

## APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava  
and Mr. Justice E. M. Nanavutty

1935  
April 2

**IQBAL BAHADUR NIGAM AND OTHERS (DEFENDANT-APPELLANTS) v. DOORGA PRASAD NIGAM (PLAINTIFF-RESPONDENT)\*.**

*Negotiable Instruments Act (XXVI of 1881), section 87—Promissory note—Material alteration in promissory note—Signature of an executant forged by or at instance of payee—Promissory note, whether void against other executants—Civil Procedure Code (Act V of 1908), order XXIII, rule 1—Two promissory notes for same loan—Suit on one pronote withdrawn without permission to bring fresh suit—Suit on second promissory note, whether barred under order XXIII, rule 1(3) C. P. C.*

Where after the execution of a promissory note by some persons the signature of another person as an executant is forged on it by or at the instance of the payee without the consent of the other executants and the alteration is not made in order to carry out the common intention of the original parties, the promissory note is void against the original executants also under section 87 of the Negotiable Instruments Act. *Kamal Khan v. Nizam Uddin* (1), *Gogun Chunder Ghose v. Dhurmodhar Mundul* (2), *Davidson v. Cooper* (3), *Gardner v. Walsh* (4), and *Gour Chandra Das v. Prasana Kumar Chandra* (5), referred to.

Where a loan is advanced on a promissory note which is embodied in a subsequent promissory note and a suit on the first promissory note is withdrawn without obtaining permission to bring a fresh suit, then a fresh suit on the second promissory note is barred under order XXIII, rule 1, sub-clause (3) of the Code of Civil Procedure. *Payanna Reena Saminathan v. Panalana Palaniappa* (6), distinguished.

Messrs. *Ambika Prasad and Mahesh Prasad*, for the appellants.

Mr. *Makund Behari Lal*, for the respondent.

\*First Civil Appeal No. 9 of 1933, against the decree of Babu Mahabir Prasad Varma, Subordinate Judge of Lucknow, dated the 5th of December, 1932.

(1) (1923) A. I. R., All., 123.

(3) 13 M & W. Ex. Ch. 353.

(5) (1906) I.L.R., 33 Cal., 812.

(2) (1881) I.L.R., 7 Cal., 616.

(4) 24 L.J., Q.B., 285.

(6) (1913) L.R., 41 I.A., 142.

1935

---

 IQBAL  
 BAHADUR  
 NIGAM  
 v.  
 DOORGA  
 PRASAD  
 NIGAM

SRIVASTAVA and NANAVUTTY, JJ.:—This is a defendants' appeal from a judgment and decree of the Court of the learned Subordinate Judge of Lucknow decreeing the plaintiff's suit.

The facts out of which this appeal arises are briefly as follows:

The plaintiff, B. Durga Prasad Nigam, filed a suit against B. Iqbal Bahadur, B. Khurshed Bahadur and B. Tej Bahadur on the basis of a promissory note said to have been executed by the defendants on the 30th of December, 1930, for a sum of Rs.4,500. The plaintiff alleged that B. Shyam Sunder Lal Nigam, the father of B. Khurshed Bahadur and Tej Bahadur, and brother of B. Iqbal Bahadur, had also executed the pronote, but that, as he had not signed the pronote in the presence of the plaintiff, the latter discharged him.

The defendants in their written statements alleged that prior to the filing of the present suit the plaintiff had filed another suit, suit No. 99 of 1930, in the Court of the Subordinate Judge of Lucknow against B. Iqbal Bahadur, B. Tej Bahadur and B. Shyam Sunder Lal on the 15th of October, 1930, on the basis of a pronote for Rs.3,000 said to have been executed by B. Iqbal Bahadur. In that suit also the plaintiff discharged B. Tej Bahadur Nigam, and wanted to obtain an *ex parte* decree against the other defendants, but the defendants B. Iqbal Bahadur and Shyam Sunder Lal having come to know of the filing of the suit against them appeared through their counsel on the 5th of December, 1930, and applied for setting aside of the order that the suit should be heard *ex parte*. Their application was granted and the order directing the hearing of the case *ex parte* was set aside on payment of costs. The defendants in that suit denied all liability in respect of the plaintiff's claim on the pronote for Rs.3,000, and alleged that the loan in respect of which the suit was brought was actually taken by one Mr. Dikshit, proprietor of the Dikshit Motor Works in Hazratganj in the city of

1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Srivastav  
and Nana-  
vally, JJ.*

Lucknow, and alleged that the pronote and receipt for Rs.3,000 were without consideration and were obtained by means of mis-representation and false promises, that during the course of the trial of that suit the plaintiff went to Etawah to have an attachment before judgment of the movable property of B. Iqbal Bahadur and B. Shyam Sunder Lal, that when he reached Etawah the plaintiff represented to B. Shyam Sunder Lal that he would advance Rs.10,000 on the security of the family property situate in Etawah and Cawnpore and so have the Etawah property released from attachment and sale by depositing the necessary amount in Court on or before the 5th of January, 1931, that B. Shyam Sunder Lal, believing in the truth of the representations made by the plaintiff, agreed to accept the timely help preferred by the plaintiff and sent his son B. Khurshed Bahadur to B. Iqbal Bahadur at Cawnpore asking the latter to go with Khurshed Bahadur to Lucknow with all the necessary documents and to satisfy the plaintiff with regard to the properties which were to be mortgaged to the latter, that the plaintiff was satisfied with the title deeds shown to him by Iqbal Bahadur, but insisted on B. Iqbal Bahadur, B. Khurshed Bahadur and B. Tej Bahadur executing a pronote for Rs.4,500 in adjustment of the claim made by him in suit No. 99 of 1930, that the defendants objected to this proposal but the plaintiff, taking advantage of the helpless condition in which the defendants were, constrained them to sign the pronote otherwise he would not make the advance of Rs.10,000 promised by him to Shyam Sunder Lal, that the plaintiff further agreed that the pronote for Rs.4,500 which he wanted the defendants to execute would be returned to them when the mortgage for Rs.10,000 was executed, and that a sum of Rs.4,500 would be included in the mortgage deed, that the defendants in order to save their valuable property in Etawah which had been put up for sale yielded to the pressure which was put upon them and signed the pronote and the receipt of Rs.4,500,

although they had received no part of the consideration up to that time, that relying on the assurances given by the plaintiff, B. Shyam Sunder Lal, his wife and sons reached Cawnpore on the 2nd of January, 1931, and on the following day the plaintiff informed the defendants that he had not brought the sum of Rs.10,000 with him to Cawnpore, and he represented to the defendants that he was wiring to his nephew B. Shyam Sunder Lal Nigam to bring the sum of Rs.10,000 from the Bank and sent a telegram to that effect, that B. Shyam Sunder Lal the father of defendants 2 and 3, on learning that the plaintiff had not brought the sum of Rs.10,000 with him which he had promised to advance. refused to sign the pronote for Rs.4,500 and left Cawnpore for Etawah at once, that B. Khurshed Bahadur informed the plaintiff that his father had left for Etawah and did not agree to sign the pronote for Rs.4,500 until he had received the money promised by the plaintiff, that thereupon the plaintiff himself left for Lucknow and the proposed transaction whereby the plaintiff had agreed to advance a sum of Rs.10,000 to the defendants fell through, that B. Iqbal Bahadur and B. Shyam Sunder Lal informed the Court of the Subordinate Judge of Lucknow, while suit No. 99 of 1930, was pending in that Court, that the pronote and receipt for Rs.4,500 were obtained by the plaintiff from the defendants under false representations and fraud, and they opposed the application of the plaintiff, dated the 12th of January, 1931, for withdrawal of his Suit No. 99 of 1930, that the Subordinate Judge of Lucknow framed additional issues on the 22nd of January, 1931, on the pleas raised by the defendants and fixed the 20th of April, 1931, for recording the evidence in respect of those issues, that the plaintiff however got the suit dismissed on the 16th of April, 1931, in spite of all opposition by the defendants, that B. Shyam Sunder Lal never signed the pronote and receipt for Rs.4,500 and that the signatures of the latter on the pronote and

1935

---

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Sivastava  
ann Nana-  
vutty, J.J.*

1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Srivastava  
and Nana-  
vutty, J.J.*

receipt for that amount were forged by or at the instance of the plaintiff, that the pronote and receipt in suit were also not attested by any witnesses at the time they were written out and signed by Iqbal Bahadur, Khurshed Bahadur and Tej Bahadur, and that the plaintiff had subsequently got them attested by persons who were not present when they were written out and signed by the defendants, that the pronote in suit was void under section 87 of the Negotiable Instruments Act by reason of a material alteration having been effected in it by or at the instance of the plaintiff while it was in his possession without the consent and knowledge of the defendants, that it could not form the basis of any relief in favour of the plaintiff, and that as distinct issues had been framed in the former suit as to the pronote and receipt now in dispute having been obtained by means of fraud and undue influence, the present suit of the plaintiff was void by virtue of the provisions of section 11 of the Code of Civil Procedure and by the principle of *res judicata* and estoppel and also under the provisions of order XXIII, rule 1 and order II, rule 2 of the Code.

The plaintiff in his replication to the written statements filed by the defendants alleged that the pronote was executed at Lucknow and that the defendants signed it and also obtained the signatures of Shyam Sunder Lal at Etawah before they signed it, that the pronote in suit had nothing to do with the loan transaction for Rs.10,000 which the plaintiff had agreed to advance to B. Shyam Sunder Lal if the latter satisfied him in respect of his title deeds to the property owned by him in Etawah and Cawnpore, and that even if it be taken as true that the pronote in suit was connected with the above transaction nevertheless the plaintiff's claim should be decreed.

Upon the pleas of both parties the learned Subordinate Judge framed the following issues:

1. Is the suit barred by *res judicata*?

1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Srivastava  
and Nana-  
vutty, J.J.*

2. Is the suit barred by order II, rule 2 and order XXIII, rule 1 of the Code of Civil Procedure?

3. Have the signatures of B. Shyam Sunder Lal been forged on the pronote and receipt by or at the instance of the plaintiff? If so to what effect?

4. Did the plaintiff make the representations as alleged in para. 24 of the written statement and if so is he estopped from maintaining this suit?

5. Are the facts alleged in para. 22 of the written statement correct, and if so can the pronote in suit not form the basis of this suit as alleged?

6. Is the pronote in suit without consideration?

7a. Is the question of the pronote dated the 17th of March, 1929, and the pronote in suit being without consideration and having been obtained by fraud and undue influence *res judicata* between the parties?

7b. If not, were they obtained by fraud and undue influence as alleged?

8. Was the pronote dated the 17th of March, 1929, without consideration, and if so to what effect?

9. Was the receipt in suit attested by the witnesses after its execution and if so, to what effect?

The learned Subordinate Judge decided issues 1 and 5 in favour of the plaintiff and held that the present suit was not barred by *res judicata*, and that the pronote in suit could form the basis of the present suit. His finding on the 2nd issue was that the subject-matter of the two suits were altogether different and that order II, rule 2 and order XXIII, rule 1 had no application to the present case, and he accordingly decided issue 2 in favour of the plaintiff and against the defendants. His finding on the 3rd issue was that the pronote and the receipt already bore the signatures of B. Shyam Sunder Lal before it was handed over to the plaintiff and he accordingly decided issue No. 3 in favour of the plaintiff and against the defendants. He decided issue 7a against the plaintiff and held that the question of the

1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Srivastava  
and Nana-  
vutty, JJ.*

present pronote having been executed under undue influence and fraud had been left undecided in the previous suit. His findings on issues 6 and 7b were in favour of the plaintiff and he accepted the plaintiff's version of what had happened in preference to the account given by the defendants and he held that the pronote in suit was for consideration. His finding on issue No. 9 was also in favour of the plaintiff and against the defendants. The learned Subordinate Judge accordingly decreed the plaintiff's suit with costs.

Dissatisfied with the judgment and decree of the trial Court the defendants have filed the present appeal.

We have heard the learned counsel of both parties for three whole days, and have carefully examined the evidence on the record and perused the judgment of the learned Subordinate Judge. The judgment of the learned Subordinate Judge is a very lengthy one, but we have received very little illumination and help from it. In fact the learned Subordinate Judge has lost himself in a case of details and has even given conflicting findings on some of the points involved in the case. Thus, for instance, in the course of his finding on issue 7a, he expressed himself as follows:

"The defendants never gave up their plea. They again denied the alleged adjustment and agreed to the withdrawal of the suit only under order XXIII, rule 1, C. P. C. The Court could not pass an order on the merits unless it had heard the defendants' evidence."

In the course of his findings on issues 1 and 5 he, however, expressed himself thus:

"This part of the order 'that defendant No. 1 is not entitled to costs as he has failed to support the defence' is very significant. As stated above the only defence of the defendants at that stage of the suit was that the adjustment had been arrived at under fraud and undue influence. The execution of the pronote was admitted.

1935

It therefore follows that the Court *found* that the defendant No. 1 had failed to prove that the subsequent pronote was executed under fraud and undue influence."

This expression of opinion is diametrically opposed to that given by the learned Subordinate Judge in the course of his finding on issue 7a. It seems to us that the learned Subordinate Judge has lost his way in the maze of conflicting versions given by both parties, and instead of being master of the facts of the case he had allowed himself to be overwhelmed by the ingenious stories told by both sides. We have therefore examined the evidence on the record for ourselves and have arrived at an independent conclusion upon that evidence as to what, in our opinion, are the true facts of the case. Upon a careful consideration of the evidence and after giving to the arguments of the learned counsel of both parties our best attention, we have come to the conclusion that the original pronote for Rs.3,000 executed by Iqbal Bahadur on the 17th of March, 1929, is not proved to have been executed on behalf of Mr. Dikshit, late proprietor of the Dikshit Motor Works. In any case, Iqbal Bahadur, being the executant of the pronote, was legally responsible under the Negotiable Instruments Act for payment of the amount due under that pronote.

We further hold that the plaintiff in his desire to recover the amount due under that pronote went to Etawah to execute attachment before judgment, and there at the instance of the defendants entered into a negotiation with B. Shyam Sunder Lal, the father of Khurshed Bahadur and Tej Bahadur, with a view to advancing to them a loan of Rs.10,000 in order to save the property of the defendants which was under attachment and sale on the 5th of January, 1931.

In Suit No. 99 of 1930, two issues had been raised by the defendants to the following effect:

---

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Srivastava  
and Nanda-  
vally, J.J.*



1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

(3) Whether the defendant No. 1 (Iqbal Bahadur) carried on any family business and was head of the family and manager of the family business?

(4) Whether the loan in suit was contracted by defendant No. 1 as manager of the family for family necessity and for family business as alleged?

*Srivastava  
and Nana-  
vally, J.*

The plaintiff B. Durga Prasad Nigam discharged defendant No. 3, B. Tej Bahadur, on the 3rd of December, 1930 and, as he found that it was difficult for him to prove that Iqbal Bahadur had executed the pronote for Rs.3,000 as head and manager of the family and for family necessity, he conceived the ingenious idea of getting a fresh pronote executed by all the members of the family and to take advantage of the difficulties under which the members of the defendants' family were labouring because of the attachment and sale of their property in Etawah. He, therefore, agreed to advance them Rs.10,000 on a mortgage provided he was satisfied with their title to the properties owned by them in Etawah and Cawnpore. He, however, made the grant of his aid in the shape of a loan to the defendants conditional on all the members of the family executing a pronote for Rs.4,500. Iqbal Bahadur, Khurshed Bahadur and Tej Bahadur, finding no way out of their difficulties, executed the pronote for Rs.4,500 in Lucknow but when Shyam Sunder Lal came to Cawnpore hoping to get the loan of Rs.10,000 from the plaintiff, he declined to sign the pronote for Rs.4,500 unless B. Durga Prasad Nigam actually gave him the promised sum of Rs.10,000. The latter having already got the pronote for Rs.4,500 executed by B. Iqbal Bahadur, B. Khurshed Bahadur and B. Tej Bahadur, had no intention of giving them a loan of Rs.10,000, and accordingly Shyam Sunder Lal, who was almost as shrewd a man as Durga Prasad, declined to put his signature to the pronote and receipt which had already been signed by his brother and his sons, and thus the whole transaction fell through.

This, in our opinion, is the conclusion as to the true facts of the case to be gathered from the evidence on the record. We hold that the signatures of B. Shyam Sunder Lal on the pronote and receipt in suit were made by or at the instance of the plaintiff B. Durga Prasad Nigam while the pronote and receipt were in his custody. In affixing the signatures of Shyam Sunder Lal on the pronote, or in getting them affixed, B. Durga Prasad over-reached himself and that is why in the very plaint that he filed on the basis of this pronote in para. 5, presumably acting under legal advice, he wrote "that B. Shyam Sunder Lal executant is discharged and no relief is sought against him as he did not sign in the presence of the plaintiff." Had the plaintiff been content to leave well alone, and had he not fictitiously and fraudulently got the signature of B. Shyam Sunder Lal affixed on the pronote and the receipt of the 30th of December, 1930, he might have had a valid claim against the defendants in the present suit, for in that case it would not have been possible to discover the true facts of the case as the pronote itself would have borne out the story of the plaintiff, but the material alterations made in the pronote and receipt by, or at the instance of, the plaintiff, in our opinion, clearly go to support the version of the transaction as given by the defendants.

We have come to the conclusion that the signatures of B. Shyam Sunder Lal on the pronote and receipt are not his genuine signatures because we have compared them with the signatures of B. Shyam Sunder Lal on documents which are more than 30 years old and produced from proper custody and whose genuineness has been rightly presumed by the lower Court. The signatures of B. Shyam Sunder Lal on these old and genuine documents differ radically from the signatures of B. Shyam Sunder Lal alleged to have been made by him on the pronote and receipt in question. We have come to this conclusion after a careful comparison of signatures.

1935

IQBAL  
BAHADUR  
NIGAMv.  
DOORGA  
PRASAD  
NIGAM*Srivastava  
and Nana-  
waty, JJ.*

1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Srivastava  
and Nana-  
vutty, J.J.*

In the second place B. Shyam Sunder Lal has himself denied his alleged signatures on the pronote and receipt and we believe him on that point. On the other hand the plaintiff B. Durga Prasad does not positively assert that the signatures purporting to be Shyam Sunder Lal's on the pronote and receipt were really made by Shyam Sunder Lal. On the contrary he has virtually conceded the possibility of their being forgeries by discharging Shyam Sunder Lal of all liability under the pronote and receipt. These circumstances and our own personal observation and comparison of signatures and the place on the pronote and receipt where these signatures are to be found lead us to the reasoned belief that they are not genuine and that they were made by somebody other than Shyam Sunder on the pronote and receipt below the signatures of those executants who admit having put their signatures on these documents, and that these forged signatures of B. Shyam Sunder Lal were made on the pronote and receipt while they were in the custody of the plaintiff. We believe the evidence on this point given by B. Shyam Sunder Lal, Iqbal Bahadur and Tej Bahadur and others examined on behalf of the defendants. Relying upon the evidence of these witnesses we hold that the evidence of B. Durga Prasad, plaintiff, that the signatures of B. Shyam Sunder Lal had been made on the pronote and receipt at Etawah before these documents were brought to him is false. The very position of these suspected signatures made below the signatures of other executants who are said to have signed these documents subsequently gives the lie direct to the plaintiff's story. The fact that there are two signatures of Shyam Sunder Lal on each of these documents is also not without significance. And for all these reasons we are constrained to hold that forgery in respect of Shyam Sunder Lal's signatures on the pronote and receipt was committed while these documents were in the custody of the plaintiff, and that these signatures

1935

---

 IQBAL  
 BAHADUR  
 NIGAM  
 v.  
 DOORGA  
 PRASAD  
 NIGAM

*Srivastava  
 and Nana-  
 vally, J.J.*

of B. Shyam Sunder Lal were forged by or at the instance of the plaintiff B. Durga Prasad.

Section 87 of the Negotiable Instruments Act (Act XXVI of 1881), runs as follows:

“Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties.”

In the present case we hold that the addition of the name of B. Shyam Sunder Lal, father of defendants 2 and 3 and brother of defendant No. 1, was not made with the consent of these defendants nor was it made in order to carry out the common intention of the original parties, because we hold that the common intention of the parties was that a loan of Rs.10,000 should be advanced by the plaintiff to the defendants and that this common intention fell through owing to the unwillingness of the plaintiff to advance that sum to the defendants. We, therefore, decided issue No. 3 against the plaintiff and hold that the signatures of B. Shyam Sunder Lal on the pronote and receipt in suit have been forged by, or at the instance, of the plaintiff B. Durga Prasad Nigam, and therefore the pronote is void as against the defendants, who were not consenting parties to the material alteration made in the pronote and receipt.

In *Kamal Khan v. Nizam Uddin* (1), it was held that where a pronote was originally written in favour of Alam Khan, which was subsequently changed into Kamal Khan, the alteration was a material one rendering the note void under section 87 of the Negotiable Instruments Act.

In *Gogun Chunder Ghose v. Dhurmodhur Mundul* (2), it was held that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state and any material alteration in it will

(1) (1923) A.I.R., All., 123.

(2) (1881) I.L.R., 7 Cal., 616.

1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Srivastava  
and Nana-  
vutty, JJ.*

vitiating the instrument, and it was further held that where a person brings a suit upon a document which when produced in evidence is found to have been fraudulently altered to the knowledge of the plaintiff no Court ought to allow an amendment to enable him to succeed upon it in its original state. The cases of *Davidson v. Cooper* (1) and *Gardner v. Walsh* (2), were relied upon by the learned Judges of the Calcutta High Court in this case.

Again in *Gour Chandra Das v. Prasanna Kumar Chandra* (3), it was held that any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke and which changes the legal identity or character of the instrument either in its form or the relations of the parties to it is an alteration which will invalidate it against all parties not consenting to the alteration, and that it is of no consequence whether the alteration would be beneficial or detrimental to the parties sought to be charged under the contract.

It is clear from the authorities cited above that the pronote in suit in the present case is void under section 87 of the Negotiable Instruments Act, and the suit must fail on that account.

We are also clearly of opinion that the present suit is barred by order XXIII, rule 1 of the Code of Civil Procedure. In the proceedings in the previous suit, Suit No. 99 of 1930, the learned Subordinate Judge, Pandit Sheo Narain Tiwari, had framed the following additional issues on the 22nd of January, 1931 :

1. Whether the defendant No. 1 Iqbal Bahadur and Tej Bahadur and Khurshed Bahadur and Shyam Sunder Lal had executed a fresh pronote for Rs.4,500 in favour of the plaintiff in adjustment of the claim in suit by means of fraud and undue influence practised upon them

(1) 13 M. & W. Ex. Ch. 353.

(2) 24 L.J., Q.B., 285.

(3) (1906) I.L.R., 33 Cal., 812.

by the plaintiff as alleged by them in their written statement and oral pleadings?

2. Whether Shyam Sunder Lal, defendant No. 2, signed the fresh pronote for Rs.4,500?

3. Whether the fresh pronote for Rs.4,500 is for consideration so far as defendant No. 1 is concerned?

4. To what relief if any is the plaintiff entitled?

The learned Subordinate Judge fixed the 11th of February, 1931, for filing of documents. On the 16th of April, 1931, the plaintiff B. Durga Prasad Nigam, and his counsel stated that the plaintiff's suit be dismissed as the plaintiff had obtained a fresh pronote in lieu of the pronote in suit. The defendants' counsel stated that defendant No. 2 Shyam Sunder Lal had not executed the fresh pronote and that the signatures of B. Shyam Sunder Lal on the pronote and receipt were forged and that defendant No. 1 Iqbal Bahadur had executed the pronote under circumstances alleged by him in his written statement, and that it was not in consideration of the pronote of the 17th of March, 1929. Counsel for the defendants also stated that if the plaintiff wanted to withdraw his suit under order XXIII, rule 1 of the Code of Civil Procedure, costs should be awarded, and he also stated that he did not want to produce further *evidence in support of his claim for costs*. It is clear from the statement of the defendants' counsel in the previous suit that the defendants never withdrew their allegations that the pronote for Rs.4,500 executed on the 30th of December, 1930, was obtained from them by fraud and misrepresentation, and that B. Shyam Sunder Lal had never executed it, and that his signatures on the pronote and receipt were forgeries. Nevertheless the learned Subordinate Judge on the 16th of April, 1931, upon the request of the plaintiff, dismissed his suit with no orders as to costs. It is clear that the order of the learned Subordinate Judge, dated the 16th of April, 1931, was

1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DURGA  
PRASAD  
NIGAM

*Srivastava  
and Nana-  
vally, J.*

1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Srivastava  
and Nana-  
vutty, J.J.*

not passed under order XXIII, rule 3, of the Code of Civil Procedure, which runs as follows:

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

It was not proved to the satisfaction of the learned Subordinate Judge that Suit No. 99 of 1930 had been adjusted wholly or in part. There was no evidence given of any lawful agreement or compromise entered into by the parties. In fact the defendants were loudly protesting that the fresh pronote was a forgery and had been obtained from them by means of undue influence, misrepresentation and fraud. The order dismissing the plaintiff's suit was undoubtedly passed under order XXIII, rule 1, because the plaintiff withdrew from the suit, and it is equally clear that no permission of the Court to bring a fresh suit in respect of the same subject matter was granted to the plaintiff before his suit was dismissed under order XXIII, rule 1, of the Code of Civil Procedure. That being the case, the present suit, which is brought in respect of the same subject-matter, namely, the loan of Rs.3,000 advanced on the pronote of the 17th of March, 1929 and alleged to have been embodied in the pronote of the 30th of December, 1930, is barred under order XXIII, rule 1, sub-clause (3) of the Code of Civil Procedure, which lays down that where the plaintiff withdraws from his suit, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. In our opinion, the subject-matter of the present suit is the same as the subject-matter of the former suit, Suit No. 99 of 1930, the only difference being that the subject-matter in the former suit was embodied in the pronote of the 17th of

March, 1929, while the same subject-matter is embodied in the pronote of the 30th of December, 1930.

The learned counsel for the plaintiff-respondent invited our attention to a ruling of their Lordships of the Privy Council reported in *Payanna Reenu Saminathan v. Panalana Palaniappa* (1), in which their Lordships of the Judicial Committee held that although the claims in the two actions arise out of the same transaction they were in respect of different causes of action and that consequently the second action was not brought contrary to section 34 of the Ceylon Code of Civil Procedure of 1899, which is in the same terms as the Indian Code of Civil Procedure of 1908 (order II, rule 2). That ruling can afford no guidance in determining the application of order XXIII, rule 1 of the Code of Civil Procedure to the present case. Here the consideration for the pronote of Rs.4,500 upon which the plaintiff has brought the present suit, is the same consideration which was embodied in the pronote for Rs.3,000 which formed the subject-matter of the former suit, Suit No. 99 of 1930.

We are, therefore, clearly of opinion that the present suit is barred by order XXIII, rule 1, sub-clause (3) of the Code of Civil Procedure.

In our opinion the plaintiff's suit fails both by reason of section 89 of the Negotiable Instruments Act as also by reason of the provisions of order XXIII, rule 1 of the Code of Civil Procedure.

The result, therefore, is that we allow this appeal, set aside the judgment and decree of the trial Court and dismiss the plaintiff's suit with costs of both Courts.

*Appeal allowed.*

(1) (1913) L.R., 41 I.A., 142.

1935

IQBAL  
BAHADUR  
NIGAM  
v.  
DOORGA  
PRASAD  
NIGAM

*Srivastava  
and Nana-  
vutty, JJ.*