SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Norris, and Mr. Justice Pigot.

1893 *August* 3.

MAHOMED BHOY PUDDUMSEE (PLAINTIFF) *v.* CHUTTERPUT SING AND ANOTHER (DEFENDANTS).*

Contract—Sold note—Mistake in name of one of the parties to the contract—Evidence to show with whom the contract was really made—Damages for breach of Contract, Right of suit for—

A contract intended to have been entered into between the plaintiff and the defendant, was entered by a mistake, on the part of the broker, in the sold note, as having been made between a third person and the defendant. In a suit brought by the plaintiff on the contract, oral evidence was given to show that the contract was really made between the plaintiff and the defendant. The Judge of the Small Cause Court found that the mistake did not mislead the defendant, and gave judgment in favour of the plaintiff contingent on the opinion of the High Court as to whether the mistake in the sold note was a bar to the plaintiff's suit for damages on the contract.

Held, that there was a contract between the parties for breach of which the plaintiff could sue for damages.

REFERENCE from the Calcutta Court of Small Causes made by the Officiating Second Judge of that Court.

The following was the order of reference :—

"The plaintiff sues the 1st defendant for damages for non-delivery of bags under a contract, and this defendant having denied the contract, the plaintiff added the broker as defendant No. 2 and prays for alternative relief against him.

"There were bought and sold notes, and the defence set up by the 1st defendant is that the sold note contains the name of one Madoojee Dwarka Doss as the purchaser, and not the plaintiff's name, and consequently that there was no contract with the plaintiff, and also that if there was a mistake in the name this Court had no jurisdiction to try the case on the ground that rectification of the sold note was first necessary.

"Mr. N. N. Mitter, who appeared as Counsel for the 1st defendant, referred to section 19 (*j*) of Act XV of 1882, and

* Small Cause Court Reference No. 3 of 1893, made by E. Ormond, Esq., Offg. Second Judge of the Calcutta Small Cause Court.

sections 31 and 34 of the Specific Relief Act. I find that the 1st defendant authorised the broker to enter into the contract with the plaintiff; that the broker entered the name of Madoojee Dwarka Doss instead of the plaintiff's name as the buyer in the sold note by mistake; that the 1st defendant knew that the contract was made with the plaintiff, and that the error in the sold note did not mislead him. The contract was proved by the plaintiff from the particulars entered in the broker's book and the bought note.

"The sold note was put in evidence by the 1st defendant.

"The learned Counsel has submitted the following questions on behalf of the 1st defendant for the decision of the High Court:—

"(1) Can a suit be tried in this Court when in the sold note the name of Madoojee Dwarka Doss appears as one of the contracting parties, and the name of the plaintiff does not appear in it at all, or in other words, has this Court jurisdiction to try a case under sections 31 and 34 of Act I of 1877?

"(2) Can any oral evidence be given at the trial to prove that the parties intended to contract with Mahomed Bhoy Puddumsee?

"(3) Can any parol evidence be given to vary the terms of the written contract, namely, the sold note, to show that the name of Mohomed Bhoy Puddumsee was put in the sold note by a mistake?

"These questions I think could be condensed into one question. 'Is the mistake contained in the sold note a bar to the plaintiff's suit for damages under the contract?' I have given judgment for the plaintiff contingent upon the opinion of the High Court on this point. I held that the sold note was not necessary to the plaintiff's case, and that he could not therefore be compelled to have it rectified; and I admitted evidence to show that Madoojee's name was inserted by mistake. This is not the case of a mutual mistake, nor is the suit one for specific performance of a contract. Sections 31 and 34 of the Specific Relief Act therefore seem to me to have no application. The point in the case is, was there, in spite of the mistake in the sold note, a contract between the parties, for the breach of which the plaintiff can sue for damages."

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MAHOMED BHOY PUDDUMSEE v. CHUTTERPUT SING.

Mr. J. G. Apear for the defendant Chutterput Singh.—With reference to the Judge's contention that the sold note was not necessary to the plaintiff's case, he admits that the bought note was sufficient to prove the contract, but this could be so only on the supposition that the sold note corresponds with the note relied on—*Sievewright* v. *Archibald* (1); *Hawes* v. *Foster* (2); *Parton* v. *Crofts* (3); and where both the bought and sold notes are in evidence, and a variance is found to exist between them, there is no contract—*Gregson* v. *Rack* (4). By the custom of Calcutta contracts of this nature are by bought and sold notes, and no evidence can be given to correct the mistake. *Cowie* v. *Remfry* (5); *Jadu Rai* v. *Bhubotaran Nundy* (6). The plaintiff in this case relies on the bought and sold notes as forming the contract, but seeks to get rid of the variance and to correct an alleged mistake by oral evidence. Such evidence could be admitted only as a weapon of defence on behalf of the defendant on equitable principles, except where a plaintiff, in a properly framed suit, was seeking either to have a writing re-formed where the mistake was mutual, or in order to obtain rescission of a document. See Taylor on Evidence, page 970, 8th edition; while parol evidence can be received to explain what has been written, it can never be admitted to explain what it was intended to write: here to accept parol evidence would really be to set aside a writing, and this, on the evidence of a person who was being sued in the alternative, and whose interest it was to throw the burden of payment on his co-defendant. [PIGOT, J., referred to *Mitchell* v. *Lapage* (7).] The mistake is not a similar one to that in the present case. See *Ex parte Barnett* (8). [PETHERAM, C.J.—It has been found that you were not misled.] But that finding proceeds on evidence which the Judge was not entitled to consider. His decision is not based on that ground, and there was no question raised on the point. My whole contention is that the personality of the contracting party is a material

(1) 17 Q. B. 103 at p. 117; 20 L. J. Q. B. 529 (535).
(2) 1 Mood & Rob. 368 at p. 371.
(3) 16 C. B., N. S., 11.
(4) 4 Q. B., 737, at p. 747.
(5) 3 Moo. I. A., 448.
(6) I. L. R., 17 Calc., 173.
(7) 1 Holt's Rep. 253.
(8) L. R., 3 Ch. D., 123.

condition of the contract, if it is held that it is immaterial, then there would be an end of the case.

Mr. *Acworth*, for the plaintiff, was not called upon.

The opinion of the Court (PETHERAM, C.J., NORRIS and PIGOT, JJ.) was delivered by

PIGOT, J.—We think that in this case it is not necessary to call on Mr. Acworth. The principle to be applied is sufficiently expounded by Mr. Justice Gibbs in the case of *Mitchel* v. *Lapage* (1).

We think it quite clear that the learned Second Judge of the Small Cause Court is quite right in the view which he takes, and that our answer to the question put by him must be in the affirmative that there is a contract between the parties, for breach of which the plaintiff can sue for damages.

Attorney for plaintiff: Mr. *R. Rutter*.

Attorneys for the defendant: Messrs. *Gregory* and *Jones*.

T. A. P.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

GIRISH CHUNDER GHOSE AND ANOTHER (PETITIONERS) *v.* THE QUEEN-EMPRESS (OPPOSITE PARTY).*

1893 *March* 24.

Magistrate, disqualifying interest of—Criminal proceedings—Irregularity —"Personally interested"—Criminal Procedure Code, 1882, *s.* 555.

Where a District Magistrate, as prosecutor, initiated and directed the proceedings against certain accused persons who were charged by him with having committed offences punishable under sections 143 and 150 of the Penal Code, and where it appeared that the District Magistrate had himself taken an active part in causing the dispersion of the unlawful assembly, and had pursued and directed the pursuit of the members thereof, and that he subsequently took pains to collect the evidence showing the connection of

* Criminal Revision No. 114 of 1893, against the order passed by A. E. Staley, Esq., Sessions Judge of Backergunge, dated the 11th of January 1893, modifying the order passed by H. Savage, Esq., District Magistrate of Backergunge, dated the 25th of December 1892.

(1) 1 Holt's Rep. 253.