100/- towards principal & Rs. 300/-, towards interest on 25-1-56 at Balotra at his own house in the presence of Ghewarchand attesting witness DW 1 and at that time the other witness DW 2 Kanmal was also present. The defendant also examined Naraindas DW 3 who identifies the writing C to D & signatures of the plaintiff E to F in receipt Ex. A-1. The trial court in its judgment dated 30-1-67 adopted the reasonings given earlier by the trial court and by the first appellate court. In the earlier judgment the trial court judged the versions of both the parties and found the plaintiff's version unbelievable and has given cogent reasons for the same and observed that the plaintiff does not appear to be honest. He has tried to put up cooked up witnesses and changed his statement in order to meet the situation from which he could not escape with regard to the plea of alibi. The plaintiff's plea in the rejoinder was that he was not in Balotra on the alleged date of payment but his presence was recorded in the proceedings in the court on that day. So, he had to change his statement and he could not adhere to his plea of absence from Balotra on the date of payment. In his statement he deposed that he went to Tapra to attend the Court. He had come from Tapra on the very day and had gone to Tapra a day early in connexion with the treatment of Ranmal's daughter. It is true that the burden of the plea of payment was on the defendant and it is the defendant who has to discharge the burden, still the respective versions of both the parties have to be simultaneously taken into consideration & after weighing the evidence, it is to

be found as to whose version, or case is truthful Believing the statements of the defendant Chandanmal, and his witness Ghewarchand whose statement on the question of payment and execution of receipt goes unchallenged, the trial court found the issues in favour of the defendant The learned District Judge reversed the finding of the Civil Judge on the basis of the contradictory statements of Ghewarchand, Kantnal & Chandanmal regarding the presence of Ghewarchand. It appears that the statement of Chandanmal has been misread by the learned District Judge Such a contention was advanced earlier at veil and the then District Judge who dismissed the plaintiff's appeal, dealt with this matter. Chandanmal, DW 5-stated that Ghewarchand was not present when he told the plaintiff to give a duly attested receipt to him Ghewarchand stated that he was present when receipt Ex. A-1 was written by Rawatmat. It appears that Chandanmal's reference was to that point of time; when Ghewarchand was not even called. The defendant having asked the plaintiff to give a duly attested receipt thereafter Ghewarchand was called Chandanmal merely stated so to the plaintiff before the receipt was actually written by that time admittedly Ghewarchand was not present. Thus, there is no contradiction, in the testimony of Chandanmal and Ghewarchand. The learned District Judge proceeded to consider this contradiction at great length but without properly appreciating the statements of these witnesses. He further misread the statement of Chandanmal that Ghewarchand was called twice Chandanmal made no such statement, as stated by the learned District Judge in para 21 of his judgment Though there appears to be some contradiction in the statements of Ghewarchand & Kantnal on the point as to when money was paid. According to Ghewarchand, money was paid by the defendant to the plaintiff in his presence whereas Kantnal has stated that after counting of money Ghewarchand was called and receipt was written after counting of money; It may be stated that Ghewarchand in cross examination has deposed that the plaintiff called him from the house opposite to the house of the defendant attitude him that he is obtaining Rs. 2,400/- from the defendant and executed a receipt so he may attest the receipt. It may be that the money may be in the plaintiff's hands on that basis Ghewarchand deposed that it was paid in his presence but he is very categorical that the plaintiff told him that he is receiving money and executing the receipt. From this statement, it can even be said that none was received when

Ghewarchand reached the place where the transaction was taking place So no capital can be made out by the alleged contradiction.

25. The learned-District Judge further considered this improbability as to how the defendant could have saved a sum of Rs. 2,010/- trim the remuneration as a clerk of a lawyer. Had he saved a sum of Rs. 3,000/-, he would have returned the mortgage money in full and got the property redeemed earlier and would not have allowed to grow the burden of interest which was galloping like a horse. He also considered the improbability of the plaintiffs conduct to have denied the receipt of Rs. 2,400/- only after 25 days of the execution of the receipt in the presence of Ghewarchand and Kanmal. He further considered that why the full receipt was not manipulated, the reason was that he could not obtain the title deed and so the receipt for the full amount was not prepared. He further proceeded to consider that earlier the receipt Ex. A-8 was obtained in Bahi whereas the receipt Ex. A-1 is on a piece of paper from which it is quite manifest that it has been prepared very cautiously and there is no suggestion that any quartet changed the plaintiff from an honest man to a dishonest man.

26. From the manner in which the defendant's evidence has been considered and the improbabilities have been taken notice of, it would appear that instead of dealing with the evidence, the learned Judge proceeded to determine the question on his own imagination. The sequence of events appears to be what Chandanmal has stated. Ghandanmal has deposed that Rawatmal made a demand to him seven days prior to 25-1-56. At that time he told him that he will make payment after 4-6 days. When the plaintiff made a demand, he told him to render accounts and he did not tell him that he may bring the mortgage deed and rent note after 4-6 days. On 25-1-56, the plaintiff came to him of his own accord and he asked him as to whether he has brought the account. Thereupon, he told him that he has not brought the account. On being demanded, he paid a sum of Rs. 2,400/- to the plaintiff. For about a month, he continued to ask the plaintiff to clear the account and accept the balance money but the plaintiff avoided, and so he felt that there is some dishonesty on the part of plaintiff. Then he first served a notice Ex. 4 on 20-2-56 referring to the payment of Rs. 2,400/- under receipt. On this part of the defendant's statement that the defendant continued to ask the plaintiff for clearing

the account and accepting the balance money and the plaintiff continued to avoid, no cross-examination has been directed on this sequence of events. It is a very material aspect of the case which led the defendant first to serve a notice, which has been completely lost sight of by the learned District Judge. Further the defendant has deposed that he had received a sum of Rs. 1,000/- by sale of wheat and he had saved Rs. 2,000/-. The defendant has not been cross-examined as to what was his monthly income and monthly expenditure and whether it was possible for him to save a sum of Rs. 2,000/- during 2 years. It has also not been asked as to when he received a sum of Rs. 1000/- by sale of wheat. In the absence of such cross-examination, it was wrong on the part of the District Judge to observe that the defendant, a clerk of a lawyer cannot save so much money. Further it has also not been put to the defendant as to on what dates he had what money and why he did not, pay off the money which he had collected so as to reduce the burden of interest. It may further be pointed out that it had not been put to the defendant as to why the receipt was not executed in Bahi when earlier the receipt was executed in Bahi. According to the defendant, the piece of paper was taken out by the plaintiff from his bag and receipt was executed thereon. Had any question been put, the defendant might be in a position to explain it. Further Ghewarchand's statement has been discredited for no reason whatsoever, rather unchallenged testimony of Ghewarchand, establishes truthful character of the defendant's version and falsity of the plaintiff's case. If the defendant's version is judged in the light of the plaintiff's conduct in the conduct of the case as well as in the light of plea taken in the rejoinder as considered by the trial court earlier, the conclusion would be irresistible that the defendant's version is more reliable as compared to the plaintiff's version. The learned District Judge has also failed to consider as contended by Shri Parekh that normally the whole writing could not have been forged. The forgery is generally made of the signatures. Instead of considering the other improbabilities, this improbability should have been considered by the District Judge. The learned District Judge did not like to consider the plaintiff's evidence on his plea of alibi. According to him it would be unnecessarily burdening the judgment and he also did not discuss the other evidence of the plaintiff. Had he considered the evidence of plaintiff, he would have been able to form an opinion about the plaintiff for whom he expressed that what

changed him from an honest man to a dishonest one. The trial court has earlier considered his evidence thoroughly and I am in complete agreement with the view that the plaintiff's evidence is not reliable. Further conjectural considerations and misreading of evidence by the District Judge leading to disbelieving the defendant's evidence cannot be accepted. Thus, I have no hesitation in coming to the conclusion that from the evidence on record, it is proved that the defendant made payment of Rs. 2,400/- and the plaintiff executed the receipt Ex. A-1.

27. Though it is not necessary to consider the evidence of the experts in view of the first contention of Shri Parekh having been upheld and the proceedings stand vitiated, still it may be observed that both the courts have not placed much reliance on the evidence of the experts. The opinions given by the experts are contradictory to each other. In such a situation both the courts have observed that it is unsafe to depend on or to take any help from the opinions expressed by the experts. In my opinion, when there is direct evidence of the defendant which has been found to be reliable, it is not necessary to draw any support from the opinions given by the experts but when one considers the opinions given by the experts, the opinion of Shri H.L. Bhadwar appears to be more sound and plausible. Great resemblance and similarities have been found in the two writings and the variations appear to be natural. Shri Bhadwar has stated that there is no reasonable suspicion of any dots having been put first in the document Ex. A-1 and the document was prepared or imitated. According to him Ex. A-1 was all written by the wrist movement as other specimen or admitted writings I have myself closely looked into the receipt Ex. A-1 and other specimen and admitted writings. On such closer observation, I find myself in agreement with the opinion expressed by the expert Shri H.L. Bhadwar. Even if the first contention of Shri Parekh is not upheld and expert statements may be considered to be part of the evidence of the parties, still my conclusion would be that receipt Ex. A-1 is not a forged document.

28. Now, I come to the payment of Rs. 50/-. With regard to this payment, there is the testimony of the defendant and the statement of DW 4 Shri N.R. Bhansali. There is no reason to disbelieve the testimony of Shri N.R. Bhansali. This money was due to the witness from the plaintiff Rawatmal and towards payment of his

fee, the defendant paid a sum of Rs. 50/- to him at the instance of the plaintiff. The defendant was the clerk with him. The learned District Judge did not find that a sum of Rs. 50/- was not paid to Shri N.R. Bhansali by the defendant. He has however observed that the plaintiff did not authorise the defendant to make payment to DW 4. In this connection, it may be stated that the learned District Judge failed to notice the statement of the defendant who has deposed that the plaintiff told the defendant in the presence of DW 4 that a sum of Rs. 50/- may be taken from the defendant by him so there was a clear authority by the plaintiff to make payment of Rs. 50/-. Thus, the finding regarding payment of Rs. 50/- has been arrived at by the learned District Judge in disregard of the statement of the defendant. So I hold that it is also proved that the defendant paid a sum of Rs. 50/- to DW 4 as asked by the plaintiff so he is entitled to its adjustment towards the mortgage money.

29. No other point has been pressed before me.

30. In the light of the foregoing discussion, this appeal deserves to be accepted.

31. Accordingly, the appeal is accepted, the judgment & decree of the learned District-Judge is set-aside and the judgment & decree of the trial court is restored. The appellant shall get the costs of this appeal and the cost of the first appeal from the plaintiff-respondent.

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