APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

HOE MOH

v.

I. M. SEEDAT.*

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June 8.

Burden of proof—Admission by defendant of his signature on blank paper containing figures only, effect of—Issues—Denial by defendant of material facts alleged and relied on by plaintiff, suggesting incidentally fraud on his part does not shift burden of proof on defendant—Res judicata—*Decision of inferior Court—No adjudication of claim preferred in the present suit in the former suit.*

In a suit on a promissory-note, defendant admitted his signature but denied the claim of the plaintiff for Rs. 1,300 and interest thereon, and stated that he had signed a blank note with only the figures Rs. 700 written at the top of the paper. The trial Court gave a decree in favour of the plaintiff not on the ground that the plaintiff had proved his claim but because it held that the defendant failed to discharge the burden of proof laid on him of plaintiff's forgery.

Held, reversing the judgment, that the defendant had specifically denied that he had promised to pay the plaintiff the sum named with interest, so the burden of proving the loan rested on the plaintiff. The admission of the defendant of his signature under the circumstances of the case and the incidental charge of fraud made by him against the plaintiff did not shift the burden of proof on defendant. The defendant by his pleading had never admitted the material facts on which the plaintiff's case rested, nor had the defendant made a substantive claim on the ground of fraud. *Held*, on the evidence that the plaintiff failed to prove the loan as claimed by him.

Held, also, that as the transaction in suit was incidentally referred to by the appellant in his written statement in a Small Cause Court suit between the the parties, but not decided in that suit, and moreover as the Small Cause Court was not competent to decide the matter, the principle of *res judicata* did not apply at all.

N. N. Burjorjee—for Appellant.

N. N. Sen—for Respondent.

RUTLEDGE, C.J., AND BROWN, J.—The respondent sued the appellant for a sum of Rs. 2,236 which he alleged to be due to him by the appellant on a

* Civil First Appeal No. 293 of 1926 from the judgment of the Original Side in Civil Regular Suit No. 409 of 1925.

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promissory-note. The defendant denied taking the principal sum mentioned in the promissory-note, and denied signing the promissory-note in the form it had assumed when the case was brought. He admitted that his signature appeared on the note, but said that when he signed it, the only entries were the figures Rs. 300 at the top of the paper, and his signature at the bottom. All the other spaces in the form he alleges were left blank. The learned trial Judge has given the plaintiff a decree, and against this decree the appellant has now appealed. The judgment appealed against contains a very careful discussion of the evidence, and had the trial Judge come to a definite conclusion that the plaintiff had proved that he had lent the sum of money alleged by him, we should have been exceedingly chary of questioning the correctness of his decision. But as we read the judgment no definite conclusion of this nature was arrived at. The judgment sets forth at the commencement that as the charge of fraud has been raised by the defendant, the burden of proof in the case rested on him, and he was made to begin. In a later stage of the judgment the learned Judge remarks "The defendant has taken upon himself the burden of proving a grave charge of forgery as against the plaintiff, and the question for me is whether I am satisfied beyond reasonable doubt that this charge has been proved." And near the end of the judgment the following passage occurs "In considering the whole matter I have before me the pro-note which upon the face of it I cannot hold is a forgery. I have the evidence that the consideration appearing upon the note has passed to the defendant. It is for the latter therefore to satisfy me that the document is a forgery and after careful consideration I have come to the

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conclusion that I am not satisfied on this point." The case has therefore been decreed in favour of the plaintiff not because the Judge was satisfied that the loan alleged had been made, but because the defendant had not succeeded in proving affirmatively that the note in its present form was a forgery. In deciding the case on these grounds we are of opinion that the trial Judge took a mistaken view of the law. The plaint sets forth that by the promissory-note filed the defendant promised to pay to the plaintiff the sum of Rs. 1,300 with interest thereon at Rs. 3 per cent. per mensem. This allegation as to the promise to pay was entirely denied in the written statement, and unless he could prove the promise the plaintiff was clearly bound to fail. Now can we see that the admission of the defendant that his signature did appear on the document was sufficient to alter the initial burden of proof. Rule 1 of Order XIV of the Code Civil Procedure lays down that " Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other," and clause 2 of that rule explains that " material propositions are those propositions of law or fact which a plaintiff must allege in order to shew a right to sue or a defendant must allege in order to constitute his defence." All that the defendant admitted in this case was that his signature appeared on the document filed. Now it is quite clear that if the plaintiff had merely set forth in the plaint that the defendant's signature appeared on the document without any further allegation of fact his plaint must have been rejected as disclosing no cause of action. It was a necessary averment to state that the defendant had promised to pay him the sum named with interest. The admission made by the defendant did not establish the plaintiff's case, and

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if there had been nothing on the pleadings besides the plaint and the defendant's denial, the suit must have failed. It is quite true that the fact that the defendant's signature appears on the note is of very great evidentiary value, and in many cases of this nature it might be sufficient corroboration of evidence given by the plaintiff himself to establish the plaintiff's case. That would depend on the circumstances of the particular case. But the defendant did not and never has admitted the material propositions of fact which would give the plaintiff a right to sue, and the burden of proving the loan in our opinion rested on the plaintiff. The pleading of the defendant does incidentally involves a charge of fraud against the plaintiff. But exactly the same implication would be conveyed if the defendant had denied signing the note at all, and quite clearly in such a case the burden of proof would rest on the plaintiff. Were the defendant making a substantive claim on the ground of fraud then it would undoubtedly be incumbent on him to prove that fraud. But that is not the case here. The case to be decided in the present case is not whether the plaintiff has been proved to have committed forgery but whether the plaintiff has proved that he lent the Rs. 1,300 to the defendant as he alleges, and the burden of proving this loan in our opinion clearly rested on the plaintiff. To prove the loan he has given evidence himself and has called one witness Maung Po Yan. Maung Po Yan is giving evidence as to what is alleged to have taken place some four years before, and gives that evidence in considerable detail. Had he been definitely believed by the trial Judge it would have been difficult for us to discard his evidence as unreliable. But it does not appear to us that the trial Judge has placed any particular reliance on his evidence. He has pointed

out one somewhat serious discrepancy between the evidence of Po Yan and of the plaintiff. Po Yan says that the defendant protested against the rate of interest whereas as the plaintiff says he thanked him for making the loan. Were the evidence of Po Yan entirely uncontradicted we might be able to accept it, but it is contradicted by the evidence of the defendant himself and of two witnesses. The evidence of these two witnesses does not impress us any more favourably than the evidence of Po Yan. As is only to be expected in the case of oral evidence of this nature given after an interval of four years, we do not consider the direct oral evidence on either side as very convincing. There are however other features of the case which help us in coming to a conclusion. The defendant's case is that when he signed the Ex. A it was signed merely as a receipt for Rs. 300, and on the face of it the figure 1 before the 300 does seem to us to be somewhat suspicious and to be so placed that it might easily have been inserted at a later date. The plaintiff at first denied that he had ever made an advance to the defendant on a promissory-note form drawn up in blank, but subsequently he had to admit that an exactly similar document was given to him by the defendant. That document is Ex. 2, in which everything is blank except the figures and the signature and that is what is claimed by the defendant to have been the case with the document in suit. The figures shewn in that document is Rs. 600, and it is to be noted that the vacant space before the 6 in that note is just as large as the space to the left of the figure 3 in the document in suit, and that a figure 1 could have been inserted with ease in Ex. 2.

The story of the plaintiff is further on the face of it somewhat improbable. He admits that he is not a professional money-lender. In his own words "I did

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not do any money-lending business. I did not do money-lending as a profession. I sometimes lent out to my friends and acquaintances on interest." That being so it is somewhat extraordinary that he should suddenly lend a sum of this sort to a man who had a comparatively small contract with him involving Rs. 2,500. According to the plaintiff, quite apart from this particular note the defendant has received from him more than Rs. 1,000 in excess of what was due on the contract. The story of the defendant that a sum of Rs. 300 only was advanced to him towards what might be found due on the contract is *primâ facie* much more probable.

Stress has been laid on behalf of the appellant on the fact that the plaintiff did not file his suit on this promissory-note until a day or two before the period of limitation had expired. This contention loses most of its force owing to the fact that a few months after the note is alleged to have been signed the appellant sued the respondent for money due on the contract, and although the matter of this particular note was not then decided, similar matters were in dispute between the parties in that litigation.

One result of the long delay however is that it is now exceedingly unsafe to trust oral evidence on either side and as the burden of proof rests on the plaintiff, the delay must effect his case injuriously.

The learned trial Judge laid considerable stress on the fact that the defendant did not produce his account books in the previous case in the Small Cause Court. It certainly is somewhat curious, if those books were then in existence, that they were not produced, but they were definitely referred to by the appellant in the pleadings in that case and the fact of their existence does not appear to have been called in question by the other side.

As to the demeanour of the parties in the witness-box, the learned trial Judge remarks with regard to the defendant "I had occasion to observe closely the the demeanour of the defendant, and he appeared to me to give his evidence with apparent sincerity." And, later on, he says "The defendant himself is a man whose appearance is somewhat against him but on the whole he was not to any extent shaken in cross-examination." The defendant's demeanour clearly therefore was not one of the deciding factors against him. In all the circumstances of the case we are not satisfied that the plaintiff proved that he had lent the sum of Rs. 1,300 to the defendant as he alleges. The explanation of his signature on the promissory-note given by the defendant is shewn by the production of Ex. 2 not to be an incredible one. It was undoubtedly very foolish conduct on his part to sign a document in such a form and he largely has himself to blame for the position in which he now is. But it is a matter of common knowledge that receipts are frequently given in forms like this in Rangoon. And after a review of all the circumstances of the case we are of opinion that the appearance of the defendant's signature on the note is not conclusive against him but that on the contrary the probability is that the account given by him of the transaction is the true one. We are unable to hold that the plaintiff has proved the loan on which he sues.

It has been urged that the defendant is barred from pleading his present defence by the principle of *res judicata*. The case relied on as having prejudged this point is the Small Cause Court case in which the appellant sued the respondent for money alleged to be due for work done. But quite apart from the fact that that case was decided by a Court of Small Causes and the present case is not one which that Court would be

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competent to try, it is quite clear that the transaction relating to the document in issue in the present suit was not decided on in the earlier litigation. It was referred to by the present respondent in his written statement, but although claiming a set-off with regard to other items, he did not do so with regard to this note which he left for adjudication in a separate suit. We are clearly of the opinion that no question of *res judicata* arises.

The plaintiff's suit must therefore fail.

We set aside the decree of the trial Court and pass a decree dismissing the suit of the plaintiff-respondent with costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

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June 9.

PADAYACHI AND ONE

v.

R.M.K.M.S. CHINNAYA CHETTIAR.*

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47—Order for stay of execution or for security for stay of execution is neither a decree nor an appealable order.

Held, that an order for security to stay execution is not an order determining any rights of the parties and is neither an order under section 47 of the Civil Procedure Code, nor is it a decree, and is therefore not appealable.

Husainbhai and another v. *Bellie Shah Gilani*, 46 All. 733; *Janardan Triumbak Gadre* v. *Martand Triumbak Gadre*, 14 Bom. 241; *Mukhtar Ahmad* v. *Muqarrub Husain*, 34 All. 530; *Rajendra Kishore Choudhury* v. *Mathura Mohun Choudhury and others*, 25 C.W.N. 555; *Saraswathi Barmania* v. *Golap Das Barman*, 41 Cal. 160—*referred to.*

Sastry—for Appellant.

Doctor—for Respondent.

HEALD AND MYA BU, JJ.—In Civil Regular No. 11 of 1926 of the District Court of Hanthawaddy, the

* Civil Miscellaneous Appeal No. 56 of 1927.