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QUTUB HUSAIN v. ABUL HASAN.

The High Court (OLDFIELD, J. and DUTHOIT, J.) delivered the following judgment:—

OLDFIELD, J.—The objection taken by the respondent is valid, as under the decision of the Full Bench in *Nath Prasad* v. *Baij Nath* (1) the suit is one of the nature of a Small Cause suit in which no appeal lies to this Court. Under the circumstances of the case we make no order as to costs, and dismiss the appeal.

Appeal dismissed.

CIVIL JURISDICTION.

1881
August 18.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HIRA LAL (PLAINTIFF) v. DATADIN (DEFENDANT.)*

Debt—Promissory note—Written acknowledgment of debt—Oral acknowledgment—Evidence of debt—Act I of 1872 (*Evidence Act*), *s.* 91.

H lent Rs. 85 to *D* on a pledge of moveable property. *D* repaid *H* Rs. 40; and at the time of the repayment acknowledged orally that the balance of the debt, Rs. 45, was still due by him. It was agreed between the parties at the same time that *D* should give *H* a promissory note for such balance, and that such property should be returned to him. Accordingly *D* gave *H* a promissory note for Rs. 45, and the property was returned to him. *H* subsequently sued *D* on such oral acknowledgment for Rs. 45, ignoring the promissory note, which being insufficiently stamped was not admissible in evidence, *Held* that the existence of the promissory note did not debar *H* from resorting to his original consideration nor exclude evidence of the oral acknowledgment of the debt.

THIS was a reference to the High Court under s. 617 of Act X of 1877, by Mr. R. D. Alexander, Judge of the Court of Small Causes at Allahabad. The point on which the Small Cause Court Judge entertained doubt appears from the following statement of the facts drawn up by him:—

"The plaintiff's suit is based on an alleged admission by the defendant of Rs. 45 being due as the balance of a debt on the morning of the 23rd July, 1880. The facts as alleged for the plaintiff are as follows. Prior to the 23rd July, 1880, the plaintiff lent the defendant Rs. 85 on the security of some jewels depo-

* Reference, No. 106B of 1881, under s. 617 of Act X of 1877 by R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 19th July, 1881.

(1) I. L. R., 3 All. 66.

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HIRA LAL v. DAYADIN.

sited with him by the latter. On the 23rd July the defendant is said to have paid Rs. 40 and admitted Rs. 45 as due in the morning, and it appears to have been arranged then that the defendant should give a promissory note for that amount and retire the jewels. Accordingly in the evening of that day he brought the promissory note and received back the jewels. The plaintiff has now sued on the verbal admission, ignoring the promissory note, which being insufficiently stamped is not admissible in evidence. The question to be decided is, if taking into consideration the provisions of s. 91, Indian Evidence Act, the plaintiff can give any evidence of the defendant's admission but the promissory note. Had the suit been based on the simple fact of a balance of Rs. 45 being due on a debt of Rs. 85 originally, I think that perhaps plaintiff could ignore the promissory note and sue for the consideration, but as he has based his suit on the verbal admission of the defendant, which verbal admission was subsequently embodied in the promissory note, I am doubtful if, under the circumstances, and having regard to the remarks of Spankie, J., in *Benarsi Das* v. *Bikhari Das* (1) in revision under s. 622, Act X of 1877 (a copy of the judgment of the High Court in which is filed in this Court's records), he can recover under the facts as stated. Spankie, J., said: "But if a contract is contained in a bill of exchange, a negotiable instrument, the bill itself must be proved. This written instrument, according to Taylor (6th ed., vol. 1, p. 405), is to be regarded in some measure as the ultimate fact to be proved, and in all cases of written contracts the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement." If then the admission of the defendant must be looked upon as evidenced by the promissory note and it alone, the plaintiff's suit must fail. As I feel great doubts whether the promissory note is the only evidence the plaintiff is competent to offer, although inclining to the belief that such is the case, I refer this question for the decision of the Honorable the High Court, *viz.*, whether under the facts as stated the plaintiff can maintain this suit?"

The *Senior Government Pleader* (Lala *Juala Prasad*), for the plaintiff.

(1) I. L. R., 3 All. 717.

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HIRA LAL v. DATADIN.

Munshi *Sukh Ram*, for the defendant.

The opinion of the High Court (OLDFIELD, J., and STRAIGHT, J.,) was as follows:—

STRAIGHT, J.—The existence of the promissory note does not debar the plaintiff from resorting to his original consideration. Nor does the circumstance that there is a written admission of the debt exclude evidence of an oral admission. Under this condition of things, unless barred by limitation, the plaintiff is entitled to recover.

APPELLATE CIVIL.

1881
August 26.

Before Mr. Justice Oldfield and Mr. Justice Duthoit.

KISHEN SAHAI (JUDGMENT-DEBTOR) *v.* THE COLLECTOR OF ALLAHABAD, AS MANAGER OF THE COURT OF WARDS, ON BEHALF OF PARTAB CHAND, MINOR (DECREE-HOLDER).*

Appeal by some only and not all of the defendants—Execution of decree—Amendment of decree—Review of judgment—Act IX. of 1871 (*Limitation Act*), *sch. ii, No.* 167.

On the 27th July, 1864, a District Court gave the plaintiff in a suit a decree against all the defendants including *B*. All the defendants appealed to the Sudder Court from such decree except *B*. The Sudder Court on the 6th March, 1865, set aside such decree and dismissed the suit. The plaintiff appealed to Her Majesty in Council from the Sudder Court's decree, all the defendants except *B* being respondents to this appeal. Her Majesty in Council, on the 17th March, 1869, made a decree reversing the Sudder Court's decree and restoring that of the District Court. On the 9th October, 1869, the plaintiff applied for execution of the District Court's decree, and such decree was under execution up to July 1872. On the 9th October 1874, the plaintiff applied for amendment of such decree in certain respects, it being incapable of execution in those respects. *B* was a party to this proceeding. On the 16th August, 1876, such decree was amended; and the plaintiff subsequently applied for its execution as amended against all the defendants. *Held* that, notwithstanding *B* was not a party to the appeals to the Sudder Court and Her Majesty in Council, such decree was a valid decree and capable of execution against him. Also that the application of the 9th October, 1869, was within time, computing from the date of the decree of Her Majesty in Council.—*Chedoo Lal* v. *Nund Coomar Lal* (1). Also that the application to amend such decree, being substantially one for review of judgment, gave, under art 167, sch. ii. of Act IX of 1871, a period from which limitation would run in respect of the subsequent application for execution which was therefore within time.

* First Appeal, No. 2 of 1881, from an order of W. Tyrrell, Esq., Judge of Allahabad, dated the 2nd October, 1880.

(1) 6 W. R., Misc., 60.