

we hold the assessment illegal inasmuch as he was given no opportunity under section 23 (2) to appear and meet the objections to the return and accounts produced by him. The petitioner shall receive cost of this reference from the respondent.

N. F. E.

Petition accepted.

APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

HAKIM RAI (PLAINTIFF) Appellant

versus

GANGA RAM (DEFENDANT) Respondent.

Civil Appeal No. 1325 of 1922.

Cause of action— Suit for money due upon a deed of partition which refers to a promissory note—Non-production of note—whether a bar to suit on original contract—Collateral security.

The plaintiff and the defendant executed a deed of partition of their joint property under which a portion of the property was allotted to the defendant on his undertaking to pay one half the value thereof to the plaintiff within a certain time, but the deed (which was admitted by the defendant), besides reciting these terms, referred to a pro-note executed that same day in a *bahi* which was not produced in evidence.

Held, that the pro-note was a mere collateral security by which the payment of the original debt might be facilitated, and there being an independent admission of the loan quite apart from the pro-note, the non-production of the pro-note did not render the suit upon the original contract contained in the deed incompetent.

First appeal from the decree of Rai Sahib Lala Maya Bhan, Senior Subordinate Judge, Gujranwala, dated the 10th February 1921, dismissing the claim.

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Jan. 20.

M. L. PURI and BALKISHAN, for Appellant.

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JAGAN NATH AGGARWAL and JAGAN NATH BHANDARI, for Respondent.

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The judgment of the Court was delivered by—

LEROSSIGNOL J.—This appeal arises out of an action brought by the plaintiff-appellant for the recovery of Rs. 20,000, being the amount due to him by defendant as a result of partition of joint property, for which defendant executed a promissory note by way of memorandum of the transaction. The plaint recites the passing of certain joint property from the plaintiff to the defendant, on which the plaintiff was due Rs. 12,988 from the defendant. It also recites that if the promissory note for any reason is not admissible in evidence the plaintiff is still entitled to sue upon the original contract.

The defendant pleaded, *inter alia*, that the suit was barred by time and that the form of the suit was bad. On the merits he pleaded repayment. Originally, there was no plea that the promissory note was inadmissible, but at a subsequent hearing the defendant urged that the plaintiff should be made to produce the promissory note or prove his allegation that it had been lost, and an issue as to the loss of the promissory note which admittedly was written in a *bahi* was struck. The Court below, after recording evidence, has come to the conclusion that the promissory note has not been lost, and having read the evidence and heard counsel we have no hesitation in agreeing with the Court below in its conclusion. Thereupon the trial Court dismissed the suit, holding that secondary evidence as to the contents of the promissory note could not be led and that the plaintiff was barred from falling back upon the original contract.

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Before us it is not urged that the finding of the Court below regarding the loss of the promissory note is incorrect. The only contention raised on behalf of the plaintiff is that he is entitled to fall back upon the original contract to pay, inasmuch as the promissory note was a mere collateral security for payment, and that the real contract is to be found in the deed of partition subscribed by the parties which is printed on page 56 and following of the supplementary paper-book. We consider that this contention is correct.

The plaintiff and defendant are two brothers who jointly owned a saltpetre factory. In August 1914 they made a partition of their property retaining some as joint and partitioning some other. The value of the property partitioned amounted to Rs. 25,920 and this was allotted to the defendant who, inasmuch as he was entitled to only one-half of that property, undertook to pay one-half of that sum to the plaintiff. This fact is duly set forth in the deed of partition which is signed by both parties, and is to be found recorded on page 58 of the aforementioned paper-book. In the same document also there is a reference to the promissory note as follows:—

An entry with regard to the said sum has this day been secured from Ganga Ram. The said amount shall be paid by him together with interest at the rate of Re. 0-12-0 *per cent. per mensem* within 1½ years.

This was the original contract reduced to writing between the parties and it is admitted by the defendant. The promissory note written in the *bahi* was not the original contract and was a mere collateral security or instrument, by which payment of the original debt might be facilitated. In other

words, the cause of action was complete before the promissory note was given and there is an independent admission of the loan quite apart from the promissory note. For these reasons we hold that even though the plaintiff is debarred from supporting his claim by the production of the promissory note, he is competent to maintain his suit upon the original contract.

We accordingly accept the appeal and remand the case under Order XII, rule 23, Civil Procedure Code, for decision whether the suit on the original contract is within time, and if so, whether there has been payment of the debt as contended by the respondent-defendant. Court-fee on this appeal shall be refunded and costs up to date shall be costs in the case.

N. F. E.

*Appeal accepted.
Case remanded.*

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