

was still in force. It is quite true that in the course of his examination in court the arbitrator expressed his willingness to resume his functions as arbitrator provided the court would give him an order to that effect. In the first place this offer, if it can be treated as an offer, was only qualified. In the next place we do not think the court had any jurisdiction to give the arbitrator any directions to carry on the proceedings.

The result, therefore, is that we have before us an application to enforce an agreement to refer a dispute to the arbitration of a gentleman who had already declined to act and in these circumstances we hold that it would be quite impossible for the plaintiff to have an order such as he sought in the court below.

Other points are set out in the memorandum of appeal here, but it has been agreed before us that the decision of the point which we have already determined is sufficient to dispose of the appeal. The result, therefore, is that the appeal fails and is dismissed with costs.

Appeal dismissed.

[Compare *Shib Charan v. Rati Ram*, I. L. R., 7 All., 20, and *Dukhu v. Bhinak*, Weekly Notes, 1884, p. 209.—Ed.]

Before Mr. Justice Lindsay and Mr. Justice Ryves.

MUNDAR BIBI AND ANOTHER (DEFENDANTS) v. BAIJ NATH PRASAD
(PLAINTIFF)*

Cause of action—Suit for recovery of money lent—First suit based on promissory note—Subsequent suit for same relief based on plaintiff's account books.

Defendants borrowed money from plaintiff and executed a promissory note therefor in his favour. Plaintiff sued upon the promissory note, but the suit was dismissed, not on account of any defect in the promissory note, but owing to the plaintiff's personal default, and this order of dismissal became final.

Held, that the plaintiff could not thereafter sue the defendant on the basis of entries in the plaintiff's books of account to recover the same money. *Baij Nath Das v. Satig Ram* (1) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

* First Appeal no. 41 of 1919, from an order of Pratab Singh, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 29th of January, 1919.

1919

AHMAD
NUR KHAN
v.
ABDUR
RAHMAN
KHAN.

1919

November, 26.

1919

MUNDAR
BIBI
v.
BAIJ NATH
PRASAD.

Munshi *Panna Lal* for the appellants.

Dr. *Surendra Nath Sen*, Munshi *Haribans Sahai* and Pandit *Lakshmi Narain Tewari* for the respondents.

LINDSAY and RYVES, JJ.:—This appeal arises out of the following circumstances:—Baij Nath Prasad, the plaintiff, sued the defendants in the Court of the Munsif of Allahabad in suit No. 633 of 1916. In that suit he stated in the first paragraph of his plaint that the defendants, after borrowing Rs. 575 by means of a promissory note on the 26th of April, 1916, at Allahabad, promised to pay on demand. The cause of action arose at Allahabad on the 26th of April, 1916, the date on which the promissory note was executed. The suit was dismissed under the provisions of order IX, rule 9, of the Code of Civil Procedure, that is to say, the plaintiff did not appear and the defendants, who appeared, denied the claim. Subsequently, the plaintiff applied to have the suit reinstated, but the application was dismissed on the 28th of April, 1917, and an appeal from that order of dismissal was also rejected. Subsequently he brought this suit No. 78 of 1918 in the same court.

In the first paragraph of his plaint he stated as follows:—“On Baisakh Badi 9th, Sambat 1973, corresponding to the 26th of April, 1916, the defendant borrowed at Allahabad from the plaintiff Rs. 575 bearing interest at the rate of Rs. 2 per cent. per mensem as per entries made in the account book, a copy of which is annexed hereto and executed a promissory note in lieu thereof. Then, after describing the failure of his first suit, he proceeded to state in paragraph No. 4 as follows:—“No suit can be instituted on the basis of the said promissory note payable on demand. It is altogether null and void and ineffectual, but the plaintiff is entitled to realize the principal amount due to him in lieu of which the promissory note aforesaid was executed.” The cause of action for this suit arose on the 26th of April, 1916.

From the recitals it is quite clear that what happened was this:—The defendants asked the plaintiff for a loan. The plaintiff agreed to give it on the defendants executing a promissory note for the said amount and on execution of it, the plaintiff gave the defendants the money. The defendants failed

to repay it. The plaintiff sued to recover the amount then due. The recital of the above facts constitutes the plaintiff's cause of action which seems to us to be one and indivisible. We do not see how the fact that the plaintiff recorded the transaction in his account book or private diary can give him another or a different cause of action. The plaintiff sued to recover the amount due and his suit was dismissed. It was not dismissed because of any inherent defect in the promissory note itself but it was dismissed because the plaintiff failed to put in an appearance. Therefore it is inaccurate to say, as was said by the plaintiff in paragraph No. 4 of his plaint, that the promissory note is altogether null and void and ineffectual. It is a perfectly good promissory note and this is not one of those cases in which the courts have held that where a promissory note is invalid and amounts really to nothing more than a piece of waste paper, the plaintiff can fall back upon an action for money had and received by the defendants to the plaintiff's use on the ground that there is a total failure of the consideration by reason of the invalidity of the promissory note. It seems that what we have said above is really the law as laid down in the case on which the learned Subordinate Judge relied, that is to say, *Baij Nath Das v. Salig Ram* (1). The facts of this case are distinguishable from the various cases which have been referred to in argument before us. The result is that we allow the appeal and, setting aside the order of remand of the learned Subordinate Judge, restore the order of the Munsif with costs.

Appeal decreed.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay.

BINDESHI AND ANOTHER (PETITIONERS) v. GANGA PRASAD
(OPPOSITE PARTY).†

1919
November, 26.

Act No. IX of 1887 (Provincial Small Cause Courts Act), section 25—Revision—Suit filed before munsif not having Small Cause Court powers but decided by one who had, though as a regular suit—Appeal.

A suit which according to the frame of it was a Small Cause Court suit was filed in the court of a munsif at a time when the permanent incumbent,

* Civil Revision No. 54 of 1919.

(1) (1912) 16 Indian Cases, 88.