APPELLATE CIVIL.

1887
January 17.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Oldfield.

BALBHADAR PRASAD (PLAINTIFF) v. THE MAHARAJAH OF BETIA (DEFENDANT).*

Evidence—Contract—Promissory note executed by way of collateral security—Unstamped document—Admissibility of evidence of consideration aliunde*—Suit for money lent—Act I of* 1872 (*Evidence Act*,) s. 91.

A decree-holder agreed with the employer of his judgment-debtor who had been arrested in execution of the decree, to discharge the latter from arrest upon the condition that his master would pay the amount of the debt. Accordingly, the master executed a document the material portion of which was as follows:—"Be it known that I have borrowed Rs. 986-15 from you in order to pay a decree which was due to you by *D.P.*, so I write this in your favour to say that I will pay the said amount to you in six months with interest at 12 annas on every hundred rupees every month, and then take back this *parwana* from you." This was written upon plain unstamped paper. Subsequently, the amount due not having been paid, the decree-holder sued the executant of the document for its recovery. It was objected that the suit was not maintainable without the document being put in evidence, but that, being a promissory note and not stamped as required by art. 11 of sch. i of the General Stamp Act (I of 1879), it was inadmissible in evidence, with reference to s. 34.

Held that the document, though it was a promissory note, was not the contract out of which the defendant's liability arose, but was merely a collateral security for the defendant's fulfilment of his promise to pay the debt, and that under the circumstances the plaintiff was entitled to give evidence of the consideration, and to maintain the suit as for money lent, apart from the note altogether.

THE plaintiff in this case, Balbhadar Prasad, held a money decree of the Court of the Munsif of Benares, against one Dumbar Pandey, a servant of the late Maharajah of Betia. This decree was transferred for execution to the Court of the Munsif of Allahabad, and a warrant was issued by that Court for the arrest of the judgment-debtor. At that time the Maharajah had come to Allahabad for the purpose of certain religious observances, and was accompanied by Dumbar Pandey. On the 15th January, 1882, Dumbar Pandey was arrested under the warrant. The Maharajah, on hearing of the arrest, sent for the decree-holder and asked him to obtain the discharge of the judgment-debtor from arrest, stating that he (the Maharajah) was willing to pay the amount due under the

* Second Appeal No. 386 of 1886, from a decree of F. E. Elliot, Esqr. District Judge of Allahabad, dated the 29th September, 1885, confirming a decree of Babu Abinash Chander Bannerjee, Subordinate Judge of Allahabad, dated the 26t May, 1885.

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decree. It was agreed that Dumbar Pandey should be released in consideration of the Maharajah giving the decree-holder a *parwana* or note for Rs. 986-15, that being the amount of the debt, and interest at six months. This note was in the following terms :— "My blessing to Balbhadar Prasad *alias* Bhaddi Mal. Be it known that I have borrowed Rs. 986-15 from you in order to pay a decree which was due to you by Dumbar Panday; so I write this in your favour to say that I will pay the said amount to you in six months, with interest at 12 annas on every hundred rupees every month, and then take back this *parwana* from you. 11th Magh, 1289 fasli."

This document did not bear any stamp, as required by the provisions of the General Stamp Act (I of 1879), but was a plain unstamped paper. Upon receipt of the document the decree-holder obtained the release of Dumbar Pandey, stating that, having received from the Maharajah a note for the amount due, he did not desire to enforce the decree. Accordingly satisfaction was entered upon the decree, and the case was struck off the file of the Court. The Maharajah did not pay the amount due under the *parwana* or note, and the present suit to recover that amount was brought after his decease by the plaintiff against the present Maharajah of Betia, as his son and legal representative. The suit was instituted in the Court of the Subordinate Judge of Allahabad, the total amount claimed being Rs. 1,253-6. The principal plea of the defendant was that the *parwana* produced by the plaintiff was a promissory note, and, being unstamped, was inadmissible in evidence, and that the suit, being based upon this document, was unmaintainable.

The Court of first instance (Subordinate Judge of Allahabad) held that the document in question was a promissory note within the meaning of s. 4 of the Negotiable Instruments Act (XXV of 1881) and not being stamped according to art. 11, sch. i of the General Stamp Act, was, under s. 34 of that Act, inadmissible in evidence. The judgment of the Court continued as follows :—

"If the document be not receivable in evidence, can we admit other evidence to prove the transaction? The learned pleader for the plaintiff contends that we can do so, and he relies on the following precedents—*Golap Chand Marwaree* v. *Thakurani Mohokoom*

Kooaree (1), *Clay* v. *Crowe* (2), and *Wain* v. *Bailey* (3). It was, no doubt, ruled in those cases that under certain circumstances, although a promissory note might not be receivable in evidence, the plaintiff might fall back on the original consideration and give other evidence of it. In what cases that may be done, and in what cases it may not be done, has been clearly explained by Garth, C. J., in the case of *Sheikh Akbar* v. *Sheikh Khan* (4). His Lordship says:—'When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor *on account of the debt*, and if it is not paid at maturity, the creditor may disregard the bill or note, and sue for the original consideration.....But when the original cause of action is the bill or note itself, and does not exist independently of it, as, for instance, when, in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent, otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such cases the note is the only contract between the parties, and if for want of a proper stamp or some other reason, the note is not admissible in evidence, the creditor must lose his money.' See also *Ankur Chunder Roy Chowdhry* v. *Madhub Chunder Ghose* (5) and *Prossunno Nath Lahiri* v. *Tripoora Soondaree Dabee* (6). The facts mentioned above show clearly that the promissory note in this case is the plaintiff's original cause of action against the defendant. It was by that document that the defendant's father bound himself to pay the money due on the decree the plaintiff had against Dumbar Pandey. The defendant's father was not a judgment-debtor under the decree. Simply to prove the decree would prove nothing against him. It is only by proving the promissory

(1) I. L. R., 3 Calc. 314.
(2) L. R., 8 Exch. 295.
(3) 10 A. and E. 616.
(4) I. L. R., 7 Calc. 256.
(5) 21 W. R. 1.
(6) 24 W. R. 88.

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note that the plaintiff can prove that the defendant's father undertook the liability of paying that debt. There was no contract by the defendant's father separate from and independent of the promissory note. It was not a case in which, on the verbal contract of the Maharajah to pay the money, the plaintiff released Dumbar Pandey, and afterwards the Maharajah gave the promissory note in addition to his verbal contract for the satisfaction of the plaintiff. Here the negotiations terminated in the granting of the note by the Maharajah to the plaintiff, and the plaintiff accepted no verbal promise of the Maharajah, but released Dumbar Pandey on receipt of the note. If the note be inadmissible in evidence, the plaintiff cannot prove his case against the defendant in any other way..... The plaintiff's suit is dismissed. Each party will bear his own costs."

The plaintiff appealed from the Subordinate Judge's decree to the Sessions Judge of Allahabad, the material portions of whose judgment were as follows:—

"The appellant seeks to show that his case rests not on this document but on the verbal agreement made by the late Maharajah. But, as the lower Court has observed, there was no contract by the defendant's father separate from and independent of the promissory note. The arrested judgment-debtor was not released until the note had been executed. According to the plaintiff-appellant's own showing, when the late Maharajah said he would be responsible for the debt, the judgment-debtor was taken to his lodging, but retained in custody until the note had been signed. It is not necessary to detail the authorities quoted, though they have received attention. The facts are simple. Had the appellant released the judgment-debtor on the Maharajah's verbal promise to pay, he could then have rested his claim on the verbal promise. But as he would not release him until the written guarantee had been executed, his claim can only rest on the written guarantee. The contract was, under such circumstances, incomplete until the execution of the written guarantee. I therefore dismiss the appeal with costs."

The plaintiff appealed to the High Court.

Munshi *Sukh Ram* for the appellant.

The Hon. *T. Conlan*, Pandit *Bishambar Nath*, and Munshi *Madho Prasad*, for the respondent.

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EDGE, C. J.—This was an action by which the plaintiff sought to recover from the representative of the Maharajah of Betia a sum of Rs. 1,253-6. The action arose in this way. It appears that the deceased Maharajah, when on a visit to Allahabad for the purpose of religious observances, was accompanied by a servant or retainer against whom the plaintiff had obtained a money-decree. After the arrival of the Maharajah in Allahabad, the present plaintiff, the decree-holder, arrested the retainer of the Maharajah. On that the Maharajah requested the plaintiff to discharge his servant from arrest, offering to pay the amount of the debt. The plaintiff consented to release the retainer upon the Maharajah becoming liable for the amount of the debt, and insisted on having the Maharajah's promissory note at six months for the debt and interest. On this the Maharajah executed the promissory note, which is found to be not stamped. Under these circumstances the two Courts below held that this action was not maintainable, taking the view that the action could not be maintained without the note being put in evidence, and the plaintiff was prohibited by the Stamp Act from putting it in evidence on account of the want of stamp.

In my opinion this action can be maintained apart from the note altogether. It is said by Mr. *Conlan* that the note is the sole evidence of the contract; that the contract which was entered into between the Maharajah and the plaintiff was reduced into writing in all its essentials and embodied in that note. Now it is admitted what the contract was. We also have the promissory note before us, and, if it were necessary, we find that the note does not express what the real contract was.

The contract was that the Maharajah undertook to pay this debt on condition of the plaintiff releasing his debtor. That is a contract not embodied in the note. The note, in my opinion, is merely a collateral security for the fulfilment by the Maharajah of the promise to pay this debt, and does not form in any sense the contract between the parties. I am of opinion, consequently, that the note cannot be considered as the contract between the parties. Of course the promissory note is a contract, but it cannot be considered as the contract out of which the defendant's liability arose.

Under these circumstances it appears to me that in this case it is open to the plaintiff to show what the verbal contract was,—*i.e.*

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to prove what was the consideration for the note, in the same way as if he had lent money or delivered goods to the Maharajah. In the latter case it has been held here that the lender of the money and the vendor of the goods could maintain his action on the consideration for the note. Under these circumstances this appeal must be allowed, and the case must go down to the first Court to be tried on the merits. The appeal is decreed with all the costs.

STRAIGHT, J.—I think the plaintiff was entitled to resort to the consideration, and to maintain the suit against the defendant for money lent. I fully agree with the learned Chief Justice in the proposed order of remand.

OLDFIELD, J.—I think that the document of the 11th Magh 1289 fasli is a promissory note, and, as such, required to be stamped to be admissible in evidence. But I agree with the learned Chief Justice in holding that the claim of the plaintiff may be proved by other evidence. I think the question is one of the admissibility of evidence, and ought to be governed by s. 91 of the Indian Evidence Act, which says:—"When the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases, in which secondary evidence is admissible, under the provisions hereinbefore contained." I think that refers to cases where the contract has by the intention of the parties been reduced to writing. The following extract from Best's *Principles of Evidence*, second edition, page 282, puts very well what is meant:—"Where the contents of *any document* are in question, either as a fact in issue or a subalternate principal fact, the document is the proper evidence of its *own contents*, and all derivative proof is rejected until its absence is accounted for. But where a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it..... So, although where the *contents* of a marriage register are in issue,

verbal evidence of those contents is not receivable, yet the *fact* of the marriage may be proved by the independent evidence of a person who was present at it." If, therefore, in this case this document was intended to embody the contract of the parties, I should hold that the evidence of its contents would not be admissible. But in my opinion there is nothing whatever to show this. The claim has been brought upon the promise by the plaintiff, and he states in his plaint that in execution of his decree he arrested the retainer of the Maharajah, upon which "the master of the judgment-debtor, having taken upon himself the responsibility of the decree-money, had the said Dumbar released from arrest, and made a promise to the plaintiff to pay the said sum of Rs. 986-15, with interest at 12 annas per mensem, within a period of six months; that by virtue of the said promise of the Maharajah the plaintiff had his decree against Dumbar Pandey struck off as wholly satisfied." The promissory note is merely used, and was taken, as has been observed by the learned Chief Justice, as collateral security for the debt. Under these circumstances I see no reason whatever why the claim cannot be proved *aliunde* by other evidence. I might also refer, as entirely in point, to an unreported case decided by this Court on the 15th March, 1882, from a reference from the Judge of the Small Cause Court at Benares. (1) I therefore concur in the order proposed. (2).

Cause remanded.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

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January 28

WAZIR JAN (DEFENDANT) *v.* SAIYYID ALTAF ALI (PLAINTIFF)*.

Muhammadan Law—Gift in contemplation of death—Will—Disposition in favour of heir—Consent of other heirs.

A Muhammadan executed in favour of his wife an instrument which purported to be a deed of gift of all his property. At the time when he executed this instrument he was suffering from an illness likely to have caused him to apprehend an early death, and he did, in fact, die of such illness upon the same day. There was no evidence that any of his heirs had consented to the execution of the deed. After his death, his brother sued the widow to set aside the deed as invalid.

Held that the instrument, though purporting to be a deed of gift, constituted, by reason of the time and other circumstances in which it was made, a death-bed

* First Appeal No. 194 of 1885 from a decree of Maulvi Muhammad Saiyyid Khan, Subordinate Judge of Agra, dated the 14th September, 1885.

(1) *Gopi Nath* v. *Hurrish Chandar*, Misc. No. 35 of 1882, Oldfield and Brodhurst, JJ. (2) See *Pothi Reddi* v. *Velayudasivan*, I. L. R., 10 Mad. 94.—REP.