APPELLATE CIVIL.

1922
March, 17.

Before Mr. Justice Lindsay and Mr. Justice Stuart.

SRI RAM AND OTHERS (DEFENDANTS) *v.* SOBHA RAM, GOPAL RAI (PLAINTIFFS).*

Act No. I of 1872 (Indian Evidence Act), section 92—Evidence—Admissibility of—Promissory note—Subsidiary agreement that payment was not to be demanded until settlement of accounts.

Held that the executant of a promissory note could not be permitted to prove a separate agreement according to which the sum specified in the note was not, as expressed therein, payable on demand, but only after the adjustment of some accounts between the parties.

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

Babu *Lalit Mohan Banerji*, for the appellants.

Dr. *Surendra Nath Sen* and Munshi *Kumuda Prasad*, for the respondent.

LINDSAY AND STUART, JJ.:—In our opinion there is no merit in this appeal. The suit was brought by a firm of commission agents, doing business at Hapur, against another firm carrying on business in grain, in the Meerut city. This firm is said to consist of three persons, Narain Das, Sri Ram and Ram Nath, who were impleaded as defendants. It is stated that the defendant firm is carried on in the names of Narain Das and Sri Ram.

The case for the plaintiff firm was that on the 4th of August, 1917, a promissory note was passed in their favour by the defendant firm for a sum of Rs. 4,071-4-0. It was alleged that this amount, which carried interest at the rate of 6 per cent. per annum, was to be payable on demand. The plaintiff alleged the demand made and the refusal of the defendant firm to pay. Hence the suit.

The main defence which was set up by the defendant firm is contained in paragraph 8 of the written statement. While it was not denied that the promissory note upon which the suit was based was executed, it was alleged that, as a matter of fact, the note had not been executed after a settlement of account had

* Second Appeal No. 339 of 1921, from a decree of E. R. Neave, District Judge of Meerut, dated the 27th of November, 1920, confirming a decree of Manmohan Sanyal, Subordinate Judge of Meerut, dated the 25th of November,

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been arrived at between the parties. It was said that certain dealings were going on between the parties relating to grain, and that in view of certain circumstances some loss was apprehended at the time. The allegation was that this note for Rs. 4,071-4-0 was passed to the plaintiff as a sort of security to him and it was further alleged that the agreement between the parties was that the account between them was to be settled at a later date and that money was to be paid or received in accordance with that later settlement. Various other pleas were set out, with which we are really not concerned here.

The main complaint which is made here in second appeal is that both the courts below refused the application of the defendant firm to have an inspection of the accounts, in other words, that the courts below refused to allow the accounts between the parties to be re-opened. So far as this plea is concerned, it appears to us to have no force whatever. The suit is based upon a promissory note and the language of this document is of importance in deciding the matter which is now before us. It is stated in the body of this document that accounts had been taken between the parties and that a sum of Rs. 4,071-4-0 was found owing to the plaintiff firm. It was distinctly stated in the promissory note that this sum together with interest at the rate of 6 per cent. per annum would be payable to the plaintiff firm on demand.

The defence which was set out in the written statement was, in our opinion, a defence which could not be allowed to be raised. The defendants were in substance trying to put forward a case at variance with the terms of the written contract between the parties. As we have pointed out, the promissory note contains an unconditional promise to pay; there is nothing in the note to indicate that this undertaking to pay was subject to the further condition that accounts were at some subsequent period to be re-opened between the parties and that payment was not to be demanded or could not be enforced until this further settlement of accounts had taken place. To allow the defendants to give evidence of this kind would be to violate the provisions of section 92 of the Evidence Act. It is quite true that in certain cases which are specified in the provisos to this section evidence

may be given against the terms of the written document. Proviso I, for example, lays down that any fact may be proved which would invalidate a document—facts such as fraud, intimidation, illegality, etc. There is, however, in the written statement of the defendant firm no allegation whatever of fraud. The only case which is disclosed in the written statement is the case that the written document of contract does not contain the real contract between the parties. In this view of the case all the argument about re-opening of accounts seems to us to be out of place, and so far as the cases* to which we have been referred are concerned, and which are set out in the judgment of the court of first instance, they do not appear to us to have any material bearing on the question with which we are dealing. In our opinion the defendants in this case were not entitled to put forward the plea that they had a right to call for a re-examination of the accounts and to demand a fresh settlement.

The only other point with which we have to deal is the liability of the firm in respect of this note, which admittedly was written by the first defendant, Narain Das. There can be no doubt that the three defendants are brothers, that they are members of a joint family, that they carry on business at Meerut in one shop; and it was admitted that Narain Das, who signed this promissory note, was the managing member of the family. These being the facts, we have no doubt whatever that the defendant firm was liable on the note.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

FAZAL ILAHI (PLAINTIFF) *v.* PRAG NARAIN (DEFENDANT) †

Civil Procedure Code (1908), *schedule II, paragraphs 5, 17—Reference to arbitration without the intervention of court—Refusal of arbitrator to act—Application to court for order of reference.*

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In the case of a private arbitrator refusing to act the court may, on the application of either party to the reference, make an order under paragraph 17

(1) *Puran Mal* v. *Ford MacDonald and Company* (1919) I. L. R., 41 All., 635.
(2) *Boo Jinatboo* v. *Sha Nagar Valab Kanji* (1886) I.L.R., 11 Bom., 78.

† First Appeal No. 180 of 1921, from an order of Shibendra Nath Banerji, Officiating Subordinate Judge of Allahabad, dated the 19th of August, 1921.