1906

AULIA BIBI v. ALA-UD-DIN.

prepared in accordance with the instructions of a testator and to which he expressed approval believing that his instructions were carried out, would be valid if the will did embody the instructions. Now, according to the Muhammmadan Law, a will may be made either verbally or in writing, and no special form or solemnity for making or attesting a will is prescribed. It is sufficient if a will can be proved to have been really and truly the will of the testator. The learned District Judge has found that although the will in this case is not proved to have been signed by the testatrix or any one on her behalf, yet the document does represent her real will and he has found that she was competent at the time to make a will. It has been argued before us that this being the case the finding that the will was not signed is immaterial. We think that in view of the Muhammadan Law there is force in this contention. The will was found by the lower appellate Court to be the genuine last will of the testatrix and was made at a time when she was competent to make a will. We dismiss, the appeal, but, having regard to the fact that the respondents set up the case that the will was executed by the testatrix and entirely failed to prove this, we allow no costs of this appeal.

1906

June 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

JAI KUMAR AND OTHERS (DEFENDANTS) *v.* GAURI NATH (PLAINTIFF).*

Act No. IX of 1872 *(Indian Contract Act), section* 23—*Contract—Agreement opposed to public policy—Promissory note given for repayment of money in respect of which a criminal prosecution might possibly have lain.*

Where a *bonâ fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor by a third party as security for the debt constitutes a valid agreement.

Keir v. *Leeman* (1), *Flower* v. *Sadler* (2) and *Kessowji Tulsidas* v. *Hurjivan Muljí* (3), referred to.

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* Second Appeal No. 338 of 1905, from a decree of Rai Bahadur Lala Baij Nath, Judge of the Small Cause Court, Allahabad, exercising the powers of a Subordinate Judge, dated the 24th of January, 1905, reversing the decree of Babu Bhola Nath Seth, Munsif of Allahabad, dated the 21st of September 1904.

(1) (1844) L. R., 9 Q. B., 371, 392: 72 R. R., 293.
(2) (1882) L. R., 10 Q. B. D., 572.
(3) (1887) I. L. R., 11 Bom., 566.

THIS was a suit to recover money on a promissory note executed on the 18th of March, 1904, by one Bechu Lal and his son, Jai Kumar, in favour of the plaintiff, Gauri Nath. Gauri Nath was treasurer of the Bank of Bengal agency at Allahabad and Bechu Lal was the assistant treasurer. It appears that Bechu Lal was in the habit of taking money from the Bank of Bengal for his private requirements, and on the 18th of March, 1904, according to the plaintiff, some Rs. 881 odd were due from him. On this date Bechu Lal and his son, as mentioned above, executed the promissory note in suit. Bechu Lal died of plague on the 19th of March. The main defence to the suit was that the promissory note had been given for the purpose of avoiding the prosecution of Bechu Lal for embezzlement. The Court of first instance accepted this plea, and therefore dismissed the plaintiff's suit. On appeal, however, the lower appellate Court reversed the first Court's decree and gave the plaintiff a decree for Rs. 830. The defendants thereupon appealed to the High Court.

Munshi *Gulzari Lal* and Babu *Surendra Nath Sen*, for the appellants.

Dr. *Tej Bahadur Sapru* and Pandit *Mohan Lal Nehru*, for the respondent.

STANLEY, C.J. and KNOX, J.—This appeal arises out of a suit brought by the plaintiff to recover the amount due on foot of a promissory note of date the 18th of March, 1904, executed by Bechu Lal, now deceased, and his son, the defendant appellant, Jai Kumar. The circumstances under which the note was given are as follows:—Bechu Lal was in the service of the plaintiff as Assistant Treasurer of the Bank of Bengal, the plaintiff being the Treasurer. In addition to Government money, he had in deposit with him from time to time money belonging to the plaintiff and also money belonging to the Bank, and he used to keep a receipt and disbursement account in respect of these moneys. It is alleged in the plaint that Bechu Lal from time to time took money out of the amount so in deposit with him, to meet his own requirements, and sometimes entered his name as debtor in respect of the sums so taken and sometimes omitted to do so. On the 18th of March, 1904, a sum of Rs. 881-8-9 was due by him in respect of money so taken. Of this sum

1906

JAI KUMAR v. GAURI NATH.

the plaintiff remitted a sum of Rs. 31-8-9. This left a balance due of Rs. 850. It appears that on the 17th of March, 1904, Bechu Lal was attacked with plague, to which he succumbed on the 19th. The plaintiff on the 18th of March, 1904, required him to make good the sums which were owing by him, but, not finding it convenient to pay the amount, he gave the promissory note which is the subject-matter of the suit, his son, Jai Kumar, joining with him in executing it. There is no allegation in the plaint that Bechu Lal embezzled any money, and in the defence filed by Jai Kumar and Sumer Chand, his brother, there is a statement that Bechu Lal did not embezzle or appropriate any money, but they set up a defence to the effect that the note was given to stifle the prosecution of Bechu Lal, and therefore was illegal and could not form the basis of a suit.

The Court of first instance took this view of the situation and dismissed the plaintiff's claim; but upon appeal to the learned Subordinate Judge, he overruled the decision of the lower Court and gave a decree to the plaintiff for a sum of Rs. 830. He came to a distinct finding that the note was not given for the purpose of stifling a prosecution, but that it was given to satisfy a legal liability under which Bechu Lal lay to the plaintiff.

If the debt so contracted by Bechu Lal was not a debt of an immoral nature, his sons, as pious Hindu sons, would be under an obligation to satisfy it out of any ancestral property to which they may be entitled; but the allegation is that the debt was an illegal and immoral debt, and a debt in respect of which a suit could not be maintained. We are of opinion that, in view of the finding that the promissory note was given to satisfy a *bonâ fide* claim which the plaintiff had against Bechu Lal, and was not given to stifle a prosecution, it was a debt which was binding upon Bechu Lal, and was not in any way of the nature of an immoral or illegal debt. It is difficult to see how the giving by a Hindu debtor of a security to his creditor for the payment of a just claim can, from any point of view, be regarded as an illegal or immoral debt for which his sons would not be liable. If authority were necessary upon this question, we might refer to one or two cases decided in the Courts in England and also in this

country. In the case of *Keir* v. *Leeman* (1), Tindal, C.J., laid down the law as follows:—"We have no doubt that in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit." In the case of *Flower* v. *Sadler* (2), it was held that, in order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to show that the debtor was thereby induced to abstain from prosecuting. In that case Lord Coleridge, C.J., quoted with approval the language of Tindal, C.J., which we have quoted; and Cotton, L.J., in the course of his judgment observed:—"It seems to me that there is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor. A threat to prosecute is not of itself illegal, and the doctrine contended for does not apply where a just and *bonâ fide* debt actually exists, where there is good consideration for giving a security, and where the transaction between the parties involves a civil liability as well as possibly a criminal act. In my opinion a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor." This is a clear and cogent statement of the law in England. In the case of *Kessowji Tulsidas* v. *Hurjivan Mulji* (3), it was held that a man to whom a civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not in consideration of such securities agree not to prosecute, and such an agreement will not be inferred from the creditor using strong language. He must not, however, by stifling a prosecution obtain a guarantee for his debt from third parties.

(1) (1844) L. R., 9 Q. B., 371, 392: 72 R. R., 298.
(2) (1882) L. R., 10 Q. B. D., 572.
(3) (1887) I. L. R., 11 Bom., 566.

1906

JAI KUMAR v. GAURI NATH.

For the foregoing reasons we think that the decision arrived at by the learned Subordinate Judge is not open to objection. We dismiss the appeal with costs including fees in this Court on the higher scale.

1906
June 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

JAGAN NATH AND ANOTHER (DEFENDANTS) v. MILAP CHAND (PLAINTIFF).*

Limitation—Foreclosure decree—Possession formal and actual.

Where formal possession has been given under a final foreclosure decree, but the mortgagor has continued in actual possession, the remedy is by suit and not under section 244 of the Code of Civil Procedure. Consequently the law of limitation applicable is that governing suits, not execution proceedings. *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (1), *Hari Mohan Shaha* v. *Baburali* (2) and *Mangli Prasad* v. *Debi Din* (3), referred to.

THE father of the plaintiff respondent had been put into possession of the land in suit under the final decree in a suit for foreclosure of a mortgage. Notwithstanding this the defendants appellants had retained possession of the land and had successfully resisted an application made to the Revenue Courts for the expunction of their names from the *khewat*.

The plaintiffs now sue for possession.

The Court of first instance dismissed the suit on the ground that the question at issue, being governed by the provisions of section 244 of the Code of Civil Procedure, should be decided in execution under the foreclosure decrees, and the plaint, if treated as an application in execution, would be barred by limitation.

The lower appellate Court held that the decree had been executed in full when possession had been given; that no further question could arise upon that decree, and the refusal of the defendants to submit to the proceedings of the Court conferred no right to execute the decree a second time.

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* Second Appeal No. 359 of 1905, from a decree of A. Sabonadiere, Esq., District Judge of Jhansi, dated the 27th of February, 1905, reversing the decree of Babu Khirode Gopal Banerji, Munsif of Jhansi, dated the 23rd of December, 1904.

(1) (1884) I. L. R., 11 Calc., 93. (2) (1897) I. L. R., 24 Calc., 715.
(3) (1897) I. L. R., 19 All., 499.