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us by counsel for the respondents. It is quite in point and the principle therein adopted is that which has been applied to the case before us. The appeal is dismissed with costs.

Appeal dismissed.

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March 11.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

NIGHTINGALE (DEFENDANT) *v.* FAIZ-ULLA AND ANOTHER (PLAINTIFFS).*

Bill of exchange—Mistake—Void agreement—Act IX. of 1872 *(Contract Act), ss.* 13, 20—*Laches.*

On the 3rd March 1881 *N* drew a bill in English at Cawnpore in favour of *F* on a Calcutta firm and gave it to *F's* agent, who did not understand English. *F's* agent kept the bill till the 10th March 1881 without ascertaining its nature. On that date the Calcutta firm on which the bill was drawn became insolvent. *F* subsequently sued *N* for the money he had paid for the bill on the ground that his agent had asked *N* for a bill drawn on himself and not one drawn on the Calcutta firm. *N* asserted in defence to the suit that *F's* agent had not asked for a bill drawn on himself but merely for a bill on Calcutta.

Held that, assuming that the sale of the bill was void by reason of both parties being under a mistake as to the bill, yet *F* could not recover the amount of the bill from *N*, because his agent had been guilty of gross negligence in taking the bill and keeping it so long without ascertaining its nature and applying for redress.

THE plaintiffs in this suit stated in their plaint in effect that on the 3rd March, 1881, at Cawnpore, the defendant Nightingale drew a hundi for Rs. 2,500 on the firm of Rushton Brothers, carrying on business at Calcutta, as agent of that firm, and sold it to Jhamman, their agent, concealing the fact that it was drawn not on himself, but on that firm; that the hundi was written in English, and their agent Jhamman, who was not acquainted with that language, took it believing that it was drawn by the defendant Nightingale on himself; that on the 10th March, 1881, it became known at Cawnpore that the firm of Rushton Brothers had failed and consequently the hundi was not presented for acceptance; that by reason of the failure of the firm of Rushton Brothers the right of action had accrued before the hundi became payable; and that the cause of action arose on the 10th March, 1881. The plaintiffs accordingly claimed to recover Rs. 2,500 from the defendant Nightingale personally, and as a

* First Appeal, No. 90 of 1881, from a decree of W. Barry, Esq., Judge of Cawnpore, dated the 10th August, 1881.

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partner in the firm of Rushton Brothers, and from the firm of Rushton Brothers. The defendant Nightingale, who alone defended the suit, set up as a defence to it that he was not a partner in the firm of Rushton Brothers; that he had drawn the hundi as the agent of that firm; that the hundi was translated to the agent of the plaintiffs at the time it was sold to him, and such agent knew the nature of the hundi; and that the money received from such agent on account of the hundi had been applied to the purposes of the firm of Rushton Brothers. The following issue was framed for trial amongst others:—"Did Mr. Nightingale sell the hundi in suit as his own hundi to the agent of the plaintiffs, when in point of fact it was a hundi of Rushton Brothers, without informing such agent of that fact; if so, is Mr. Nightingale personally liable for the value of the hundi?" This was the only issue which was tried as regards the liability of the defendant Nightingale, as it was admitted that he was not a partner in the firm of Rushton Brothers, but the agent of that firm only. The Court of first instance found on the evidence adduced by the parties that the agent of the plaintiffs had asked the defendant Nightingale for a hundi on himself; that the defendant gave him the hundi in question without explaining to him its nature; and that the agent of the plaintiffs received it without knowing its nature and believing that it was drawn by the defendant on himself. Having regard to these findings, the Court of first instance held on the issue set out above that the defendant Nightingale was personally liable for the value of the hundi in question, and accordingly gave the plaintiffs a decree against the defendant Nightingale personally, as well as against the firm of Rushton Brothers.

The defendant Nightingale appealed to the High Court. On his behalf it was contended on the evidence that the agent of the plaintiffs was well aware of the nature of the hundi in question when it was sold to him; and that, assuming that the agent of the plaintiffs did not know its nature, he was guilty of gross negligence in taking it, and in keeping it without ascertaining its nature, until it was too late to obtain any redress, and consequently the plaintiffs could not recover.

Messrs. *Conlan* and *Howard*, for the appellant.

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Mr. *Colvin*, Pandit *Ajudhia Nath*, and Shah *Asad Ali*, for the respondents.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.,) was delivered by

OLDFIELD, J.—The defendant, appellant before us, drew a bill as agent of Messrs. Rushton and Co., Cawnpore, on their firm in Calcutta, for Rs. 2,500, in favour of the plaintiffs. The agent of plaintiffs, Jhamman, negotiated the transaction in person with appellant, and the case set up by plaintiffs is that Jhamman asked for a bill of appellant's to be drawn by him as principal, and was given the bill in question which he took in ignorance of its true character; and the firm of Rushton and Co. having failed, plaintiffs sue to recover the money from appellant as well as from the members of Rushton's firm, on apparently two grounds, (i) that he is liable for the amount as one of the partners, (ii) that he is personally liable for giving a bill which was not a bill of the character plaintiffs' agent demanded.

The Judge has held that appellant is not a partner in the firm, and has exculpated him of any intention to defraud plaintiffs' agent or plaintiffs by passing off on him a bill drawn by the firm as one of his own, but he holds he granted the bill "in a careless and inadvertent manner;" that the contract was void *ab initio* by the fact that the kind of bill asked for was not given; and on these grounds he holds appellant personally liable. The decision cannot be maintained. We are not satisfied from a perusal of the evidence that there was any misapprehension between appellant and the plaintiffs' agent as to the kind of bill wanted. Jhamman does not say he told appellant that he wanted his bill only, but merely that he wanted a bill on Calcutta, and appellant and his gomashta distinctly state that the character of the bill drawn was explained to Jhamman, and we consider this evidence reliable, and that Jhamman was not particular as to whether the bill was drawn by Rushton's firm or by appellant, and that the character of the bill was explained to him at the time.

But if we assume that the appellant and Jhamman were under a mutual misapprehension as to the particular kind of bill wanted by Jhamman, and that therefore their minds cannot be said to have

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met as to the matter of sale of the bill, or, in the words of the Contract Act, there was no consent, as they did not agree about the contract in the same sense, the plaintiffs cannot under the circumstances of this case recover the amount of the bill from appellant, because it is clear that Jhamman was guilty of gross negligence in taking the bill and keeping it so long without ascertaining its character and applying for redress, by which circumstances have changed and the position of the parties has been altered, and they cannot be put back into their original position. The bill on the face of it shows that appellant only acted as an agent, and if Jhamman could not read English, he should have had the bill explained; instead of this, on his own showing, he kept it by him for a week, taking no action in the matter, while in the meantime the firm failed, and appellant had expended the money, not on himself personally, but in the business of the firm for which he was agent.

We decree the appeal and modify the decree of the lower Court, by dismissing the suit against appellant Nightingale. Appellant will have his costs in both Courts.

Appeal allowed.

1882
March 20.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SALAMAT ALI (JUDGMENT-DEBTOR) *v.* MINAHAN AND OTHERS (DECREE-HOLDERS).*

Insolvent judgment-debtor—Act X. of 1877 (*Civil Procedure Code*), *s.* 351.

A judgment-debtor applied to be declared an insolvent. Certain of the claims against him were claims under decrees. The Court of first instance refused the application, notwithstanding the statements in the application were substantially true, and the applicant had not committed any act of bad faith mentioned in s. 351 of the Civil Procedure Code, on the ground that the applicant had contracted the debts for which such decrees had been made dishonestly, and that section gave the Court in such a case a discretionary power to refuse the application.

Held that the Court of first instance had taken an erroneous view of s. 351, and had assumed a wider discretion than the law conferred on it. If a person making an application to be declared an insolvent has not brought himself within clauses (*a*), (*b*), (*c*) or (*d*) of that section, then the Court has no discretion on other grounds to refuse the application. The bad faith, the reckless contracting of debts, the unfair preference of creditors, the transfer, removal or concealment of property, the making false statements in the application are all dealt with

* First Appeal, No. 3 of 1882, from an order of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge, dated the 22nd December, 1881.