1879

BADRI PRASAD v. MURLIDHAR.

found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied, if the accounts were taken, contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs. 565, or so much thereof as they should fail to prove had been actually expended by them in respect of the costs of collection.

Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the defendants to file accounts would be to increase the costs of suit which must ultimately fall on the plaintiff.

Their Lordships therefore see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court, and to dismiss this appeal with costs.

Agent for the appellant: Mr. *T. L. Wilson.*

Agent for the respondent: Messrs. *Pritchard* and *Sons.*

APPELLATE CIVIL.

1880
January 2.

Before Mr. Justice Spankie and Mr. Justice Straight.

COHEN (DEFENDANT) *v.* THE BANK OF BENGAL (PLAINTIFF).*

Bill of Exchange—Exclusion of Evidence of Oral Agreement—Act I of 1872 (Evidence Act), s. 92.

It was agreed between the Bank of Bengal at Calcutta and *C* and *Co.*, who carried on business there, that the Branch of the Bank at Cawnpore should discount

---

* Second Appeal, No. 318 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 13th November, 1878, modifying a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 25th September, 1878.

bills to a certain extent drawn by *C*, who carried on business at Cawnpore, on *C* and *Co.* against goods to be consigned by rail to *C* and *Co.*, and that the railway receipts for such consignments should be forwarded to *C* and *Co.* through the Cawnpore Branch of the Bank. *C* accordingly drew a bill on *C* and *Co.*, payable twenty-one days after date, which the Cawnpore Branch of the Bank discounted, receiving the railway receipt for certain goods consigned to *C* and *Co.* *C* and *Co.* having accepted this bill, the Bank handed over the railway receipt to them. In a suit by the Bank against *C*, on the bill, the latter set up as a defence that the bill had been discounted by the Bank on the oral understanding that the railway receipt was not to be transferred to *C* and *Co.* until they had paid the amount of the bill, and that the Bank had, by the breach of this condition, determined the defendant's liability. *Held* by STRAIGHT, J. (SPANKIE, J., dissenting) that evidence of such oral understanding was not admissible even under proviso 3 of s. 92 of Act I of 1872.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Messrs. *Conlan* and *Colvin*, for the appellant.

Messrs. *Hill* and *Howard*, for the respondent.

The following judgments were delivered by the Court:

SPANKIE, J.—The liability of appellant under ordinary circumstances is not denied, and it may be said that his entire case stands or falls with the allegation, that the railway receipt which accompanied the bill was not to be parted with to Cohen Brothers until they had paid the amount of the bill, and it is urged that the Bank did part with the receipt before the bill had been discharged, and therefore the appellant was no longer liable. It is admitted by appellant in his third plea that the determination of this point was the true issue in the suit.

I did not understand that it was seriously contended that appellant was not at liberty to offer evidence of the agreement or understanding set up by him. But I am disposed to hold that the oral agreement set up is not one that contradicts, varies, adds to, or subtracts from, the terms of the contract, and that both provisos 2 and 3 of s. 92 of the Evidence Act might apply to his case.

I do not, however, think that it is necessary to consider this point at any length, because it appears to me that both the lower Courts have disposed of the averment, which raises a question of fact. Was or was there not any such oral agreement? The first Court found

1880

COHEN v. THE BANK OF BENGAL.

that the railway receipt was taken from appellant for the satisfaction of Cohen Brothers, on whose letter of credit the amount of the bill was advanced to appellant, and for no other reason. The lower appellate Court must be regarded as having the issue before it in the words of the second plea in the memorandum of appeal below, "that the conduct of the plaintiffs debarred them from recovering in the suit against defendant." The Judge sets out in his judgment the contention of defendant that plaintiffs had failed to recover the value of the bill, and made over the railway receipt to Cohen Brothers without realising upon their acceptance, and therefore he was not liable. The lower appellate Court refers to the finding of the first Court, that it was at the request of Cohen Brothers, and for their satisfaction, that the railway receipt was taken by the plaintiff and forwarded with the bill of exchange for acceptance. The Judge then observes, that on a full consideration of the facts elicited he sees no cause to distrust the finding, and that he agrees with the lower Court as to the facts. The finding seems to me to dispose of the plea as to any separate oral understanding between the parties that the railway receipt was not to be given up until the amount of the bill had been paid.

The appeal having come as a second appeal, we cannot interfere with the finding of fact on the point, and so the legal admissibility of the evidence to prove the understanding does not arise so far as the appellant is concerned, for he relies upon it. I would therefore dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—This was a suit brought to recover the sum of Rs. 2,500, with a further amount for interest and protesting charges, due upon a bill of exchange, dated 2nd August, 1878, drawn by the defendant, appellant, upon and accepted by Cohen Brothers and Co. of Calcutta, in favour of the respondent Bank, and payable twenty-one days after date. The defendant pleaded in substance, that the bill was not discounted by the Bank upon any security of his, but upon the strength of a letter of Cohen Brothers and Co., and a certain railway receipt for goods, which two documents will be more particularly adverted to presently. He also alleged an understanding between himself and the Bank, that the railway receipt was not to be parted with to Cohen Brothers and Co., until they had paid the

amount of the bill to the Bank. The defendant further pleaded, that as the Bank had already brought a suit against Cohen Brothers and Co. and obtained a decree, there should be no second suit against him for the amount of the bill. Both the lower Courts found in favour of the plaintiff Bank, and decreed the claim. The defendant now appeals and his pleas raise the same questions as those already detailed.

The facts of the case would appear to be as follows:—The defendant, Mr. A. M. Cohen, resides and carries on business at Cawnpore. The Bank of Bengal, whose head offices are in Calcutta, has a branch at Cawnpore under the management of a Mr. Sterndale. On the 13th June, 1878, the following letter was received from the firm of Cohen Brothers and Co., then carrying on business in Calcutta, by the secretary and treasurer of the Bank of Bengal:—

"Dear Sir: We request the favour of your instructing your Cawnpore agency to take Mr. A. M. Cohen's drafts on us, to the extent of Rs. 5,000, from time to time as may be required, which we undertake to honor and pay till we countermand this. Mr. A. M. Cohen is an old resident of Cawnpore and no doubt well-known there. The drawings will be against hides and other produce to our consignment. As requested, we will advise him when sending railway receipts to us to do so through your Bank."

The authorities at the head-office of the Bank appear to have acceded to this arrangement, and instructions were given to the Cawnpore branch to honor the drafts of Mr. A. M. Cohen on Cohen Brothers and Co. On the 2nd August, 1878, the bill for Rs. 2,500, on which the suit is based, was drawn by Mr. Cohen, and discounted by the Bank at Cawnpore, and was handed over with a railway receipt for goods, valued at Rs. 2,800, for transmission to Calcutta, and acceptance there by Cohen Brothers and Co. In due course, namely, on the 5th August, the bill was accepted by them, and thereupon the railway receipt was handed over to them, and in ordinary course, no doubt, the goods were obtained and disposed of in the ordinary way of their business. Before the twenty-one days of the bill had run Cohen Brothers and Co. would seem to have got into financial difficulties, and when it matured and was presented for payment, they were unable to meet it. A suit was consequently

brought against them in the Calcutta High Court upon the bill and judgment was recovered, but no satisfaction by execution or otherwise was obtained. Consequently the present suit was brought against the defendant, as drawer, and he being resident at Cawnpore, it was instituted in the Court of the Subordinate Judge there.

It has been argued on the part of the defendant, appellant, that the bill was in reality discounted on the faith of Cohen Brothers and Co's. letter of June 13th, already set out; that it was only handed over to the Bank on the distinct undertaking that the railway receipt, which accompanied it, was not to be parted with to Cohen Brothers and Co., until they had paid the amount of the bill, and that the Bank by committing a breach of this condition had determined the liability of the defendant.

It is impossible to accept this contention. It is more than doubtful whether any such defence as that which has been set up is properly admissible, even under cl. 3, s. 92 of the Evidence Act. The whole argument for the defendant has proceeded upon a somewhat loose view of the law relating to contracts, as far as it affects negotiable instruments, and the relative position of drawer, payee, and acceptor of a bill of exchange seem to have been entirely lost sight of. S. 92 of the Evidence Act was no doubt framed in accordance with the current of English decisions upon the question of how far parol evidence can be admitted to affect a written contract, and this Court must take care, in placing a construction upon it, not to create a precedent, that would open the door to indiscriminate parol proof of transactions, where written documents have recorded what has passed between the parties. It is perfectly intelligible why there are authorities which go to show, that a defence may be set up to an action on a bill of exchange to the effect, that there was no consideration for it, but it is equally plain, that a defendant may not allege an oral agreement, that contradicts or operates in defeasance of a clear contract, which appears upon the face of a written instrument. The law upon this point may be found fully discussed in *Alrey* v. *Crux* (1), the circumstances of which case are not altogether unlike those involved in the present suit. If the contention of the defendant is correct, that he drew

(1) L. R., 5 C. P., 37.

the bill and handed it to the Bank on the understanding that the railway receipt was not to be given up to Cohen Brothers and Co. till they had paid the Rs. 2,500, his position as drawer would have involved no liability, and the instrument itself would in reality not be what it purports. What necessity was there, under such circumstances, to make it run twenty-one days, when it was intended practically to be a draft payable on demand, and how could the acceptors, who were ignorant of any such arrangement, be bound by it? Had the Bank refused to deliver the railway receipt to Cohen Brothers and Co., when they had accepted the bill on the 5th August, and damage or loss had been sustained by such refusal, it is difficult to see what defence there would have been to an action at their instance. The defendant was the consignor of the hides, the firm of Cohen Brothers and Co. the consignees, and any conditions or terms, such as those set up by the defendant, as having been agreed to between himself and the Bank, cannot in an action on a bill of which the consignees, who knew nothing of any such conditions or terms, were the acceptors, be prayed in aid by him to escape his liability. If the defence is worth anything it must be taken to its fullest extent, the effect of which must be to render the bill of August 2nd absolutely inoperative, except against an acceptor, who is in entire innocence of the circumstances under, and the condition upon which, it was drawn. This position is irreconcilable not only in law, but according to all commercial practice and custom. The Bank of Bengal would, indeed, be carrying on a strange business, if, at the ordinary rate of discount, it made advances and acted as an intermediary in the fashion suggested by the defendant. This version of the transaction is altogether at variance with common knowledge and ordinary mercantile procedure, while the position taken up by the Bank is in accordance with all well-understood and commonly practised mercantile custom. It is perfectly obvious, that at the time the letter of June 13th was written the Bank authorities had requested, as an earnest of the *bona fides* of the transactions, that in discounting the bills of A. M. Cohen the railway receipts should pass through their hands, and to suggest that they even intended to be or ever were bailees for A. M. Cohen is absurd. In the most usual and well understood fashion he, as consignor, was drawing on his consignees against his consignment,

and was obtaining discount to very nearly the full value of the goods. What profit, proportionate to the risk, the Bank was to make, if it was merely acting as agent for the defendant, in the manner suggested by him, it is not very easy to see. Nor is it at all comprehensible, why Cohen Brothers and Co. were to go through the form of accepting a bill, if the goods in respect of which their acceptance was to be given were only to come into their hands upon payment of cash. The whole case set up by the defendant appears to be untenable and impossible, and I am of opinion that each and all of his pleas fail. Although I differ with Mr. Justice Spankie, as to the admissibilty of the defence set up to this claim in point of law, this will in no way interfere with or prevent our decision of this case. The lower Courts have effectually and fully disposed of the questions of fact raised in issue upon all the pleas put forward, and with their findings we cannot interfere, though I may say I entirely agree with them. The appeal must be dismissed with costs.

Appeal dismissed.

FULL BENCH.

[18]80 [Janua]ry 3.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

BANS BAHADUR SINGH AND OTHERS (OBJECTORS) v. MUGHLA BEGAM AND OTHERS (DECREE-HOLDERS).*

CHUNNI BAI (OBJECTOR) v. NAROTAM DAS (DECREE-HOLDER) †

Appeal to Her Majesty in Council—Security for the costs of the respondent—Execution of decree against surety—Act X of 1877 (Civil Procedure Code), ss 253, 610.

An appeal was preferred to Her Majesty in Council from a final decree passed on appeal by the High Court, and *B* and certain other persons on behalf of the appellant gave security for the costs of the respondent. Her Majesty in Council dismissed the appeal, and ordered the appellant to pay the costs of the respondent. The respondent applied to the Court of first instance for the execution of that order against *B* and the other persons as sureties. *Held* by STUART, C. J., PEARSON, J., and OLDFIELD, J., that, under ss. 610 and 253 of Act X of 1877, such order could be executed against the sureties.

Per SPANKIE, J., and STRAIGHT, J.—*Contra.*

* First Appeal, No. 38 of 1879, from an order of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 14th January, 1879.

† First Appeal, No. 65 of 1879, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 29th March, 1879.