

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Foster, J.

BISHUNATH SAHAY

v.

NANKU PRASAD SINGH.*

1923.

Feb., 8.

Parties—Suit on a promissory note—one of two joint promisors not impleaded, effect of—Contract Act, 1872 (Act IX of 1872), section 43.

A suit on a handnote against one of two joint promisors is not bad for non-joinder of the other joint promisor.

Appeal by defendant No. 1.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C.J.

Lachmi Narain Sinha, Parmeshar Dayal and Jadubans Sahay, for the appellant.

Susil Madhab Mullick, Bimola Charan Sinha, Jalqobind Prasad and Tribhuan Nath Sahay, for the respondents.

DAWSON MILLER, C.J.—This is an appeal on behalf of Bishunath Sahay, the first defendant, in a suit instituted before the Subordinate Judge of Patna and decided on the 22nd March, 1920. The plaintiff, Nanku Prasad Singh, lent money to the defendant, Bishunath Sahay, under a hand-note dated the 3rd August, 1917. The money was required, as appears from the terms of the hand-note itself, to deposit in Court as the purchase price of certain property in respect to the sale of which the defendant had obtained a decree for specific performance. He also required a portion of the money to pay off certain small loans, and for these purposes borrowed Rs. 4,000 from the plaintiff at the rate of 4 per cent. per mensem simple interest. The interest was no doubt very high but at the same time no security was given for repayment of the loan. The hand-note recites that Bishunath Sahay borrowed the money in the capacity of *karta* and managing member of the joint family to which he

* First Appeal No. 147 of 1920, from a decision of M. Muhammad Zahur, Subordinate Judge of Patna, dated the 22nd March, 1920.

belonged and borrowed for himself and as guardian of his younger brother Nanhe, who is the second defendant in the suit. He also apparently had a son but about him nothing is stated in the hand-note.

After the suit was instituted the amount at that time having risen with interest to Rs. 6,400, the plaintiff applied that the defendant No. 2 might be removed from the category of defendants as he no longer wished to proceed against him, he having been a minor at the date when the hand-note was executed. An order was thereupon made that the defendant No. 2 be exonerated from the category of defendants, by which I take it that the learned Judge meant that the defendant No. 2's name should be removed from the record as a defendant. Subsequently the first defendant, the present appellant, filed a supplementary written statement objecting to the removal of the name of the defendant No. 2 and pleading that unless his name remained as a defendant the suit ought to be dismissed. I ought to have mentioned that, in addition to the appellant and his step-brother, the minor son of the appellant was also impleaded as a defendant on the ground, I presume, that he was joint with the defendant in estate.

When the case came for trial various issues were raised and they were all decided by the Subordinate Judge in favour of the plaintiff, and he granted a decree in these terms :

" That the suit be decreed against the defendants 1 and 3—that is Bishunath Sahay and his son—with costs and interest at 6 per cent. per annum until realisation. "

and then added :

" The plaintiff will realise the decretal amount first from the defendant No. 1 and then from the co-parcenary properties of the defendant No. 3. The defendant No. 2 has already been exonerated. "

I do not know why the learned Subordinate Judge entered in his order, at the end of his judgment, that the decretal amount should be realized from the co-parcenary properties of the defendant No. 3, but, however that may be, that defendant has not appealed from the decision. It was stated to us in argument that it was through an oversight that his name was not entered in the memorandum of appeal as an appellant

1923.

BISHUNATH
SAHAY
v.
NANKU
PRASAD
SINGH.

DAWSON
MILLER, C.J.

1923.

BISHUNATH
SAHAY
v.
NANKU
PRASAD
SINGH.

DAWSON
MILLER, C.J.

but, be that as it may, there has been sufficient time from the date when the memorandum of appeal was filed until the present time to apply for an amendment so that the defendant No. 3 could also appeal. That has not been done and therefore we are not concerned in this appeal with the rights or liabilities of the defendant No. 3.

The two points which have been urged before us in this appeal are that the suit cannot proceed in the absence of the defendant No. 2 and, secondly, that the interest agreed in the hand-note is excessive, unconscionable and by way of penalty. With regard to the first point, assuming that the defendant No. 2 incurred any liability at all, then one must treat him and the appellants as joint promisors, and under the terms of the Contract Act, section 43, where two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. Some argument was urged before us in support of this part of the appeal, endeavouring to point out that each of the promisors was liable for a proportion only of the debt, but there is nothing in the hand-note to lead to this conclusion. I confess I am entirely unable to follow the argument that the suit is bad merely because one only of the joint promisors has been sued. In such a case each of those liable under the hand-note is liable to the full extent of the loan unless there are some special terms in the contract which in some way limit or restrict their liability, and under the provisions of section 43 of the Contract Act it is quite within the competency of the lender to sue all or any, as he may choose, of those who have incurred the liability. There is nothing in the Civil Procedure Code which militates against such a course and I am unable to find that the learned Judge was wrong in refusing to dismiss the suit upon this ground.

[The remainder of the judgment is not material to this report.]

FOSTER, J.—I agree.

Appeal dismissed.