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VASANJI MOOLJI v. KARSONDAS TEJPAL

Per Curiam:—By consent decree varied by reducing the principal amount of decree from Rs. 4,000 to Rs. 2,200. Appellant to pay costs of appeal, and in Court below including costs of execution.

Attorneys for plaintiff: Messrs. *Motichand & Devidas.*

Attorneys for defendant: Messrs. *Kanga & Co.*

S. K. B.

ORIGINAL CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Blackwell.

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February 15

SITARAM KRISHNA PADHYE (ALLEGED PARTNER IN THE 2ND DEFENDANT FIRM), APPELLANT *v.* CHIMANDAS FATEHCHAND (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hundi—Suit on—Signature of drawer describing him as "managing proprietor" of a firm—Personal liability of drawer—Firm not liable—Evidence inadmissible to show that drawer was acting for an undisclosed principal—Indian Negotiable Instruments Act, 1881, sections 26, 27, 28.

A suit was brought on three *hundis* running in the following form:—

"56 days after date I promise to pay Seth Chimandas Fatehchand or order the sum of rupees 600 only for value received in cash.

(Sd.) G. V. ATHALE,
Managing Proprietor,
Gangadhar and B. Friends,
Sandhurst Road, Bombay No. 4."

Held, that the only person liable on these *hundis* was Athale, who had signed them, and not any alleged firm passing under the name of "Gangadhar and B. Friends," and that the words, "Managing Proprietor, Gangadhar and B. Friends, Sandhurst Road, Bombay No. 4," were merely added as a description of his occupation and business address.

In an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is not open by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

Dutton v. *Marsh*[1] and *Sadasuk Janki Das* v. *Maharaja Kishan Pershad*,[2] followed.

THE plaintiffs, who were the payees, sued the defendants to recover Rs. 4,640 and interest due

*O. C. J. Appeal No. 46 of 1927: Summary Suit No. 2418 of 1926.

[1] (1871) L. R. 6 Q. B. 361. [2] (1918) L. R. 46 I. A. 33.

under three *hundis*. In the suit G. B. Athale was the first defendant and Gangadhar and B. Friends were the second defendants. The writ of summons was served on one S. K. Padhye, as a partner in the alleged firm of the second defendants. Padhye appeared under protest, and having obtained unconditional leave to defend, put in a written statement making a general defence to the suit and denying that he was a partner in the second defendant firm.

The suit came on for trial before Jhaveri, J., when issues were raised as to whether Padhye was a partner in the defendant firm, and whether he held himself out as a partner in the said firm. The learned Judge answered both the issues in favour of Padhye, but held that he was the owner of the second defendant firm and accordingly passed a decree for Rs. 4,891 and interest against Padhye.

The first defendant had only obtained leave to defend conditionally on bringing a certain sum into Court. As he failed to do that, the suit was undefended as far as he was concerned, and a decree was also passed against him for the said sum of Rs. 4,891 and interest.

Padhye appealed. The first defendant did not appeal.

Munshi and *M. V. Desai*, for the appellant.

Taraporewala and *Bhagvati*, for the respondents.

MARTEN, C. J.:—This suit is brought on three Hundis running in the following form:—

"56 days after date I promise to pay Seth Chimandas Fatehchand or order the sum of rupees 600 only for value received in cash. G. V. Athale, Managing Proprietor, Gangadhar and B. Friends, Sandhurst Road, Bombay No. 4."

Chimandas Fatehchand, the payees, are the plaintiffs: G. B. Athale is the first defendant. Gangadhar and B. Friends are the second defendants. The appellant before us is one S. K. Padhye, and the writ in this case

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was served on him as a partner in the alleged firm of the second defendants. He appeared under protest, and subsequently obtained unconditional leave to defend, and put in a written statement making a general defence to the suit and putting the plaintiffs to strict proof on all points.

At the trial, issues were raised as to whether Padhye was a partner with defendant No. 2, and whether he held himself out as a partner in the second defendant firm. The learned Judge answered both these issues in his favour to this extent, namely, that he was not a partner and did not hold himself out to be so, but held that he was the owner. The learned Judge accordingly passed a decree for Rs. 4,891 for debt and interest against Padhye.

As regards the first defendant he had only obtained leave to defend conditionally on bringing a certain sum into Court. He failed to do that, and consequently the suit was undefended so far as he was concerned. I may here observe that that did not necessarily involve a decree being passed against him. It was still for the Court to be satisfied that he was liable to the plaintiffs. But in fact there was also a decree that the first defendant should pay the said sum of Rs. 4,891.

The first defendant has not appealed; Padhye has. And Padhye's case before us, as it was before the Court below, is that he was not a partner, nor was he the owner of the business, and that indeed the latter point was taken by the Judge after judgment was reserved and was one which was never argued in the Court below or which he was given any opportunity of answering. According to him, the true view of the situation was that he was merely a creditor who had advanced certain moneys on the goods of defendant No. 1, but on terms which in no way imposed any

liability on Padhye to outside bodies as regards any business carried on by defendant No. 1.

But there was at the outset of the case another point,—which does not appear to have been taken and which does not expressly appear in the memorandum of appeal,—and it was this. Supposing as the plaintiffs contend, Padhye was a partner with defendant No. 1, or supposing as the learned Judge holds, Padhye was the owner of the alleged firm, then are the suit hundis, which I just read, drawn in a form to make either the alleged partnership or the alleged owner liable on them? If not, and if this suit is merely brought on hundis, then it must fail so far as regards Padhye.

Now the law on the point has been clearly enunciated at any rate so far as the English law is concerned by Chief Justice Cockburn in the leading case of *Dutton* v. *Marsh*,[1] and I do not think I can do better than quote what the learned Judge said there. The case he had to deal with was one on a promissory note which ran :—

"We the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton, Esq., the sum of 1600*l.* sterling, with interest at the rate of 6 per cent. per annum, until paid for value received."

This was signed by the defendants who were the directors of the company, and the seal of the company was affixed to the promissory note. Then proceeds the learned Judge (p. 364) :—

"The question is, whether the promissory note is binding upon the persons who signed it, or was binding not upon them, but upon the company. Let us assume for the present that the seal was not affixed. The effect of the authorities is clearly this, that where parties in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing,—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company,—they are individually liable. But, on the other hand, if they state they are signing the note or the acceptance on account of or on

[1] (1871) L. R. 6 Q. B. 361.

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behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of *Lindus* v. *Melrose*[1] fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented.

And then in that case the Court held that the affixing of the seal of the company did not make any difference. The document did not purport in form to be a promissory note made on behalf of or on account of the company. Accordingly it was held that the directors were personally liable.

So, too, as regards Indian law, there is the judgment of the Privy Council in *Sadusuk Janki Das* v. *Maharaja Kishan Pershad*.[2] The head-note runs as follows:—

"No person is liable upon a hundi or bill of exchange unless his name appears upon the instrument in a manner which, upon a fair interpretation of its terms, shows that the name is the name of the person really liable. A statement after the signature of the drawer that he is acting Superintendent for another is merely descriptive, and does not make that other person a party to the instrument."

There the note was signed:—"Mohan Lal . . ., Acting Superintendent of the Private Treasury of His Excellency Sir Maharaja, the Prime Minister of H. H. the Nizam," and it was headed: "By order of Sirkar may his happiness increase." And it was there held that the description "Acting Superintendent," etc., was nothing but a description of Mohan Lal's position, and was certainly not a signature in the form necessary for an agent signing on a principal's behalf. In delivering the judgment of the Board, Lord Buckmaster says (p. 36):—

"It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand."

Then lower down he says:—

"It is not sufficient that the principal's name should be 'in some way' disclosed; it must be disclosed in such a way that on any fair interpretation

[1] (1858) 3 H. & N. 177.

[2] (1918) L. R. 46 I. A. 33.

of the instrument his name is the real name of the person liable upon the bill. Their Lordships' attention was directed to sections 26, 27 and 28 of the Negotiable Instruments Act, 1881, and the terms of those sections were contrasted with the corresponding provisions of the English Statute. It is unnecessary in this connection to decide whether their effect is identical. It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal."

Accordingly, they held that the Maharaja was not liable on the Hundis in that particular case. We quite appreciate that the present is a case of an alleged firm and not of a Maharaja; but there is no distinction in principle, and it is unnecessary therefore to cite other authorities on the point. To my mind, the ruling in *Sadusuk Janki Das* v. *Maharaja Kishan Pershad*[1] is conclusive on the question of the general principle.

What then is the ordinary, fair interpretation of the document we have here? To my mind, it is clearly a promissory note by the first defendant Athale. It is put in the first person, viz., "I promise to pay." And as regards his signature, I regard the added words, "Managing Proprietor, Gangadhar and B. Friends, Sandhurst Road, Bombay No. 4," as being merely a description of his occupation and business address. It was suggested that the words "Managing Proprietor" suggested that he was a partner. Speaking for myself, I should say that they implied exactly the contrary, namely, that he was the proprietor of the business,—the sole proprietor—and that he also managed it personally. I quite follow that if the name of the firm had been put first, or if there were words saying "Athale, for Gangadhar and B. Friends," the case might be different. But it seems to me that we cannot

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take the view of this document which the plaintiffs ask us to take unless we do violence to a well-established rule both in India and in England on the construction of that most important class of documents from a commercial point of view, namely, negotiable instruments. Accordingly, in the view I take, the person liable on these Hundis was Athale and not any alleged firm passing under the name of Gangadhar and B. Friends.

On that view of the case, it becomes unnecessary to decide what was the true position of Padhye as regards this alleged firm. Indeed, having regard to what Lord Buckmaster said in *Sadasuk Janki Das* v. *Maharaja Kishan Pershad*,[1] it would be irrelevant to go into that question and to show that the signatory Athale was really acting for an undisclosed principal.

It remains then to be considered whether this suit was brought on the hundis alone or on any other cause of action. Having read this plaint over several times, I am satisfied that it was a suit brought on the hundis alone, and none the less so because it was brought as a summary suit. I appreciate that the class of summary suits have been extended by recent Rules of this Court, but that does not alter my conclusion on the nature of the plaint before us. On that view of the case then the plaintiffs must fail, as against the present appellant Padhye. But the decree will stand as regards the first defendant Athale. I need not, therefore, consider the inconsistency that might otherwise arise in the judgment which was apparently passed against defendant No. 1 as a partner and against defendant No. 2 not as a partner but as the sole owner of the business.

At a late stage of the appeal, viz., in counsel's opening address for the respondents, we were asked to

[1] (1918) L. R. 46 I. A. 33.

give leave to amend by pleading in the plaint an alternative claim for moneys lent. To my mind it would be wrong at this stage of the case to allow the plaintiffs to introduce an entirely new and different cause of action, which would require extensive amendment of the pleadings, which would require a new trial, and which would involve quite different considerations and quite different evidence from that which were before the learned trial Judge. Even if granted, it could only be on certain terms as to costs. We have been referred to certain authorities where amendments have been allowed, and in particular to a case, *Maung Shwe Myat* v. *Maung Po Sin and One*,[1] which was against one defendant who had admitted the receipt of the consideration, and where accordingly the amendment was allowed. Here, there is nothing of the sort. In the written statement, as I have already pointed out, Padhye puts the plaintiffs to strict proof of everything. And in fact there are very serious difficulties in considering what was the precise position of Padhye as compared with the first defendant, having regard to the documents, Exhibits Nos. 1 and 2, which were executed, the one on December 13, 1923, between the first defendant and Padhye, and the other on August 21, 1926, between Padhye and one M. V. Agashe. As I have already intimated, it is unnecessary for us to give any decision on which of the several considerations that have been advanced before us is the true one on these documents, namely, whether Exhibit 2 shows that the first defendant and Padhye were partners or whether their true relationship was that of purchaser and vendor, or whether the relationship was that of debtor and creditor and there may perhaps be other ways in which the true relationship can be argued.

[1] (1924) 3 Ran. 183.

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In the result, therefore, I would allow this appeal, and discharge the decree of the learned Judge in so far as it passes judgment against Padhye and directs him to pay the sum therein mentioned and the costs therein mentioned. On the question of the costs of the suit and of this appeal we will hear counsel before giving our decision.

BLACKWELL, J.:—Before construing the hundis sued upon it seems to me very desirable to observe the relevant sections of the Negotiable Instruments Act, 1881. Section 26 provides that:—

"Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque."

Section 27 provides that:—

"Every person capable of binding himself or of being bound, as mentioned in section 26, may so bind himself or be bound by a duly authorized agent acting in his name."

Section 28 provides that:—

"Any agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable."

Applying those provisions to the hundis sued upon, it will be seen that the wording of the hundis is "I promised to pay," and the signature is "G. V. Athale, Managing Proprietor, Gangadhar and B. Friends, Sandhurst Road, Bombay No. 4." In view of section 28 of the Negotiable Instruments Act, it appears to me plain that G. V. Athale is personally liable on the instruments, inasmuch as he has not indicated upon them that he signs merely as an agent, or that he does not intend thereby to incur personal responsibility.

A further question has, however, been raised, and that is whether any other person or persons in addition

to G. V. Athale can be held liable upon these hundis as so drawn. For the purpose of answering that question, section 27 of the Negotiable Instruments Act appears to me to be very material inasmuch as it provides that " a person capable of binding himself . . ., as mentioned in section 26, may so bind himself or be bound by a duly authorized agent acting in his name." What then is the meaning to be attached to the words " acting in his name "? We are here dealing with instruments which from their very nature must be drawn, indorsed or accepted, and it appears to me that those words " acting in his name " can only be construed to mean signing the document either as drawer, indorser or acceptor in the name of the principal sought to be rendered liable. In the case of the hundis sued upon, it is to be observed that there is no signature in anybody's name except that of G. V. Athale on the face of the instruments. If the instruments had been signed in some such form as " Gangadhar and B. Friends : G. V. Athale, Managing Proprietor," I could have followed the argument that G. V. Athale had signed them in the name of Gangadhar and B. Friends. But on the hundis as signed, in my opinion, G. V. Athale has affixed his signature as the person bound, merely adding thereto words of description of himself. Accordingly, in my judgment the only person who could be sued upon these hundis was G. V. Athale as being the only person who had signed them.

It was contended by Mr. Taraporewala that it was an open question in India whether a principal whose name does not appear on the negotiable instrument can be made liable on the instrument as a party thereto. He cited in support of his argument a passage from Pollock and Mulla's Indian Contract Act, 5th edition, page 728, where it is pointed out that in England it is

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provided by the Bills of Exchange Act, section 23, that the principal is not liable in such a case, and that there is no specific provision in the Negotiable Instruments Act dealing with the matter, and that accordingly in the view of the authors it is a question whether, having regard to sections 233 and 234 of the Indian Contract Act, the principal cannot be proceeded against upon a negotiable instrument executed by the agent in his own name. Mr. Taraporewala's argument amounted to this, that even assuming that the hundis had been signed by Athale in his own name, evidence ought to be admissible to show that in fact he was signing as an agent for the owner of Gangadhar and B. Friends. In my opinion, having regard to the decision in *Sadusuk Janki Das* v. *Maharaja Kishan Pershad*,[1] to which the learned Chief Justice has referred, such a contention is wholly untenable. A similar argument was raised in that case reference being made to section 233 of the Indian Contract Act and their Lordships in terms pointed out that although sections 26, 27 and 28 of the Negotiable Instruments Act, 1881, did not correspond precisely with the sections of the English Bills of Exchange Act, 1882, nevertheless the sections of the Indian Negotiable Instruments Act contained nothing to support the contention which, as their Lordships of the Privy Council pointed out, is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

In my opinion, having regard to the fact that such instruments pass constantly from hand to hand, it

[1] (1918) L. R. 46 I. A. 33.

would be dangerous in the extreme to introduce any doctrine which permitted evidence to be given that a person who had signed a negotiable instrument apparently as the person liable thereon was in fact the agent for an undisclosed principal. In my opinion any person who takes a negotiable instrument ought only to be obliged to look at the form of the instrument as drawn, indorsed or accepted, and ought to be able to rely upon the signature, if apparently the signature of a principal, as in fact the signature of a principal.

In the English Bills of Exchange Act the position of persons signing as agents or in a representative capacity has been provided for perhaps with greater precision than in the Indian Negotiable Instruments Act, inasmuch as by section 26 (1) it is provided that :—

"Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability."

But in my judgment the true view is, as indicated by their Lordships of the Privy Council in *Sadusuk Janki Das* v. *Maharaja Kishan Pershad*,[1] that where a suit is brought upon a hundi which is in such a form as the hundi sued upon in the present case, no evidence whatever is admissible to show that a person, other than the person who has signed it, is liable. It is noteworthy that in the passage in Pollock and Mulla's work upon the Indian Contract Act, to which I have referred, no reference is made to the Privy Council case to which we have drawn attention in our judgments.

Mr. Taraporewala asked us for leave to amend the plaint in this suit. Although, no doubt, the Court should, for the purpose of doing justice between the

[1] (1918) L. R. 46 I. A. 33 at p. 37.

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parties, even at a very late stage, allow any amendment, subject to payment of costs, which would dispose of the real issues between the parties,—I am clearly of opinion that it would be wrong for us to allow an amendment in the present case. The only proper and relevant issue in my judgment on the suit as framed was the issue, who was liable upon the suit hundis upon their true construction as the maker thereof? That was the first issue. And, if in the judgment of the Court the only person liable was G. V. Athale, then, in my opinion, the Court ought to have refused to allow any other issues to be framed raising questions of partnership or authority to sign on behalf of the principal, and the Court ought to have dismissed the suit as against Padhye. We have now been asked at this late stage to allow an amendment which would have the effect of introducing not only the evidence which has been already given,—which in my judgment for the reasons already given by me was wholly inadmissible,—but which might also allow the amending party to introduce other evidence hereafter if a new trial were granted. In my opinion such an amendment would raise a cause of action entirely different from the cause of action arising upon the hundis sued upon in the present suit. Accordingly it seems to me that in such circumstances an amendment ought to be refused, even upon the terms of the party asking for the amendment paying the whole of the costs thrown away. In a case where an entirely different cause of action is raised, I think that the proper course is to leave the party to bring a fresh suit *ab initio*, if so advised.

I agree that the decree in this case must be varied in the terms already indicated by the learned Chief Justice.

MARTEN, C. J.:—On the question of costs, we have now heard counsel and in our opinion the proper order

to make is that each party do bear his own costs of the suit and of the appeal, except the special costs which the learned Judge directed the plaintiffs to pay Padhye. Here, the appellant has succeeded on a point which was never taken by him in the Court below or for the matter of that in the Appeal Court; and where the difficulties and expenses of the litigation have been largely caused by two extraordinary documents he entered into, Exhibits 1 and 2. We think then that the justice of the case would be fairly met by the order we propose to make.

Attorneys for the appellant: Messrs. *Manilal, Kher & Sequeira.*

Attorneys for the respondents: Messrs. *Purnanand, Clubwalla & Jassoobhai.*

J. S. K.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

KHARSHETJI RATANJI BOMANJI *v.* KEKOBAD S. KHAMBATTA.*

1928 *January* 11

Indian Succession Act (XXXIX of 1925), section 70—Revocation of an unprivileged will—Whether cancellation by drawing two cross lines on the face amounts to destroying a will.

A lady duly executed a will and a codicil. Sometimes later, she put cross lines in ink on the front page of the will and wrote at the top "This will is cancelled," followed by her signature. On a petition for probate of the will and codicil, caveators contended that the will and codicil had been duly revoked:

Held, that the will and codicil were not revoked or otherwise destroyed under section 70 of the Indian Succession Act, 1925. The destruction contemplated by section 70 must be by some method *ejusdem generis* with those described in that section.

ONE Jerbai Sorabji Khambatta made a will dated June 5, 1919, and appended a codicil to it on October 27, 1921. They were signed by her in English and attested by her solicitor and his managing clerk. They were kept for safe custody in the office of her attorney.

*O. C. J. Testamentary Suit No. 14 of 1927.