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displeased and prompted her to attack the deceased appears to have been the direction given by him on the 27th to one of the witnesses in the case to send away to his (the deceased's) brother the cash in the house amounting to over Rs. 200. This direction the accused seems to have much resented and the fact that, before she attacked him, she had without his knowledge taken possession of the money and secreted it, suggests that her brutal treatment of the man was not altogether really due to any grave provocation given by him at the time of the attack. In these circumstances, any punishment less than that proposed by Benson, J., would, in my opinion, be inadequate.

The result is the conviction of the accused must be, and is hereby, altered into one under Section 304, Indian Penal Code, and the accused is sentenced to rigorous imprisonment for seven years.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

1896. August 10.

SIMON AND OTHERS (PLAINTIFFS),

v.

HAKIM MAHOMED SHERIFF (DEFENDANT).*

Promissory note—Contemporaneous collateral agreement consistent with the terms of the promissory note—Suit properly brought under Chapter XXXIX, Civil Procedure Code.

The plaintiffs advanced money to defendant for the supply of certain goods. On defendant's failure to supply the goods, plaintiffs pressed for repayment and a promissory note payable on demand for the amount due was executed, at the same time an agreement was entered into by defendant to liquidate the amount due on the promissory note by fortnightly consignments, the first consignment to be made within fourteen days of the date of the promissory note. On defendant's failure to send the consignments as promised a suit was brought under Chapter XXXIX, Civil Procedure Code:

Held, that the suit was rightly filed under Chapter XXXIX that the agreement to liquidate the amount due by fortnightly consignments was a collateral undertaking consistent with the existence of the note containing an absolute promise to pay, that such collateral agreement was no answer to the suit on the promissory note and that the plaintiff was entitled to a decree.

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* Civil Suit No. 117 of 1896.

SUIT under Chapter XXXIX, Civil Procedure Code, for Rs. 7,331-8-7 being principal and interest due on a promissory note, dated 2nd May 1896, payable on demand and executed by the defendant. Demand was made on 19th May 1896. The plaint was filed on 6th July 1896. On 24th July 1896 the defendant moved on a petition for leave to defend under section 533, Civil Procedure Code, supported by an affidavit to the following effect:—"I admit "the promissory note of the 2nd May 1896, but say that, when I "executed the same, I gave an undertaking in writing to the plain- "tiffs in pursuance of an agreement come to with the latter at the "time through their attorneys Messrs. Wilson & King, whereby I "agreed to ship fortnightly through the plaintiffs' free consignments "of not less than Rs. 2,000 in value each until the note should be "liquidated, the first of such consignments to be made at the "expiration of fourteen days, from the date of the promissory note.

"I further admit that, owing to untoward circumstances over "which I had no control, I was not in a position to make a shipment "as per terms of the foregoing written undertaking on the date "mentioned therein; but say that on the 30th May last I sent two "respectable persons, C. Ghulam Muhammad Sahib, a merchant "and Inayat Hussain Sahib, Manager, Registration Department, "Deputy Collector's Office, to treat with the fourth plaintiff in "view to substitute a new agreement more favourable to me in the "place of that mentioned in the previous paragraph, the terms of "the new agreement being that a sum of Rs. 1,000 was to be paid "down at once and monthly payment of Rs. 500 to be made on "the 1st July, 1st August and 1st September 1896, and thereafter "payments of Rs. 1,000 monthly to be made on the 1st day of "every calendar month commencing from 1st October next. This "arrangement was to cover the plaint promissory note and all "anticipated shortfalls, and the fourth plaintiff, as I am informed "and believe the same to be true, accepted the proposed terms on "behalf of his firm and received Rs. 1,000 then paid into his "hands by the aforesaid persons on my behalf and faithfully pro- "mised to give me through them a letter embodying the foregoing "terms, together with a receipt for the sum of Rs. 1,000 then paid "into his hands on the Monday following.

"But in breach of the foregoing agreement, the plaintiffs' firm "failed to send me the promised letter embodying the new terms, "but sent instead a receipt for Rs. 1,000 on account of a re-draft "for Rs. 1,369-11-10, of which I had no previous notice.

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"I charge the plaintiffs have acted in bad faith. I am advised "that this is a good case for me to enter my defence on merits." In reply thereto the fourth plaintiff filed an affidavit denying the alleged substituted agreement and admitting the receipt of Rs. 1,000 paid on behalf of the defendant, but alleging that it was paid by a Muhammadan without any instructions as to the account against which it was to be placed and that consequently the plaintiff had appropriated it towards another re-draft which was due and had been presented to the defendant more than once for payment.

Mr. *Ryan* for defendant (petitioner).

Mr. *Norton* for plaintiffs.

The Court refused leave to defend.

Mr. *Ryan* for the defendant moved on the 27th July 1896 for an order precluding the plaintiffs from proceeding with this suit under Chapter XXXIX, Civil Procedure Code, on an affidavit sworn by defendant as follows:—"I admit the plaint promissory note of "the 2nd May 1896, but say that, when I executed the same, I "gave an undertaking in writing to the plaintiff in pursuance of "an agreement come to with the latter, at the time through their "attorneys Messrs. Wilson & King, whereby I agreed to ship fort-"nightly through the plaintiffs' free consignments of not less "than Rs. 2,000 in value each until the note should be liquidated— "the first of such consignments to be made at the expiration of "fourteen days from the date of the promissory note.

"The promissory note was a part only of the agreement entered "into between me and the plaintiffs and my obligation under the "said promissory note is modified by the agreement in writing "referred to in paragraph 1."

Mr. *Ryan* for defendant. There was a written agreement at the time of the promissory note that modified the liability under the so-called note and made it not a promissory note under the Negotiable Instruments Act. To see what the agreement was, we must look at the whole contract and construe both documents together. The agreement made at the time of the note shows how the note was to be liquidated, viz., by consignments and in no other way.

[By Court.—What if you made no consignments.]

Mr. *Ryan*.—Then the money would be due. But looking at the whole agreement the liability to pay money is conditional on the failure to consign. In that view, the note is not unconditional. You cannot paste a piece of paper over one part of an agreement.

[By Court.—Suppose you fail to consign for five years, what is the plaintiffs' position; can he sue?]

Mr. *Ryan*.—Yes, but not on the note; this is not a promissory note. It never was a promissory note. Negotiable Instruments Act XXVIII of 1881, section 4. There is here a contract to deliver goods in lieu of paying money in other words a sale.

[By Court.—Then he could only sue for damages for breach.]

Mr. *Ryan*.—On failure to deliver. He has a right of action on the agreement.

[By Court.—Was this promissory note delivered as an escrow?]

Mr. *Ryan*.—No. There was an immediate liability controlled by the contemporaneous agreement. He cited. *Bowerbank* v. *Monteiro* (1) and *Carr* v. *Stephens* (2).

Mr. *Norton* for plaintiff. The contemporaneous agreement is collateral to the promissory note. There is only an agreement not to sue on the note if consignments were made. The note can be sued on by itself.

JUDGMENT.—The plaintiffs advanced a sum of money to the defendant on his promising to supply certain goods. He, however, having failed to do so, the plaintiffs instructed their solicitors, Messrs. Wilson & King, to take steps for the recovery of the amount advanced. When the defendant learnt this, he requested the solicitors, through his vakil Mr. Ambrose, that they should defer taking legal proceedings. Thereupon Messrs. Wilson & King addressed to Mr. Ambrose, on the 2nd May 1896, exhibit I which is as follows:—

"With reference to my conversation with you this morning "regarding Messrs. Carl Simon's claim against Ghouse Sheriff Sahib "and Co., I am instructed to inform you that they are prepared to "stay proceedings on your clients giving them an on-demand pro-"misory note for the amount due up to date, viz., Rs. 7,189-9-11, "*plus* Rs. 21, costs already incurred by them, such promissory note to "carry interest at 9 per cent., and on your client undertaking to ship "fortnightly through our clients, free consignments of not less than "Rs. 2,000 in value each, until the note is liquidated. The first of "such consignments to be made at the expiration of fourteen days "from the date. If these terms are agreeable to your client, please "send us a promissory note in the terms above mentioned signed by

(1) 4 Taunt, 844. (2) 9 B. & C., 758.

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"your client and a letter also signed by your client undertaking to "make the above shipments. The above offer is open until 3 P.M. "to-day and is made without prejudice to our clients' strict legal "rights." This offer was accepted by the defendant, who executed exhibit A and forwarded with it exhibit II which runs thus:— "With reference to the promissory note (exhibit A) executed by us "this day in your favour for Rs. 7,210-9-11, we undertake to ship "fortnightly through you free consignments of not less than "Rs. 2,000 in value each, until the promissory note is liquidated, "the first of such consignments to be made within fourteen days "from this date." Admittedly, the defendant did not send any consignment as he promised to do.

The present suit for the recovery of the amount due under exhibit A was instituted under Chapter 39 of the Civil Procedure Code. The defendant applies for leave to defend on the ground that if exhibit A and exhibit II are taken together, it will be seen that the former was not a mere promissory note and the suit would not lie under the chapter quoted.

Of course parties to what purports to be a mere promissory note may, contemporaneously with its execution and delivery, enter into another agreement with reference to such instrument. The terms of that agreement may, on the one hand, be so inconsistent with the terms of the document, purporting to be a promissory note, as to render it clear that the parties never intended to invest what seems a promissory note with the attributes of an instrument really of that description. On the other hand, the terms of the agreement may go to show that it was not intended that the document which on the face of it is a promissory note, should not operate as such. In the former class of cases, the two agreements must be construed to be parts of but one contract, not severable by the Court for the purpose of giving to one of the two parts, an effect, that it would have had, if such part alone formed the whole contract. In the latter class of cases the agreements are treated as distinct contracts capable of standing side by side.

The contention on behalf of the defendant seemed to be that the present case fell under the first class of cases. Now if, as in *Hartley* v. *Wilkinson*(1), the unconditional promise to pay contained in exhibit A were qualified into a conditional one by exhibit II, the

(1) 4 Camp., 127.

former instrument cannot of course be held to be a promissory note. Manifestly, however, no such qualification is found to exist in exhibit II. Again if, as in *Leeds* v. *Lancashire*(1), the effect of exhibit II were to render the amount mentioned in exhibit A a sum *not certain* that also would be fatal to the view that the latter document is valid as a promissory note. But it cannot be pretended that exhibit II affects in any way the *certainty* of the amount payable under exhibit A. Yet again, if the provisions to be found in exhibit II had been inserted in the same paper as exhibit A and as a part of the contract to pay the amount therein mentioned, then the instrument would of course have had to be declared to be one containing more than what a proper promissory note should contain, and therefore not a negotiable instrument (compare *Kirkwood* v. *Smith*(2). For, in the case just supposed, the circumstance that all the provisions were thus linked together in one and the same document would by itself lead, almost irresistably to the conclusion that the intention was to make the promise to pay the money and the agreement to send the free consignments, terms of the same indivisible contract. Here, however, the two agreements are evidenced by separate documents, and the fact that the parties thought it necessary to make the undertaking set forth in exhibit II, quite distinct from the promise to pay money, contained in exhibit A, is pregnant against the suggestion that the parties meant to qualify the negotiable character of the latter instrument. That the requisition that free consignments should be sent by the defendant emanated, not from him, but from the plaintiffs, is strongly in favour of the view that so far as the latter were concerned, the arrangement about these consignments was merely a supplemental provision made for securing a speedy realization of the debt due to them, and by no means intended to derogate in any way from their right, as payees under the promissory note, to demand unconditional payment of the sum due. As to the defendant's intention, the circumstance that, until the present contention was put forward about three weeks ago, he had spoken of exhibit A as a promissory note and acted upon the footing that it was such, cannot but lead to the inference that he also intended it to be a valid promissory note.

Such being my opinion of the transaction with reference to the circumstances in which the two documents came into existence, is

(1) 2 Camp., 205. (2) 1896 I.Q.B.D., 582.

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there anything in the provisions contained in exihibit II, which compels me, in spite of the obvious intention of the parties as explained above, to decide that exhibit A is not in reality a promissory note? The learned counsel for the defendant seemed to argue that, reading the documents, in question, together, it must be held that the plaintiffs agreed not to enforce payment of the amount of the note until the defendant had had time to send free consignments sufficient to discharge the debt. I have no doubt that the plaintiffs meant to wait and would have waited if the defendant was at all inclined to keep his engagement to forward such consignments. But I should hesitate to say that they entered into a legally binding arrangement not to claim payment before the expiry of the period during which the consignments were to be sent. I think it would be scarcely reasonable to hold that the plaintiffs entered into such a contract with the defendant, simply because they were prepared to afford him facilities for his repaying the money due to them, in the manner contemplated by exhibit II. But suppose that the plaintiffs legally bound themselves to wait, as suggested on behalf of the defendant, it is difficult to see how that renders exhibit A the less a promissory note. The reasoning on which the decision of the House of Lords in *Salmon* v. *Webb and Franklin*(1) rests, is clearly in favour of the view that an agreement by the payee not to enforce payment of the debt due under a promissory note, for a limited time does not, in any way, trench upon the negotiable character of the instrument. In that case, it was found that the payees of a promissory note, payable on demand, had entered into a contract with the maker of the note and with certain other parties who, like the maker himself, had an interest in the money, lent under the note, that no suit should be brought thereon till the youngest of the persons, so interested, had arrived at a certain age. Nevertheless, the payees sued on the note during the life time of the specified individual and before he had attained the age fixed. The agreement referred to was pleaded by the maker as a defence to the claim. *Baron Parke* in stating the opinion of the majority of the Judges, who were consulted on the occasion, expressed himself thus: "My brother "Erle thinks that upon the facts stated in the plea, the defendant "did not intend to deliver the note so as to make himself liable "until the happening of one of the contingencies there specified.

(1) 3 H.L. Cases, 510.

"The other Judges think that the meaning of the phrase 'cotem-"poraneously with and at the same time' is merely that the "agreement alleged in the plea was made at the same time with "the promissory note, not that it was part and parcel of the same "instrument and to be treated and construed as if it was written "on the same paper. We consider it, therefore, to be a collateral "undertaking, perfectly consistent with the existence of a note "containing an absolute promise to pay; and such a collateral "agreement is no answer to the declaration; because it is an "agreement not to sue for a limited time only and a covenant not "to sue for a limited time is no answer to an action." The House of Lords agreed with the view taken by the majority of the Judges as expounded by the learned Baron, and held that the plea set up by the maker was bad in substance.

I am, therefore, of opinion that the ground of defence urged by the defendant is unsustainable, and I refuse to grant leave to defend. The application is dismissed with costs. There will be a decree for the plaintiffs as prayed.

Wilson & King—Attorneys for plaintiffs.

Ramanuja Chariar—Attorney for defendant.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS

v.

VIRASAMI.*

1896. March 26, 27, 31. August 3.

Witness—Committed for trial for offence under s. 193, *Penal Code—Criminal Procedure Code, ss.* 282, 428, 477, 526-A—*Incompetence of juror—New trial—Application for transfer.*

On the trial of certain prisoners on a charge of dacoity, a witness gave false evidence and was committed under section 477, Criminal Procedure Code, for trial on a charge under section 193, Penal Code. After such committal it was discovered that one of the jurors empannelled in the dacoity case was deaf and partly blind; and thereupon under section 282, Criminal Procedure Code, the case was tried *de novo* before a competent jury.

* Criminal Appeal No. 704 of 1895.