ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

1931 *August 26.*

CHIMANRAM MOTILAL (ORIGINAL PLAINTIFFS), APPELLANTS *v.* DIVANCHAND GOVINDRAM (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), sections 91, 92, proviso (1)—Written contract—A contract signed by person ignorant of language in which contract is written—Incomplete contract—Mistake induced by honest misrepresentation—Admissibility of oral evidence to prove additional terms.

Sections 91 and 92 of the Indian Evidence Act, only apply when the document evidencing a contract contains or appears to contain all the terms thereof.

The inference whether a writing was intended to contain the whole agreement may be drawn from the document itself as well as from extrinsic evidence.

Mercantile Bank of Sydney v. *Taylor*,[1] relied on.

Under section 92, proviso (*1*), of the Indian Evidence Act, oral evidence of the terms of a written contract can be admitted even if it is proved that there was a mistake, which was caused by an innocent misrepresentation.

Defendants agreed to purchase bars of silver from the plaintiffs through a broker. The plaintiffs made a note about this contract in their Soda book in these terms :—'Sold silver bars sixty to Divanchand Govindram (defendants) deliverable on May 30, by the hand of Dhanasing.' This entry which was in the Gujarati language was signed by Dhanasing who was the broker in the transaction. Dhanasing did not know how to read or write Gujarati. He signed the entry in the belief that it contained all the terms of the contract. On failure of the defendants to take delivery of the bars of silver on the due date, the plaintiffs sold the same and brought a suit against the defendants to recover by way of damages the difference between the contract price and the price at which they sold them. It was contended at the hearing that the entry in the plaintiffs' Soda book did not contain all the terms of the contract between the parties and evidence was led to show that the contract was for the purchase of bars of silver of 999 hall-mark, that the purchase price was to include customs duty, and that the plaintiffs were to get Kabul drawback certificates from the customs in respect of the silver bars.

The trial Judge held that the contract was on the terms as alleged by the defendants and finding that the plaintiffs had failed to carry out those terms, he dismissed the plaintiffs' suit.

On appeal, it was contended that the evidence as to the additional terms was wrongly admitted.

Held, that as the written contract did not contain all the terms, neither section 91 nor section 92 of the Indian Evidence Act applied and oral evidence was admissible.

*O. C. J. Appeal No. 64 of 1930; Suit No. 1271 of 1930.

[1] [1893] A. C. 317 at p. 321.

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Held, further, that even assuming that section 92 of the Indian Evidence Act applied to the case, nevertheless oral evidence could be admitted under the first proviso to that section, as there was a mistake as to the subject matter of the contract.

Held, also, by *Rangnekar J.*, that the defendants were not liable on the contract on the principle that where a contracting party who cannot read has had a written document read over to him and the contract differs from that pretended to have been read, the signature on the document is of no force because he never intended to sign and, therefore, in contemplation of law, did not sign the document as his mind did not accompany the signature.

Thoroughgood's case,[1] *Foster* v. *Mackinnon*[2] and *Dagdu* v. *Bhana*,[3] followed.

SUIT to recover damages for breach of contract.

On May 25, 1930, the plaintiffs agreed to sell to the defendants through a broker Dhanasing 60 bars of silver at the rate of Rs. 52-9-0 per 100 tolas, to be delivered on May 30, 1930. The plaintiffs made an entry about this transaction in their Soda book in the Gujarati language and that entry was signed by the broker. The entry was in these terms :—

"60 bars of silver sold to Divanchand Govindram of the delivery of 30th May by the hand of Dhanasing."

It was alleged by the plaintiffs that the defendants failed to take delivery of the silver bars on the due date, and that they therefore sold the said bars on June 2, 1930, on account and at the risk of the defendants. The said sale resulted in a deficit of Rs. 5,258-11-6. The plaintiffs filed the suit to recover that amount from the defendants.

The defendants contended that the contract in writing as entered in the Soda book did not contain all the agreed terms. They said that the goods sold were not ready goods but they were goods which were coming to Bombay by a steamer arriving on May 30, 1930. That the contract price of the silver bars was to include the customs duty and the obtaining of drawback certificates by the plaintiffs for exporting the bars to Kabul. They further alleged that their broker, who could not read or write Gujarati, signed the entry in the plaintiffs' Soda book on the representation that it contained

(1) (1582) 1 Co. Rep. Part II, 444. (2) (1869) L. R. 4 C. P. 704.
(3) (1904) 28 Bom. 420.

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all the agreed terms of the contract. They therefore contended that they were not liable on the contract.

The suit was tried before Blackwell J. before whom evidence was led by the defendants to prove their contentions. The trial Judge held on the evidence that the defendants' contentions were proved and he dismissed the plaintiffs' suit.

The plaintiffs appealed.

F. J. Coltman, with *Sir Jamshed Kanga*, Advocate General, and *V. F. Taraporewala*, for the appellants.

Dr. J. S. Khergamwala, with *M. M. Jhaveri*, for the respondents.

BEAUMONT, C. J.:—This is an appeal from a decision of Mr. Justice Blackwell. The case took several days in the Court of first instance and it has occupied more than a day in this Court, but the dispute is really confined within a small compass. It is agreed that on May 25, 1930, a contract was made by which the plaintiffs agreed to sell to the defendants sixty bars of silver and that that contract was negotiated on behalf of the defendants by a broker named Dhanasing. There was a note of the contract made in the plaintiffs' Soda book in these terms:—"Sold silver bars sixty to Divanchand Govindram deliverable on May 30, by the hand of Dhanasing", and Dhanasing signed that note in the plaintiffs' book. The defendants' case is that that note does not contain a complete record of the contract. They say that the quality of the silver was to be the highest quality which is known as 999, that the purchase-price was to include the customs duty, and that the plaintiffs were to get Kabul drawback certificates from the customs. The learned Judge has found as a fact what the contract was. He says:—

"I hold that it was a contract for sixty bars of silver expected to arrive on May 30, and deliverable on that day of 999 hall-mark, the price to include customs duty and drawback certificates to be furnished by the plaintiffs."

That is to say he finds that the contract was as set up by the defendants, and on that finding he holds that, inasmuch as the plaintiffs did not fulfil their part of the contract in obtaining drawback certificates, the defendants were entitled to repudiate the contract, and he, therefore, dismissed the action which was for damages for breach of the contract.

The only point on which any difficulty arose was as to the drawback certificates. There is no question that the silver was in fact 999 hall-mark. It is quite clear on the evidence that the defendants were in fact buying the silver for re-export to Kabul, and it was, therefore, very important for them that drawback certificates should be obtained. There was, as far as I can see, no difficulty in either side obtaining the drawback certificates, but unfortunately each party seems to have thought that the duty of obtaining the certificates rested on the other party, and nothing was, therefore, done until the documents had gone to the customs and it was then too late to obtain the certificates. The learned Judge's finding of fact as to what the contract was has been challenged in this Court, but, apart from the fact that the learned Judge after seeing the witnesses in the box preferred the evidence of the defendants' witnesses to that of the plaintiffs, there are three documents which certainly support his finding. Those are Exhibits 3, 4 and 6, which are entries made respectively in the books of the broker Dhanasing, in the books of another broker named Biharilal who was interested in the matter, and in the defendants' books. All these three entries which are couched in quite different language refer to the fact as to the silver being bought on Kabul customs and subject to customs, that is to say, they all support the defendants' case. Of course it is perfectly true that the plaintiffs did not see any of these entries before they were produced in Court and they are not bound by them, but still, if the entries are genuine as the learned Judge held, they certainly support the view that the defendants themselves imagined that the contract was such as

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they have set up. I think therefore that the Judge has found correctly the terms of the contract.

Then the next point taken by the plaintiffs is that, having regard to section 92 of the Indian Evidence Act, the defendants were not allowed to give any evidence that the contract contained any provisions not included in Exhibit A, which is the note in the plaintiffs' book signed by Dhanasing. Section 92 has to be read with section 91, and the effect of the two sections for the purposes of this case seems to me to be as follows. When the terms of a contract have been reduced to the form of a document, only the document can be proved. That is the effect of section 91, and then section 92 provides that in such a case no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms, and then there are several provisos, of which the first is :—

> "Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law."

It is, I think, clear that sections 91 and 92 only apply when the document in question on the face of it contains or appears to contain all the terms of the contract, and speaking for myself I entertain great doubt whether a note such as Exhibit A written in the plaintiffs' book only and signed only by the defendants' agent is in form a reduction into writing of the whole terms of the contract, because there is nothing in the entry which shows who the vendors are and the entry contains no reference by which the vendors can be ascertained. There is nothing except the fact that the entry is made in a book which belongs to the plaintiffs, and I doubt myself whether that contract could be specifically performed without letting in oral evidence as to who the vendors were. However, that point has not been fully argued, and before expressing a decided opinion upon

it I should desire to consider the analogy of English cases upon the Statute of Frauds: (see for example, *Stokes* v. *Whicher*.[1]) Assuming, however, that section 92 of the Indian Evidence Act applies, it seems to me that the evidence which the defendants gave can be justified under the first proviso to section 92 and that was what the learned Judge held. The learned Judge, in dealing with that point, says :—

"No fraud is suggested in this case against the plaintiffs but it is alleged that Exhibit A was signed by Dhanasing in the mistaken belief that it contained all the terms, which he says the parties agreed to, and on the representation by Juthalal (one of the partners in the plaintiffs' firm) that it contained all those terms."

Now, Mr. Coltman for the appellants objects very strongly to that finding because he says that when we look at the evidence it is clear that that is really a finding of fraud against Juthalal—whatever it may be called—because the evidence of Dhanasing was that he particularly asked whether Exhibit A, which was written in Gujarati, a language he did not understand, contained the terms on which he was insisting, including the term as to obtaining drawback certificates, and that he was told by Juthalal that it did contain those terms. Of course, if Juthalal had deliberately stated that the document which Dhanasing was unable to read contained terms which he knew very well that it did not contain, that would be fraud. But I do not think the learned Judge intended to hold fraud and it is quite possible that the representation of Juthalal was made innocently. He told his *munim* to write down the terms of the contract and he may somewhat carelessly have said that it contained all the terms imagining that it did so, but without having read it. I confess, however, that I fail to appreciate the force of Mr. Coltman's argument that you cannot get out of Exhibit A without alleging fraud, and that in fact the defendants have got out of Exhibit A by alleging fraud. As a matter of fact what is pleaded, not very artistically I admit, but still I think pleaded, in paragraph 5 of the points of defence, is that

[1] [1920] 1 Ch. 411.

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there was an innocent misrepresentation, and a mistake induced by innocent misrepresentation is sufficient for the defendants' case. Even if the evidence goes further than that plea and suggests fraud, that cannot disentitle the defendants to the relief to which they are entitled on the basis of innocent misrepresentation. Mr. Coltman says further—I think with truth—that the fact that Juthalal represented to Dhanasing that Exhibit A contained terms as to drawback certificates was not put to him in cross-examination. It is, as I say, pleaded but it was not put to him in cross-examination as it no doubt should have been. But even if we leave out the evidence of misrepresentation it seems to me to make no difference, because the evidence is quite plain that Dhanasing when he signed this document which he could not read did in fact believe that it contained all the terms. Therefore, he executed the document under a mistake as to the subject of the contract, of which evidence could be given under the first proviso to section 92 of the Indian Evidence Act, and when the true contract is ascertained, I think that the defendants could repudiate the goods under section 118 of the Indian Contract Act. In my view, therefore, the judgment of the learned Judge was right. But, I think, it is only fair to Juthalal to say that I do not think that the evidence shows fraud. It is quite plain that if Juthalal had appreciated on May 25 that the obligation was on him to get the drawback certificates he could have got them. It would have cost him nothing, and I see no reason whatever for thinking that he had any motive for fraudulently suggesting that the contract contained provisions that the plaintiffs should get drawback certificates. I think, therefore, there is no case of fraud against him. I do not think the learned Judge really intended to hold that there was, although some of the expressions in his judgment do afford some ground for thinking that he did hold fraud. In my view, therefore, the appeal fails and must be dismissed with costs.

RANGNEKAR, J. :—The defendants' case in the suit was that they were justified in cancelling the contract as the plaintiffs failed to obtain Kabul drawback certificates from the customs and this was a condition precedent to the contract. The plaintiffs denied this and relied on Exhibit A, an entry in their Soda book signed by the defendants' broker Dhanasing. The defendants contended that Exhibit A did not correctly set out all the terms of the contract, and that it was written in Gujarati character which Dhanasing could not read, and that the latter signed Exhibit A on the representation of Juthalal, a partner in the plaintiff firm, that all the terms of the contract were correctly recorded in Exhibit A.

The learned trial Judge held on the evidence that Dhanasing was ignorant of Gujarati language and that he signed Exhibit A on the representation made by Juthalal that it contained all the terms of the contract and under a mistaken belief that it did contain all the terms and that the representation made by Juthalal was in fact incorrect. His finding as to the contract was as follows :—

"Accordingly, on the question of what the contract was, I hold that it was a contract for sixty bars of silver expected to arrive on May 30 and deliverable on that day of 999 hall-mark, the price to include customs duty and drawback certificates to be furnished by the plaintiffs."

From this it will be seen that there were at least two terms agreed upon which do not find a place in Exhibit A, one as to the quality of silver, which was admitted by the plaintiffs, and the other as to the term now in issue between the parties. It will also appear that the goods were not "ready", as described in Exhibit A, but were goods expected to arrive on May 30. This also was admitted by the plaintiffs. I am not, on the evidence, disposed to attach any importance to the terms as to customs duty nor to the fact that Exhibit A did not contain the name of the vendors.

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Mr. Coltman says that the finding amounts to a finding of fraud which was never pleaded. I do not think the defendants alleged any fraud against Juthalal, nor do I think the learned Judge intended to hold or suggest that the representation made by Juthalal was made by him fraudulently. Having regard to the place where the transaction took place and the surrounding situation, it was quite possible that Juthalal honestly believed that he had instructed his Mehta Punjiram to record all the terms agreed upon between the parties, and that for some reason or other due to a hurry at the moment or carelessness on the part of Punjiram this important term about the drawback certificates did not find a place in Exhibit A.

The main contention before us is that the learned Judge erred in allowing the defendants to lead oral evidence to prove the term as to the drawback certificates although it was not mentioned at all in the contract Exhibit A. I may point out at the outset that the evidence which is now objected to was allowed to go in when it was being tendered and it was not until counsel addressed the Court at the end of the hearing that any objection was raised that the evidence was not admissible under section 92 of the Indian Evidence Act. This, of course, would not prevent the parties from objecting to such evidence if it is inadmissible in law. Now, on the pleadings the case was that Exhibit A did not contain the whole of the contract between the parties, and secondly, Dhanasing who was ignorant of the Gujarati language signed Exhibit A under a mistaken belief that it contained all the terms and owing to the representation made by Juthalal to that effect.

It is clear on a true construction of section 92 read with section 91 of the Indian Evidence Act that it applies only in cases when a document contains or appears to contain on the face of it all the terms of a contract. Now, the inference whether the writing was or was not intended to

contain the whole agreement may be drawn from the document itself as well as from extrinsic evidence (see *Mercantile Bank of Sydney* v. *Taylor*[1]), and this may appear from direct evidence or from informality of the document. The burden of proving that the writing does not contain the whole of the agreement would of course be on the party setting up that plea.

In this case the writing Exhibit A is a note made in the Soda book of the vendors, which cannot be considered to be a formal contract. But assuming it is, the further fact as found by the Judge remains that it was written in Gujarati language which the broker Dhanasing did not know. Undoubtedly, when a party signs a document, he must be taken to know the contents of the document and must be bound by it, and the onus lies heavily on him to prove that there were circumstances under which he signed it in ignorance of what the document actually contained or under a mistaken belief that it contained all the terms of the contract. But I am unable to see why a party cannot be allowed to prove that when he signed the document he did so on the belief that it contained all the terms agreed upon between him and the opposite party and that such belief was caused by the conduct of the opposite party or by a representation made by him, either fraudulent or innocent.

When a person is illiterate or blind, or ignorant of alien or foreign language of the document, in my opinion that is a controlling circumstance which the Court has to take into consideration, and the case of such a person has to be tested by the doctrine of reasonable consequences as applied to the circumstances. In such cases it seems to me that such a person would not be bound by his mere signature to a document unless of course he is negligent. There is no suggestion in this case that Dhanasing was negligent in signing the document. There can be none, because the circumstances show that before signing the document he

[1] [1893] A. C. 317 at p. 321.

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did all that was possible for him to do. He made all proper inquiries, and after signing the document he made a note of what he believed to be the contract in his own book, and it is quite clear that it cannot be said that he was guilty of any negligence in signing the document. Therefore, I think the case really falls within the principle of the well-known case of *Foster* v. *Mackinnon*,[1] and the principle to be applied in this case, in my opinion, is the principle which was laid down in that case. Where a contracting party who cannot read has a written document read over to him and the contract differs from that pretended to be read, the signature on the document is of no force because he never intended to sign and therefore, in contemplation of law, did not sign the document, as his mind did not accompany the signature. In *Dagdu* v. *Bhana*[2] Sir Lawrence Jenkins, after pointing out the effect of a mistake in a written document, emphasised this aspect of the case as follows (p. 427) :—

"There is another aspect of this case, which has not been presented to us, but which we think calls for allusion. The second defendant is illiterate, and it is established that if a man, who cannot read, has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature of the document is of no force because he never intended to sign, and therefore in contemplation of law did not sign the document on which the signature is : *Foster* v. *Mackinnon.*[3] And it is all one in law to read it in other words and to declare the effect thereof in other manner than is contained in the writing : *Thoroughgood's case.*" [4]

I think the present case falls within the principles of *Foster* v. *Mackinnon*[1] and *Thoroughgood's case*,[4] and the learned Judge was right in allowing the oral evidence.

Apart from this, in my opinion, the case also falls within proviso (*1*) of section 92 of the Indian Evidence Act. That proviso runs as follows:—

"*Proviso* (*1*).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law."

(1) (1869) L. R. 4 C. P. 704.
(2) (1904) 28 Bom. 420.
(3) (1869) L. R. 4 C. P. 704 at p. 711.
(4) (1582) 1 Co. Rep. Part II, 444.

On the findings of the learned Judge this is a case where oral evidence to show that the obtaining of the drawback certificates was an important term was properly admissible on the ground of a mistake induced by the incorrect representation of Juthalal. Ordinarily a mistake by one party does not affect the rights of the parties which arise from the words used in a writing, but the rule is not one of inflexible application. This is pointed out by Sir Lawrence Jenkins in the case referred to above in these words (p. 425) :—

"Mistake in expression (it is of that class of mistake alone that we speak in this judgment) implies that the minds of the parties were not at one on that which is expressed : but it does not follow that in every case where there in fact has been such mistake, there is no contract. Practical convenience dictates that men should be held to the external expression of their intentions, unless this be outweighed by other considerations ; and to this legal effect is given by the law of evidence, which permits oral proof at variance with documents only in certain cases : in the rest the proof, if it be of mistake, is not received, so that the mistake does not come to light and in a Court of law does not exist."

Later on the learned Chief Justice observed as follows (p. 427) :—

"For the purpose of determining the existence of mistake in a written document oral evidence is admissible when the circumstances are appropriate : see proviso 1 to section 92 of the Evidence Act. This evidence must be clear, and the Court in weighing it will be entitled to take into consideration defendant No. 1's capacity and all the circumstances as they existed at the date of the sale to plaintiff No. 2."

For these reasons I agree that the appeal must be dismissed with costs.

Attorneys for appellants : Messrs. *Mulla & Mulla.*

Attorneys for respondents : Messrs. *Chub, Gagrat & Ghaswalla.*

Appeal dismissed.

B. K. D.