1876

JANKI PRASAD v. BALDEO NARAIN.

decree runs as follows:—"In accordance with the confession of judgment filed by the defendants, it is ordered that a decree for Rs. 5,589-6-6, the amount of the claim, the costs, and interest pending the suit, and on the whole amount up to the date of realization, within the two years mentioned in the confession of judgment accepted by the plaintiffs, be passed in favor of the plaintiffs against the defendants." This decree is no doubt most inartificially prepared, but it contains in the judgment language sufficient to import, not a part only, but the whole of the terms of the confession; and it being manifestly the intention of the Court and the parties that the whole of the terms should be incorporated in the decree, we consider ourselves warranted in pronouncing that the decree is not a mere money-decree, and that the sale effected under it was made in exercise of the power of sale for the enforcement of the security.

SPANKIE, J.—We are asked whether the decree is merely a money-decree, or whether it includes all the terms of the compromise, and so declares the decree-holder's lien on the property hypothecated in the bonds on which the plaintiffs sued and the defendants filed a confession of judgment. It appears to me, looking at the terms of the decree, that it is confined to a decree for Rs. 5,589-6-6, the amount claimed, and costs and interest, "in favor of the plaintiffs against the defendants, who promise to pay the amount due to the plaintiffs within two years as specified in their confession of judgment accepted by the plaintiffs." I think that this is a money-decree, and that the words outside the decree, "and according to the confession of judgment filed by the defendants, it was ordered," cannot be said to extend all the terms of the confession of judgment to the decree itself.

APPELLATE CIVIL.

1880
March 3

Before Mr. Justice Pearson and Mr. Justice Oldfield.

DURGA PRASAD (PLAINTIFF) *v.* BALDEO AND OTHERS (DEFENDANTS).*

Agreement without Consideration—Act IX of 1872 *(Contract Act), s.* 2 (d) *and s.* 25 (2).

The plaintiff sued to establish an agreement in writing by which the defendants promised to pay him a commission on articles sold through their agency in a

* Second Appeal, No. 1056 of 1879, from a decree of F. E. Elliot, Esq., Judge of Mainpuri, dated the 1st July, 1879, reversing a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 10th July, 1878.

1880

DURGA PRASAD v. BALDEO.

bazár in which they occupied shops, in consideration of the plaintiff having expended money in the construction of such bazár. Such money had not been expended by the plaintiff at the request of the defendants, nor had it been expended by him for them voluntarily, but it had been expended by him voluntarily for third parties. *Held* that such expenditure was not any consideration for the agreement within the meaning of s. 2 (*d*) of Act IX of 1872, and the agreement did not fall within cl. (2), s. 25 of that Act, and was void for want of consideration.

IN or about the year 1862 a market for grain was established at Etáwah, and called Hume Ganj, after the Collector of the Etáwah district of that name. The plaintiff in this suit, Durga Prasad, had, at the instance of the Collector, assisted in the establishment of the market, erecting shops at his own expense and causing other persons to erect them, and causing persons to occupy such shops. Some of the occupiers of such shops set up business as agents for the sale of grain and other commodities, taking a commission of Re. 1-8-0 per cent. from the "*biparis*," or traders, who frequented the market. The plaintiff, on the ground apparently of his services in establishing the market, claimed to be "*chaudhri*" of the market, and as such to receive from such occupiers one-third of such commission. The plaintiff's claim appeared to have been recognised by the district authorities, for in or about 1864 the Municipal Committee made an order declaring him entitled to such share of such commission. Such occupiers had, however, always disputed the claim, and in August, 1864, at their instance, the order above mentioned was cancelled by the Local Government as illegal. With a view to settle the constant disputes between the plaintiff and such occupiers, the Municipal Committee suggested to the plaintiff that he should enter into an agreement with such occupiers respecting his claim. Accordingly the plaintiff produced an agreement in writing, which purported to be executed by the defendants in this suit, in which it was agreed by them that he should receive six annas of the percentage received by the occupiers of shops who acted as commission agents. This agreement was dated the 22nd June, 1875. At the further suggestion of the Municipal Committee the plaintiff applied to have the agreement registered, but as many of the defendants denied that they had exceeded the agreement, registration of it was refused. The plaintiff was subsequently prosecuted by one of the

persons by whom the agreement purported to be executed for forging the signature of such person to the agreement, but the prosecution failed. In 1877 the plaintiff brought the present suit against the defendants, one hundred and eighteen in number, to establish the validity of the agreement. He stated in his plaint the following particulars respecting his claim:—"The plaintiff established two grain-markets at Etawah, one called Hume Ganj, the other Ram Ganj, expending thousands of rupees in building shops and purchasing land, at the instance of the district authorities: the defendants rented shops in these markets, and set up as commission agents, receiving a commission of Re. 1-8-0 per cent. from the traders: in consideration of the plaintiff having expended thousands of rupees, the defendants fixed eight annas of such percentage as the plaintiff's '*haq*', which they used to pay him: in 1875, by mutual consent, six annas was fixed as the plaintiff's '*haq*', and the defendants executed an agreement on the 22nd June, 1875, according to which that amount was paid to the plaintiff: when the plaintiff desired to have that agreement registered, some of the defendants refused to register it, others denied having executed it; the plaintiff consequently was obliged to sue for the establishment of his right; accordingly the present suit has been brought on the agreement by which the defendants agreed to pay six annas out of the Re. 1-8-0 they receive as commission from the traders to the plaintiff who is known as '*chaudhri*' of the market"

Nineteen of the defendants confessed judgment; twenty-eight did not appear; and seventy-one defended the suit, on the ground, amongst others, that the agreement was void for want of consideration. The Court of first instance disallowed such defence, its decision on the issue arising from such defence being as follows:—

"Now it is proper for the Court to decide the defendant's plea (involved in the second issue of law), *viz.*—Is this document invalid with reference to s. 10, Act IX of 1872, or not? The Court thinks it is not, because in s. 2 (*d*), Act IX of 1872, consideration is defined as anything done or promised to be done or abstinence from doing that thing. In that case it should be admitted that the plaintiff, besides spending money from his own pocket in the establishment of 'Hume Ganj,' exercised great diligence and took

1880

DURGA PRASAD v. BALDEO.

great pains in having it tenanted, and this market gave the defendants an opportunity to get 'fees' (*arath*) by following their profession. In recompense of that trouble and diligence, if a portion of the fees was fixed for the plaintiff under the agreement in question as alleged by him, the consideration for that portion of the fees is that very diligence of the plaintiff." The Court of first instance in the event gave the plaintiff a decree against all the defendants excepting four of those who had defended the suit. On appeal by twenty-five of the defendants who had defended the suit, the lower appellate Court held that the agreement was void for want of consideration. It also held that the genuine character of the agreement was so doubtful that the agreement could not be supported; and it set aside the decree of the Court of first instance, and dismissed the suit. The material portion of the lower appellate Court's judgment was as follows:—"It is contended that Durga Prasad, the respondent, neither had done, was doing, or promised to do anything for the appellants; that the fees they derived from the '*biparis*' were not due to any exertions on his part; that if he built shops so did the appellants; that the efforts he may have made 11 or 12 years previously to establish the market-place were made to please the Collector and not at their desire; and that it was never agreed that they should receive certain fees in consideration of paying him certain dues. On behalf of the respondent it is argued that there was consideration within the meaning of s. 25 (2), Act IX of 1872, and that the dues secured by the agreement were in compensation for something already voluntarily done by the respondent for the appellants, namely, the establishment of the market place. I am unable to see clearly what it is that the respondent has done for the appellants. The market place was evidently established with great difficulty and in the force of much opposition mainly through the exertions of Durga Prasad, but this was to please the Collector not the appellants. The respondent was a person of standing and influence, and in consideration of his assistance the local authorities wished to recognize him as *chaudhri*, but their action in appointing him as such was disallowed by the Local Government on a petition being filed by several persons, among whom were some of the defendants. It is evident that the respondent was not

by any means acceptable to the persons immediately concerned. It might be considered that the appellants would not agree to pay the respondent fees unless they had gained something through him, and that the fact of their executing such an agreement afforded a presumption that he had done something for them. But, as will be noticed under plea 9, the agreement was extremely informal and vague, and there is much reason to doubt whether in fact it was executed by most of the defendants or not. It does not, for instance, recite any service done by the respondent or advantage accruing to the appellants through him. All the appellants are made to say in it is that they will not take more than Re. 1-8-0 out of which they will pay the respondent six annas. There was evidently no 'consideration,' as defined in s. 2 (*d*), and as evidently the circumstances do not bring the matter under cl. 2, s. 25 of Act IX. of 1872. I think it desirable, notwithstanding that this finding is a sufficient reason for reversing the decree, to enter into that part of the 9th plea also which raises the question whether the deed was really executed by the appellants or not, and whether the confessing defendants are in collusion with the plaintiff or not. On behalf of appellants several peculiarities are pointed out, which tend to show that the document was not executed with the propriety and deliberation suitable where such considerable interests were concerned and usual on such occasions. It was executed on an eight-anna stamp and a penalty subsequently enforced of twenty times the proper stamp. To this a long slip of country paper was past d upon which the signatures which could not be got on to the stamp were written; there were no marginal witness, and the agreement was not drawn up in the usual form. The stamp was purchased in the respondent's name, not, as is usual in such cases, by the executants. Several of the names are those of shop-keepers, not brokers, though the former take no fees. From all this the inference deduced on behalf of the appellants is that the document was not fairly and openly executed, and cannot be fully trusted, and the inference is not unreasonable. It is evident that the Municipal Committee did not feel sure of the genuineness and validity of the document as they wished to be, for they recommended the respondent to get it

1880

DURGA PRASAD. v. BALDEO.

registered. When he produced it for registration, some of the alleged executants admitted their signatures but declined to register; others said they had signed a blank paper; and four denied having executed the document at all. Registration was refused and the order maintained on appeal. As to one of those who denied their signature, it was found by the Sessions Court, to which the respondent was committed for trial on the charge of forgery, that his signature had in fact been forged, and the document was impounded though the respondent was acquitted on the ground of ignorance and good faith. The evidence as to the signature consists of the statements of the writer of the document, of Muhammad Nazir, Tahsildar and Sub-Registrar, and of several of the confessing defendants, and is extremely weak, as might be expected from witnesses relating what they could recollect after a lapse of three years. No confidence can be placed under such circumstances in the genuineness of any of the signatures which are denied. It may be, and apparently is, the case that certain fees were paid to Durga Prasad, but there was a dispute about them for years. It is obvious that the respondent was strongly supported by the authorities, and it is not improbable that some of the appellants may have given a reluctant assent to the terms specified in the agreement and that others subscribed to them willingly. But I am of opinion that the contract it embodies is void for want of consideration, and that the whole document is not such as can be accepted as proving the alleged agreement, and that the other evidence is also insufficient to prove it."

The plaintiff appealed to the High Court, it being contended on his behalf that his past services and exertions in establishing the market were good consideration for the agreement; that the agreement was proved; and that he was entitled to a decree against the defendants who admitted the execution of the agreement, or could not prove that they had not executed it.

Mr. *Conlan*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Munshi *Hanuman Prasad*, for the appellant.

Babu *Baroda Prasad Ghose*, for the respondents.

1880

DURGA PRASAD v. BALDEO.

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

OLDFIELD, J.—The object of the suit is to establish an agreement in writing, dated the 22nd June, 1875, alleged to have been executed by the defendants, whereby they agreed to pay certain commission to the plaintiff on the price of articles brought for sale in a market called Hume Ganj in Etawah. The allegation of the plaintiff is that he established the Ganj at his own expense by request of the Collector at that time, built shops, which were occupied by some of the defendants, who received commission at Re. 1-8-0 per cent. on articles brought for sale, and who used to pay 8 annas per cent. to the plaintiff, and that the agreement now sought to be established has been executed to give effect to the understanding existing between the parties on the subject. Out of the defendants, nineteen confessed judgment, twenty-eight put in no appearance, and seventy-one defended the suit. The Court of first instance decreed the claim against all but five; twenty-five persons among the defendants appealed to the Judge, and these are the respondents in appeal before us. The grounds of appeal were substantially that a suit of the nature of the present suit to establish a right to fees as *chaudhri* of a bazár is not maintainable; that the absence of registration of the document is fatal to the maintaining of the suit; that the suit should be dismissed, since the document had been held to be a forgery by a Criminal Court: and that there was no consideration for the agreement under s. 25, Act IX of 1872, and it cannot be a binding agreement on the appellants under the circumstances under which it was drawn up. The Judge rejected all the objections in respect of the maintenance of the suit, but he found that there had been no consideration for the agreement, as the term is defined in s. 2 (*d*), Act IX of 1872, and that it was not such an agreement as might be valid with reference to the provisions of cl. (2), s. 25 of that Act; and he further held that the document had not been executed with proper formality and the deliberation suitable when such considerable interests were concerned, nor with the fairness or openness required to allow of its being fully trusted; and he reversed the decree of the first Court and dismissed the claim against the defendants.

1880

DURGA PRASAD v. BALDEO.

The plaintiff has presented a second appeal in this Court, making the defendants respondents who had appealed to the Judge. The objections are to the effect that the Judge's finding in respect of the invalidity of the agreement for want of consideration, and for want of proof of its proper execution, is wrong, and that he should not have dismissed the suit against those defendants who had not appealed to him.

The Judge's finding on the question of consideration is one which is not open to question in second appeal. To render the agreement valid as a contract, it must be shown that there was consideration as defined in the Contract Act, or if not, that the agreement comes within the exceptions provided for in s. 25. Now the deed is silent as to the character of the consideration for the promise, and the only ground for making the promise is the expense incurred by the plaintiff in establishing the Ganj; but it is clear that anything done in that way was not "at the desire" of the defendants, so as to constitute a consideration, and the Judge has very distinctly found that "the circumstances do not bring the matter under cl. 2, s. 25, Act IX of 1872," as has been contended. To bring it within the provisions of that clause, it must be shown that what was voluntarily done by the plaintiff was done "for the promisors" or "something which the promisor was legally compellable to do," and the Judge finds that this has not been shown. He says he does not see clearly what it is that respondents had done for appellant, and that what he did was to please the Collector. In fact, when plaintiff established the Ganj, the defendants were not in his mind, and there was nothing done for them, for which compensation might be given. On the finding by the Judge there is no case for second appeal, and we cannot disturb the decree in respect of those defendants who have not been made parties to this appeal by the appellant. The appeal is dismissed with costs.

Appeal dismissed.