1931

MUNNI BIBI v. TIRLOKI NATH.

For the reasons given their Lordships are of opinion that this appeal should be allowed, that the decrée of the High Court should be set aside, that it should be declared that the appellant's title to the Agra house, the subject of the suit, is established, but without prejudice to such claim, if any, as the respondents may have by reason of the alleged payment by Gokal Nath to Narayan Singh in satisfaction of his claim against Amar Nath's estate, and that this appeal should be remitted to the High Court for their decision upon the twelfth issue and the thirteenth ground of appeal; and their Lordships will humbly advise His Majesty accordingly. The defendants respondents will pay the costs of the appeal to the High Court and before this Board.

Solicitors for appellants: *Barrow, Rogers and Nevill.*

Solicitor for respondents Nos. 1, 2 and 3: *H. S. L. Polak.*

FULL BENCH.

Before Sir Grimwood Mears, Chief Justice, Mr. Justice Mukerji and Mr. Justice Young.

1930 *July*, 3.

NAZIR KHAN AND ANOTHER (PLAINTIFFS) *v.* RAM MOHAN AND ANOTHER (DEFENDANTS).*

Evidence Act (I of 1872), section 91—Promissory note—Insufficiently stamped—Inadmissible in evidence—Oral evidence of loan whether admissible.

It is not open to a party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in contravention of the provisions of section 91 of the Evidence Act.

In cases in which there is already a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note is afterwards

*Civil Revision No. 154 of 1927.

given as a collateral security, the creditor may, if the promissory note be inadmissible in evidence, recover on the original consideration and evidence *aliunde* can be given to prove the same. But where the promissory note and the lending of the money are part and parcel of the same transaction and the terms of the loan are the very terms of the promissory note, the contract of loan can not be proved apart from the document itself and the plaintiff's suit must fail if the document itself be inadmissible in evidence.

Parsotam Narain v. *Taley Singh* (1), *Sheikh Akbar* v. *Sheikh Khan* (2), *Radhakant Shaha* v. *Abhoy Churn Mitter* (3), *Yarlagadda* v. *Gorantla* (4), *Muthu Sastrigal* v. *Visvanatha* (5), *Chanda Singh* v. *Amritsar Banking Company* (6), and *Dula Meah* v. *Moulvi Abdul Rahman* (7), approved. *Banarsi Prasad* v. *Fazal Ahmad* (8), *Sri Nath Das* v. *Angad Singh* (9), *Ram Sarup* v. *Jusodha Kunwar* (10), and *Pramatha Nath* v. *Dwarka Nath* (11), disapproved. *Main Bakhsh* v. *Bodhiya* (12), distinguished. *Farr* v. *Price* (13), and *Dhaneswar Sahu* v. *Ramrup Gir* (14), referred to.

Messrs. *Iqbal Ahmad* and *S. B. Johari*, for the applicants.

Messrs. *N. C. Vaish*, *K. C. Mital* and *P. M. L. Verma* for the opposite parties.

MEARS, C. J., MUKERJI and YOUNG, JJ.:— The following point of law has been referred to a Full Bench, namely, whether it is open to the party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in the teeth of the provisions of section 91 of the Evidence Act.

The facts which have led to the reference are these. The applicants, Nazir Khan and Ismail Shah Khan, brought a suit for recovery of money in the court of small causes at Allahabad, alleging that on

(1) (1903) I.L.R., 26 All., 178.
(2) (1881) I.L.R., 7 Cal., 256.
(3) (1882) I.L.R., 8 Cal., 721.
(4) (1905) I.L.R., 29 Mad., 111.
(5) (1913) I.L.R., 38 Mad., 660.
(6) (1921) I.L.R., 2 Lah., 330.
(7) (1923) 28 C.W.N., 70.
(8) (1905) I.L.R., 28 All., 298.
(9) (1910) 7 A.L.J., 459.
(10) (1911) I.L.R., 34 All., 158.
(11) (1896) I.L.R., 23 Cal., 851.
(12) (1928) I.L.R., 50 All., 839.
(13) (1800) 1 East, 55.
(14) (1928) I.L.R., 7 Pat., 845.

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foot of a promissory note filed with the plaint they lent to the two defendants to the suit, who were husband and wife, namely, Ram Mohan Lal and Mst. Girindra Kuari, a sum of Rs. 500, which was to be repaid with interest at 4 per cent. per mensem, on demand. The promissory note bears a stamp duty of one anna only, while under the law for the time being in force it ought to have borne a stamp duty of annas two.

The defence of the defendant No. 1, who alone appeared, was that his wife never executed the promissory note, that he borrowed a sum of Rs. 50 only and that being under pressure for money he executed the promissory note, relying on the assurance of the plaintiffs that they would not claim more than Rs. 50 and interest thereon. He further pleaded that he had repaid the money which he had borrowed, with interest. When it was discovered that the promissory note bore insufficient stamp duty, the plaintiff sought to prove by oral evidence that he had lent a sum of Rs. 500.

The learned Judge of the small cause court held that to establish the loan alleged by the plaintiffs the promissory note was the only evidence that could be adduced to prove the transaction, having regard to the provisions of section 91 of the Evidence Act. In the result, the learned Judge dismissed the suit in its entirety.

The plaintiffs filed an application in revision under section 25 of the Provincial Small Cause Courts Act and the contention of the learned counsel for the applicants was that the applicants were entitled to prove the factum of the loan. This point was not specifically taken among the grounds of revision, but as the point was supported by cases decided in this Court, the point was allowed to be argued and considered. The Bench before which the revision application came were not satisfied that some of the cases decided in this

Court were good law and as none of these cases were decisions of a Full Bench, they referred the matter to a larger Bench.

Before we proceed to consider authorities, it would be desirable to consider the state of the statutory law. As already stated, the plaintiffs lent money in consideration of the promissory note and the note alone. Gul Mohammad Khan, who appeared as a witness for the plaintiffs and is their relation, said: "I lent Rs. 500 to the defendant and not Rs. 50. . . . . I would not have lent money without the promissory note." It is clear, therefore, that this is not a case in which there was already a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note was given as a collateral security. To illustrate what we mean, we would give an example. Suppose a trader sells a motor bicycle to a purchaser on credit. Later, to secure the payment, the purchaser gives a promissory note. The trader and the purchaser have a completed transaction, namely, the sale of a motor bicycle, as soon as the delivery is made with the stipulation that the price would be paid later on by the purchaser. On this transaction, the trader is entitled to sue for the price of the article sold by him. The promissory note here is only a collateral security. In these circumstances, it is agreed on all hands that the trader will be entitled to sue for the price of the motor bicycle, even if for some flaw in the promissory note, the promissory note itself may not be sued upon, being inadmisible in evidence under the law. In the case before us there is no such completed transaction as we have described above. On the other hand, the promissory note and the handing over of the money are part and parcel of the same transaction and the terms of the loan are the very terms of the promissory note. There is no room for the argument that there was a completed loan and by way of collateral security a promissory

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note was given. To quote again the words of the witness Gul Mohammad, the plaintiffs would not have lent the money without the promissory note. The making and handing over of the note and the payment of the money are "concurrent conditions."

The question then is, whether the promissory note contains the entire terms of the transaction between the parties and, if so, can any oral evidence be adduced where the document itself is not admissible in evidence? Our clear answer is that oral evidence is not admissible, section 91 of the Evidence Act being a bar to such a procedure. Section 91 reads as follows: "When the terms of a contract, ... have been reduced to the form of a document, ... no evidence shall be given in proof of the terms of such contract . . . . . except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible." The question which we have to decide is whether it is or is not the case that the terms of the contract between the parties have been reduced to the form of a document. If they have been reduced to the form of a document, then by the express language of the law, the document itself is the only proof admissible in evidence, it being common ground that there is no case made out for admission of secondary evidence. Oral evidence is in the nature of secondary evidence where the terms of a contract have been reduced to the form of a document. On the statute, therefore, there seems to be no reason to doubt that oral evidence was not admissible in evidence.

Now we propose to consider some of the important cases decided in this and other Courts. In *Parsotam Narain* v. *Taley Singh* (1), the facts were very similar to the facts of this case. The headnote runs as follows: "When money is lent on terms contained in a promissory note given at the time of the loan, the

(1) (1903) I.L.R., 26 All., 178.

lender suing to recover the money so lent must prove those terms by the promissory note. If for any reason such as the absence of a proper stamp, the promissory note is not admissible in evidence, the plantiff is not entitled to set up a case independent of the note." The case was heard by a learned single Judge of this Court, AIKMAN, J., and he, following certain cases decided in the Calcutta High Court, disallowed the plaintiff's contention to prove his case independently of the promissory note. The learned Judge quoted section 91 of the Evidence Act and said: "It appears to me that the decisions which have held otherwise ignore the provisions of sections 91, 65 and 22 of the Evidence Act; and I do not think that it can be denied that these decisions condone and encourage evasions of the Stamp Act." We are of the same opinion as the learned Judge.

This case of *Parsotam Narain* was not considered in the case of *Banarsi Prasad* v. *Fazal Ahmad* (1), and a contrary decision was given by a Bench of two Judges. It is rather significant that the learned Judges professed to follow the very case of *Sheikh Akbar* v. *Sheikh Khan* (2), on which AIKMAN, J., had founded his decision in *Parsotam Narain's* case. In the Calcutta case, GARTH, C. J. said at p. 259 of the report as follows: "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." The learned Judges of this Court, in *Banarsi Prasad's* case, quoted the language quoted above and said: "Now here the plaintiff did state the consideration for

(1) (1905) I.L.R., 28 All., 298. (2) (1881) I.L.R., 7 Cal., 256.

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the note, namely money borrowed from him by the defendant." The facts of the case show that the loan and the promissory note were part and parcel of the same transaction. The learned Subordinate Judge, who heard the appeal from the court of the munsif, said: "The defendant took a loan of Rs. 572 and executed a promissory note." This finding was binding in second appeal to the High Court, but the learned Judges of this Court said, after quoting from the judgment of the Subordinate Judge the sentence quoted above: "It seems to us, therefore, that the court of first instance ought not to have summarily dismissed the plaint, but ought to have given the plaintiff an opportunity of proving the consideration for the note if there was such consideration. The law on the subject is clearly stated by GARTH, C. J., in the case of *Sheikh Akbar* v. *Sheikh Khan* (1)." In our opinion the learned Judges of this Court overlooked the use of the word "then" by GARTH, C. J., which we have italicized above. The whole point of GARTH, C. J., was that evidence *aliunde* could be given only if the transaction of the promissory note could be separated from a previously completed transaction. We are of opinion, therefore, that this case of *Banarsi Das* which is based on the authority of the Calcutta case was decided on a misreading of that case.

Referring to the opinion of GARTH, C. J., quoted from *Sheikh Akbar's* case, Mr. *Iqbal Ahmad* argued that it would always be difficult to determine in the case of a loan whether the loan was a previous transaction or whether it was a transaction which occurred simultaneously with the execution of the promissory note. He said: If the loan was advanced five minutes before the execution of the promissory note, will the plaintiff be entitled to prove the loan, if the promissory note is ruled out of evidence? This argument is entirely based on a misapprehension. It would

(1) (1881) I.L.R., 7 Cal., 256.

always be a question of fact whether there was or was not a completed transaction between the parties, whether in the shape of a sale or other transaction or whether it be in the shape of a loan. As an illustration, we can cite the case of an "antecedent debt" of the father under the Hindu law. Under the law, a father is entitled to transfer joint family property belonging to himself and his sons to pay his "antecedent debt". In the case of a mortgage executed by the father it was urged before the Privy Council that the money advanced might be taken as an "antecedent debt" and the mortgage might be treated as one given in consideration of the "antecedent debt". Their Lordships of the Privy Council, in the case of *Brij Narain* v. *Mangal Prasad* (1), at p. 103 remarked as follows: "The incurring of the debt was the creation of the mortgage itself and there was no antecedency either in time or in fact." Again, in laying down the several propositions of Hindu law, where their Lordships dealt with the question of antecedent debts, they said (at p. 104): "Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and no part of the transaction impeached." In the language of their Lordships of the Privy Council, we may say: The transaction of sale of goods or loan must be a matter antecedent in fact as well as in time, that is to say, the transaction must be truly independent and not part of the transaction of the promissory note.

The next case in this Court is *Sri Nath Das* v. *Angad Singh* (2). It was a Letters Patent appeal against the judgment of a learned single Judge of this Court who had dismissed the suit of the plaintiff. The learned Judges who heard the appeal professed to follow the dictum of GARTH, C. J., in *Sheikh Akbar's* case (3) and *Banarsi Prasad's* case in this Court (4), which itself

(1) (1923) I.L.R., 46 All., 95.
(2) (1910) 7 A.L.J., 459.
(3) (1881) I.L.R., 7 Cal., 256.
(4) (1905) I.L.R., 28 All., 298.

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professed to be based on the Calcutta case. We have shown that the actual decision of the Calcutta case was just the other way. But this was again overlooked and, on the basis of a previously decided case, the judgment of the learned single Judge was set aside and the plaintiff's suit was decreed. In this judgment there is no discussion whatsoever of section 91 of the Evidence Act.

The next case in this Court is *Ram Sarup* v. *Jasodha Kunwar* (1). In this case their Lordships definitely pronounced their opinion against the case of *Sheikh Akbar* v. *Sheikh Khan* (2) decided by GARTH, C.J., and basing their judgment on the dictum of Lord KENYON in the well known case of *Farr* v. *Price* (3), held, in effect, that even where the debt is inseparable from the promissory note, the debt could be proved although the promissory note was not admissible in evidence. It is interesting to note that GARTH, C. J., himself had referred to the case of *Farr* v. *Price* and had distinguished the dictum of Lord KENYON (at p 260). In the last mentioned Allahabad case there is no consideration of section 91 of the Evidence Act.

Mr. *Iqbal Ahmad* places his reliance on the case of *Mian Bakhsh* v. *Bodhiya* (4). That case has no relevance whatsoever to the case before us. The question that had been referred there to the High Court by a learned munsif was whether a certain promissory note which purported to be in favour of the bearer was void and inadmissible in evidence and could not be the basis of a claim in any court of law. Two of the learned Judges (BOYS and KENDALL, JJ.) held that the promissory note was in a form forbidden by law, that the promissory note could not form the basis of a suit. They, however, further went on to state that the plaintiff could sue on the basis of any obligation whether antecedent to or arising simultaneously with the execution

(1) (1911) I.L.R., 34 All., 158.
(2) (1881) I.L.R., 7 Cal., 256.
(3) (1800) 1 East. 55 (57).
(4) (1928) I.L.R., 50 All., 839.

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of the promissory note, independently of the execution of the promissory note. SEN, J., refused to express any opinion and said, at page 851: "It is outside the scope of the present reference to determine whether the plaintiff can maintain a claim against the debtor founded upon an obligation independent of the promissory note." He further held that although the promissory note was in a form forbidden by law, it was admissible in evidence under section 91 of the Evidence Act (see the same page). It will be noticed in connection with this case that there is no provision in the Paper Currency Act which forbids the admissibility in evidence of a promissory note which has been drawn up in a form condemned by section 25 of the Act. In the circumstances, the very document itself could prove the obligation created by it. The answer of the two learned Judges, BOYS and KENDALL, JJ., namely that the plaintiff could sue on the basis of an obligation whether antecedent to or arising simultaneously with the execution of the promissory note, was not called for. The case was decided without any counsel appearing on either side. These circumstances entirely differentiate the case of *Mian Bakhsh* v. *Bodhya* (1) from the present case.

This exhausts the cases decided in the Allahabad High Court. We need not examine at length the cases decided in other High Courts. We may, however make one remark, that in Calcutta there is a conflict of opinion. The case of *Sheikh Akbar* v. *Sheikh Khan* (2) was followed by *Radha Kant Shaha* v. *Abhoy Churn Mitter* (3), but was sought to be explained away in a later case in the same court in *Pramatha Nath* v. *Dwarka Nath* (4). In this latter case there is no consideration of section 91 of the Evidence Act. In Madras it appears that the view has been consistently taken that where there is no

(1) (1928) I.L.R., 50 All., 839. (2) (1881) I.L.R., 7 Cal., 256.
(3) (1882) I.L.R., 8 Cal., 721. (4) (1896) I.L.R., 23 Cal., 851.

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independent and separate cause of action, the suit based on a promissory note which is not admissible in evidence should fail. This was held, following *Sheikh Akbar's* case. In *Yarlagadda* v. *Gorantla* (1) and in *Muthu Sastrigal* v. *Visvanatha* (2) section 91 of the Indian Evidence Act was relied upon and it was held that in circumstances similar to this case before us, oral evidence could not be given in proof of the loan. At page 663 in I. L. R., 38 Madras, the learned Judge, SADASIVA AYYAR, observes as follows: "To import the doctrines laid down in English cases about vague obligations to repay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received concealing the real contract of loan which had been reduced to the form of a document is, it seems to me, merely *trying to nullify section* 91 *of the Indian Evidence Act.*" The learned Judges who heard this case differed from certain Bombay cases and followed the cases decided in their own court.

In Lahore the same view has been taken as we are disposed to take in the case before us. In *Chanda Singh* v. *Amritsar Banking Company* (3) section 91 of the Evidence Act was applied as we are disposed to apply it.

We asked the learned counsel for the applicant to cite a case decided by any High Court that may have been decided in his favour in spite of a consideration of section 91 of the Evidence Act. He cited the case of *Dhaneswar Sahu* v. *Ramrup Gir* (4). In that case one of the learned Judges did consider the applicability or otherwise of section 91 of the Evidence Act, but his learned colleague expressed his doubts.

(1) (1905) I.L.R., 29 Mad., 111.
(2) (1913) I.L.R., 38 Mad., 660.
(3) (1921) I.L.R., 2 Lah., 330.
(4) (1928) I.L.R., 7 Pat., 845.

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Lastly it was argued by Mr. *Iqbal Ahmad*, the learned counsel for the applicant, that the plaintiffs were not precluded from proving an oral agreement to pay. On this point we cannot do better than quote the following remarks made by the present Chief Justice RANKIN of the Calcutta High Court. In *Dula Meah* v. *Moulvi Abdul Rahman* (1) his Lordship observed as follows :—"Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence (Evidence Act, section 91). Moreover, where there is an express promise, an implied promise will not be inferred." We entirely agree with these observations.

In the result our answer to the question referred to us by the Division Bench is in the negative, namely, that in the circumstances set forth in the question referred to us, the plaintiff cannot recover.

We direct that the record with our answer and a copy of this judgment be sent to the Bench making the reference.

REVISIONAL CIVIL.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Niamat-ullah.

DEORAJO KUER (OBJECTOR) *v.* JADUNANDAN RAI (DECREE-HOLDER)*

1930 *July*, 1.

Civil Procedure Code, sections 64 (Explanation) and 73—Rateable distribution among decree-holders—What constitutes "application for execution" for purpose of section 73—Claimant for rateable distribution need not expressly pray for attachment afresh and sale—Inquiry into validity of claimant's decree whether competent.

Where the property of the judgment-debtor had already been attached and been ordered to be sold at the instance of one decree-holder, and another decree-holder made an application in the form prescribed for applications for execution and

*Civil Revision No. 182 of 1929.
(1) (1923) 28 C.W.N., 70.