APPELLATE CIVIL.

Before Lort-Williams and M. C. Ghose JJ.

RANENDRAMOHAN TAGORE

v.

KESHABCHANDRA CHANDA.*

1934

Jan. 31.

Amendment—Leave to amend, Conditions of—Hâtchitâ—*Handnote—Bill—Choice of suit—Whether on original consideration or on handnote—Costs under judge's order, acceptance of, Effect of—Estoppel.*

Leave to amend ought to be refused, where the effect of the amendment would be to take away from the defendant a legal right, which has accrued to him by lapse of time, and this general rule ought not to be departed from except in very special cases.

Charan Das v. *Amir Khan* (1) referred to.

The question whether, when a bill or note is found to be inadmissible in evidence, the payee can sue on the original consideration, depends upon whether the cause of action with regard to the original consideration is one, which is complete in itself, and the debtor then gives a bill or note to the creditor for payment of the money at a future time.

If this be so, then the plaintiff may disregard the promissory note, if he chooses, and sue upon the original debt.

Where, however, the original cause of action is a bill or note itself and does not exist independently of it, then the plaintiff cannot disregard the note and sue for the original consideration.

Akbar v. *Khan* (2) referred to.

Where a party accepts costs under a judge's order which, but for the order, would not at that time be payable, he cannot afterwards object that the order was made without jurisdiction. The party, who makes the application to rescind the order, having taken something under that order, must be considered to have adopted it and cannot thereafter be heard to impeach it.

Tinkler v. *Hilder* (3) and *King* v. *Simmonds* (4) referred to.

Manilal Guzrati v. *Harendra Lal Rai Chowdhry* (5) distinguished.

*Appeal from Appellate Decree No. 736 of 1932, against the decree of Amritalal Banerji, Subordinate Judge of Dinajpur, dated Aug. 19, 1931, reversing the decree of Brajendrasharan Sanyal, Second Munsif of Balurghat, dated July 10, 1930.

(1) (1920) I. L. R. 48 Calc. 110; L. R. 47 I. A. 255.
(2) (1881) I. L. R. 7 Calc. 256.
(3) (1849) 4 Exch. 187; 154 E. R. 1176.
(4) (1845) 7 Q. B 289; 115 E. R. 498.
(5) (1910) 12 C. L. J. 556.

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SECOND APPEAL by the plaintiff.

The facts of the case and the arguments advanced at the hearing of the appeal appear sufficiently in the judgment.

Amarendranath Basu and *Nripendrachandra Das* for the appellant.

Seetaram Banerji and *Sudhangshukumar Sen* for the respondent.

LORT-WILLIAMS J. The plaintiff's case was that defendant No. 1 had acted as his agent, and that, on balance of account, a sum of Rs. 643 was due to the plaintiff. This account appeared in a *hâtchitâ*, upon which there had been adjustments from time to time, the last being on the 25th December, 1926. On that date, according to the plaint, the account was adjusted at the figure of Rs. 643 and on that day, the defendants took a loan from the plaintiff for that sum by executing in his favour a promissory note, thereby making a part payment towards the satisfaction of the debt due on account. They agreed to repay the principal amount due on the hand-note with interest. The account was stated to have arisen in respect of some misappropriations of cash made by the defendants. The cause of action was stated to have arisen on the date when the promissory note was executed, namely, the 25th December, 1926, and the plaintiff asked for a decree for Rs. 643 with interest, upon the hand-note. At the end of the prayer, the plaintiff concluded with the following paragraph: "Be it declared that both "the defendants have executed a *hâtchitâ* on account "of the amount misappropriated, as found on a "subsequent adjustment; suit will be instituted, if "necessary, later on for the same". It is agreed by both parties that this paragraph refers to other misappropriations, and is not relevant to the present issue. The suit was instituted on the 12th July, 1929.

The defendants raised the defence of coercion and undue influence and other defences, but both courts

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have decided these issues in favour of the plaintiff. The promissory note was not properly stamped and was, therefore, inadmissible in evidence. Thereupon, the plaintiff, on the 27th March, 1930, prayed to be allowed to amend his plaint in order to enable him to sue upon the original debt, which arose out of the account to which I have referred. This was opposed by the defendants' pleader on various grounds, but not on the ground that the plaintiff's claim on the original debt was barred by limitation. The Subordinate Judge came to the conclusion that the amendment would not prejudice the defendants in such a way that it could not be compensated by costs and he allowed the amendment on payment of Rs. 10 as compensation to the defendants. This sum was paid over at once and accepted without protest by the defendants. At this date, the plaintiff's claim on the original debt was barred, the last adjustment having been made on the 25th December, 1926, but it would not have been barred at the time he instituted the suit.

On appeal, the Subordinate Judge came to the conclusion that the amendment ought not to have been allowed and he, therefore, allowed the appeal, reversed the decree of the trial court and dismissed the plaintiff's suit. The reasons for the conclusion, to which the Subordinate Judge arrived, were that the amendment set up a claim different to the original claim upon the promissory note and, further, it allowed the plaintiff to rely upon a claim, which had become barred by limitation at the time of the amendment.

The questions, which we have to decide, are whether the amendment ought to have been allowed, and, secondly, whether, in any case, the defendant can raise this point and object to the allowance of the amendment, in view of the fact that he accepted a benefit under the order made by the trial judge, namely, the benefit of the costs, which were awarded to him. There is no doubt that the general rule is correctly stated in Mulla's Code of Civil Procedure, 9th Edition, at page 499. "Leave to amend ought to

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be refused, where the effect of the amendment would be to take away from the defendant a legal right, which has accrued to him by lapse of time and this general rule ought not to be departed from, except in very special cases. Upon this point, the plaintiff has relied upon the case of *Charan Das* v. *Amir Khan* (1), where their Lordships of the Privy Council refused to interfere with the discretion exercised in allowing such an amendment. In that case, it was clear that the claim, which the party sought to raise by his amendment, had been sufficiently indicated in the pleadings, but the presentation of it had been bungled by the pleader. In the present case, the facts about the account and the *hâtchitâ* and the adjustments of the account appear clearly in the plaint. The whole story is set out there, except that the actual details of the account have not been reproduced. The amendment allowed the plaintiff to sue for the original debt without any further amendment of the plaint. In my view, no further amendment was necessary, because the facts, upon which the amendment was founded, already appeared with sufficient clarity in the plaint. For this reason, I am of opinion that the trial judge was right in allowing the plain to be amended.

I do not think that in circumstances, such as exist in the present case, the plaintiff is debarred from suing upon the original debt. Whether, when a bill or note is found to be inadmissible in evidence, the payee can sue on the original consideration depends upon whether the cause of action with regard to the original consideration is one, which is complete in itself and the debtor then gives a bill or note to the creditor for payment of the money at a future time. If this be so, the plaintiff may disregard the promissory note, if he chooses, and sue upon the original debt. Where, however, the original cause of action is a bill or note itself and does not exist independently of it, then the plaintiff cannot disregard the note and sue for the original

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consideration. This difference has been well and clearly explained by Garth, Chief Justice, in the case of *Akbar* v. *Khan* (1).

Upon the last question, whether the defendant can now be heard to object to this amendment having been allowed, I am of opinion that he can no longer raise that objection. The principle was laid down so far back as 1849 in the case of *Tinkler* v. *Hilder* (2), the head-note of which is as follows :—

> Where a party accepts costs under a judge's order which, but for the order, would not at that time be payable, he cannot afterwards object that the order was made without jurisdiction.

Pollock, C. B. in his judgment says that—

> The present Rule must be discharged on the ground that the party who makes the application to rescind the order having taken something under that order, must be considered to have adopted it and cannot be now heard to impeach it.

In *King* v. *Simmonds* (3), it was decided that—

> Where a judge having ordered, on summons by the plaintiffs that they should be at liberty to amend the record and that they should pay the defendant his costs occasioned by such amendment, the defendant cannot, after taking and receiving his costs, apply to set aside the order for amendment, as made without jurisdiction.

These cases were considered in *Manilal Guzrati* v. *Harendra Lal Rai Chowdhry* (4), where Mookerjee J. accepted as an undoubted principle that a party, who has adopted an order of the court and acted upon it, cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. But he distinguished the cases, to which I have referred, because, in the case with which he was dealing, the plaintiff had accepted payment of costs under protest, and the learned Judge came to the conclusion that the defendant had no alternative but to obey the order of the court and accept the costs. It is clear that, in the present case, the costs were not accepted under protest, nor was the defendant under

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any obligation or compulsion to receive them. In fact, although he resisted the amendment, he did not do so on the ground of limitation, because he had not appreciated that point at the time when the amendment was made. In my opinion, therefore, the defendant cannot be heard on his objection that this amendment ought not to have been allowed, and for this reason, as well as for the reason that I have already given about the amendment itself, this appeal must be allowed, and the judgment and decree of the court of first instance restored with costs.

M. C. GHOSE J. The case was that defendant No. 1 owed a sum of Rs. 643 on adjustment of account to his master, the plaintiff, and he satisfied the account by payment of a sum of Rs. 643 which he borrowed from his master on a promissory note. The suit was instituted on the promissory note. It was found out that the promissory note was insufficiently stamped and, as such, could not be received in evidence. Thereupon, the plaintiff filed an application, praying that the sum claimed in the plaint might be allowed on the basis of the original debt. The defendants objected to the amendment. The trial court overruled the defendants' objection and ordered that the amendment prayed for by the plaintiff would be allowed upon his paying Rs. 10 as compensation to the defendants. The said compensation of Rs. 10 was paid to the defendants and the amendment was allowed. Thereupon, the plaintiff proved the original debt by a *hâtchitâ*, which was in the handwriting of the defendant No. 1 himself and signed by him. The suit was decreed on contest against defendant No. 1 and dismissed against defendant No. 2. On appeal by defendant No. 1, the learned Subordinate Judge found that the amendment was unjust and ought to have been refused.

I agree with my learned brother, in the particular circumstances of this case, that the trial court was right to allow the amendment.

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As to the argument of the learned advocate for the appellant, that the defendant is estopped by the fact, that he took Rs. 10 as costs for the allowing of the amendment, from raising the validity of the amendment in this Court, I am of opinion, on the facts of this case, that the receipt of Rs. 10 does not operate as an estoppel preventing the defendant from raising the question of the validity of the amendment. But, as stated above, the amendment was rightly made and the decree of the appellate court should be set aside and that of the court of first instance restored with costs.

Appeal allowed.

G S.