APPELLATE JURISDICTION. *(a)*

Regular Appeal No. 34 *of* 1871.

JAMES FISCHER.....*Appellant.*

ROBERT FISCHER.....*Respondent.*

Plaintiff sued to recover Rupees 21, 650-5-1, balance of principal and interest due. He alleged in his plaint that, between the 16th February and 23rd July 1867, he paid, at the request of defendant's father, the late G. F. Fischer, Rupees 25,000 on account of the Shivaganga zamindári ; that the defendant having assumed the management of the zamindári under an assignment from his father, gave plaintiff a receipt for the said sum of Rupees 25,000 under date the 7th August 1867 ; that in October and December 1867, defendant paid the sums of Rupees 5,000 and Rupees 3,000 respectively, in part liquidation of the debt, but since 20th December 1867 refused any further payment. Defendant answered that this debt due by the late G. F. Fischer had been validly released by the terms of an assignment, dated 29th July 1871 ; that the receipt given by defendant was a mere acknowledgment of the payment of Rupees 25,000 by the plaintiff to the late G. F. Fischer and imposed no obligation on defendant to pay the said amount ; that there was no consideration for defendant's promise to pay Rupees 25,000 ; that when defendant executed the receipt he was not aware of the effect of the release, and that the part payments were made under a mistaken idea of liability. At the hearing it was not disputed that a release was executed, and that this claim was embodied and was intended to be embodied in that written release, but it was attempted to set up a contemporaneous oral agreement, leaving this claim as a subsisting demand. The Civil Judge dismissed the suit, holding that this oral evidence could not be adduced to contradict the written release. *Held*, on Regular Appeal, that the Civil Judge was right. The principle is—Is the matter of the contemporaneous oral agreement so outside the scope of the written one that they can logically subsist together, so that the oral shall neither contradict nor modify the written ?

In the present case, to set up an oral agreement that the sum released should, in fact, be paid, is to deal with an object already embodied in the written agreement in a manner antagonistic to its provisions. It is not only to vary what the words do mean, but what they were intended to mean. The subsequent receipt for the money did not create a debt, for the release had already extinguished it.

THIS was a Regular Appeal against the decree of J. D. Goldingham, the Civil Judge of Madura, in Original Suit No. 16 of 1870.

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The plaintiff sought to recover from the defendant Rupees 21,650-5-1, balance of principal and interest due.

The plaint set forth that between 16th February and 23rd July 1867, plaintiff paid at the request of the defendant's father, the late G. F. Fischer, Rupees 25,000 on account of the kist due on the zamindári of Shivaganga ; that the

(a) Present : Holloway and Innes, JJ.

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defendant having assumed the management of the zamindári under an assignment from his father, delivered to plaintiff a receipt under date the 7th August 1867, in acknowledgment of the said sum of Rupees 25,000 ; that in October and December 1867, defendant paid Rupees 5,000 and Rupees 3,000 respectively, in part liquidation of the debt, and since 20th December 1867 refused any further payment. Hence this suit.

In his written statement the defendant pleaded that the late G. F. Fischer was released from all obligations to repay the sum of Rupees 25,000 by the terms of an assignment (Exhibit I) dated 29th July 1867 ; that the receipt A, given by defendant, was a mere acknowledgment of the payment of Rupees 25,000 by the plaintiff to the late G. F. Fischer, and imposed no obligation on defendant to pay the said amount ; that there was no consideration to support defendant's promise to pay the sum of Rupees 25,000 ; that when the defendant executed the receipt A he was not aware of the effect of the release contained in the assignment, defendant's Exhibit I ; that the part payments were made under a mistaken idea of liability, and that defendant resisted payment as soon as he became aware of it ; that the amount of Rupees 25,000 was not a loan to the zamindári, nor was it a charge upon the estate ; that defendant had no assignment of the zamindári, and had no interest in it until the bequeathal thereof by the late G. F. Fischer, under his will, dated 29th July 1867, which began to take effect from the 28th August 1867, and that the will imposed no liability on defendant to pay the amount sued for.

The following issues were settled :—

Whether the release had the effect of extinguishing the defendant's liability.

Whether when defendant signed the receipt A and made the part payments alluded to, he was unaware of the legal effect of the deed Exhibit I, and acted under a mistaken idea of his liability.

Whether, assuming the debt to be due from the estate of the late G. F. Fischer, defendant is liable for the debt in question, and if so, to what extent.

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The judgment of the Civil Judge contained the following:—

" Plaintiff claims to recover from defendant the unliquidated portion of a sum of 25, 000 Rupees which he advanced to defendant's father between 16th February and 23rd July 1867, and which defendant has acknowledged by a receipt, dated 7th August 1867; defendant's plea is in substance that the debt had no legal existence, because plaintiff, subsequent to the date of the said loan, by deed, dated 29th July 1867 (Exhibit I), released his father from all liabilities which he had incurred towards him.

The parties to this suit are close relations, and the admitted facts are these:—James Fischer, the plaintiff, married a sister of the defendant Robert, the son of the late George Frederick Fischer. Plaintiff is also the latter's nephew, and he is thus both first cousin and brother-in-law of the defendant. When George Frederick Fischer was advancing in years, and, as it turned out, a month before his death, he made by two written instruments distribution of his property, which seems to have been very extensive, assigning certain interests to plaintiff, certain to his other daughter Mrs. Foulkes, and the remainder which was specified he bequeathed, by a will which bears the same date, to his son Robert, the defendant, whom he also appointed residuary legatee. The date on which the distribution was effected was the 29th July 1867, and in para. 2 of the deed (Exhibit I), in virtue of which plaintiff took possession of his estate, is the release on which the defendant relies. It runs thus,— " that the said James Fischer on his part hereby grants to the said George Frederick Fischer as head of the firm of Fischer and Co. of Salem, and personally also, a full release *from all claims whatsoever* which the said James Fischer has or may have up to the 31st July 1867 against the said George Frederick Fischer."

Now there is only one construction which the English language admits of that can be put upon the wording of this covenant, and that is, that, up to the date indicated, all existing liabilities were to be extinguished. James Fischer

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plaintiff's 3rd witness, in his deposition virtually admits this much, and he assigns as the reason, that they found the accounts so intricate that it was impossible to unravel them. Such being the case, on what ground then does plaintiff seek to attach to defendant a liability on account of this 25, 000 Rupees? He states in his evidence that he demurred signing the deed, because the amount of this loan to his uncle was borrowed on the security of a lac of Rupees, or thereabouts, which he had in Company's paper in the Oriental Bank, and which in para. 1 of the deed he covenanted to settle upon his three daughters, a heavy penalty being attached in case of non-fulfilment on his part, and that in consequence of this demur of his, his uncle promised to make the above sum good to him. I am not prepared to say this is not true, but it is not the policy of the law to allow transactions of this nature to be ripped up after they have been brought to a close in the most solemn manner that human dealing suggests, nor can it take the case out of the well known and long established rule that parol evidence is not admissible to prove a contemporaneous oral agreement, when the effect of that evidence is directly to contradict the terms of the written agreement."

The Civil Judge then further commented upon the evidence and continued,—

"Now what is the state of things that these letters disclose, certainly nothing more than that defendant gratuitously undertook to repay this loan out of his father's assets, and I cannot see, however much defendant might have thought himself bound to repay it, whether as a point of honor or on the score of honesty, that the payments he made can be construed into anything more than a voluntary courtesy on his part, and they certainly carry with them no continuing obligation. It has been decided in the Courts in England over and over again, that a mere moral obligation, however sacred, is not a sufficient foundation for a binding promise (save perhaps where there has been a legal right which has become devoid of a legal remedy), and as it is clear to me that no debitum existed when the receipt was given, it follows by the application of this principle that plaintiff's claim is not recoverable by any course of law.

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For this reason I decide the 1st issue in defendant's favor. The 2nd issue is not necessary for the determination of the suit, and in regard to the 3rd, I think that if the debt had had any legal existence, defendant, who alone took under the will, would have been personally liable, as a debt due by the estate of his father. The result, however, is that plaintiff's suit is dismissed, and I see no reason why he should not pay defendant's costs, save the bill which I disallowed in an order of this Court, dated 21st January.

The plaintiff preferred a Regular Appeal on the grounds that :—

The Judge was wrong in holding that the deed of release included the Rupees 25,000 sued for.

Oral evidence was admissible to explain the circumstances under which the deed was executed with a view to show its meaning.

The Judge ought upon the whole evidence to have found in favor of the plaintiff.

Mayne, for the appellant, the plaintiff.

O'Sullivan, for the respondent, the defendant.

The Court delivered the following

JUDGMENT:—Before the Lower Court, in a plaint singularly meagre, the claim was for a sum of Rupees 25.000 advanced on account of the Shivaganga zamindári, for which defendant, cognizant of the advance, had given a receipt.

The answer was that this debt due by the late G. F. Fischer had been validly released. That a release was executed as part of a complete and complex family arrangement is not disputed, that this claim is embodied and was intended to be embodied in that written release is also undisputed.

The claim made rather upon the evidence than the plaint, was that a contemporaneous oral agreement had left this as a subsisting demand. Following that case, the reasons for appeal were that the Rupees 25,000 were not within its scope. The Civil Judge dismissed the suit, holding that this oral evidence could not be adduced to contradict the written

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one. This is undoubtedly a sound and wholesome principl Cases like *Lindley* v. *Lacey* (17, C. B. N. S., 578) and *Malpas* v. *S. W. R. Co.*, are not exceptions to the rule. The agreements there were held to be distinct collateral oral agreements not inconsistent with the written one. *Wake* v. *Harrop* (1, H. & C., 202) was a case of equitable relief on the ground that through mistake of both parties the written words did not represent their intention. *Lyall* v. *Edwards* (6, H. & N., 337) is an instance of relief because the release in terms included more than the parties could have intended and for the very satisfactory reason that the demand had not come to the knowledge of the party releasing. Now there is no pretence of any such mistake here. On the contrary, the evidence is that the parties well knew the effect and sought to obviate that effect by a contemporaneous oral agreement. On the ground on which the case was put in the Lower Court and in the original grounds of appeal it manifestly fails. In other grounds, not filed in accordance with the rules, Mr. Mayne has put the case upon a distinct oral contract of old Fischer first, and also of the defendant, for the good consideration that the lac of Rupees was to be settled on old Fischer's grand-children, the daughters of plaintiff and nieces of defendant. This is in form a more plausible, but in substance, perhaps, not a different mode of making the same attempt. The principle still is.—Is the matter of the contemporaneous oral agreement so outside the scope of the written one that they can logically subsist together, so that the oral shall neither contradict nor modify the written ?

Now, in the elaborate family arrangement, embodied in writing, very valuable property was conveyed to the plaintiff, who covenanted to settle a lac of Rupees on his own children and to release G. F. Fischer from all demands, among which by no mistake, excusable or otherwise, the present was included. To set up an oral agreement that the sum so released should in fact be paid is to deal with an object already embodied in the written agreement in a manner antagonistic to its provisions. It is not only to vary what the words do mean but what they were intended

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to mean. We think it probable that old Fischer did intend to add this Rupees 25,000 to many other acts of bounty previously conferred on the plaintiff, but a sound and, as we believe, salutary rule of law prevents our saying that there is any evidence whatever of a binding obligation. The evidence of an agreement by the defendant, Robert, is still looser. As to what is said to have occurred at the bedside, Robert's promise to carry out his father's wishes, if made, was made in his capacity of manager, for this is the only effect of the plaintiff's own evidence. The subsequent receipt for the money will not create a debt, for the release had already extinguished it. His subsequent payments and the letters written, both on the one side and on the other, are inconsistent with the belief of either party that there was a separate contract of Robert's. Both of them treat the payment as of a debt due by the father. There is, however, no evidence of an obligation even of Fischer the elder, and even if there were, the suit against the present defendant alone must have failed entirely. We are not disposed to credit the affectation of total ignorance of the scope of the release on the part of Robert Fischer. The true explanation probably is, that both believed that the advance having been made for the benefit of the zamindári of which the lease had passed to Robert, this, coupled with the father's intention, constituted the strongest moral, perhaps even a legal, claim upon him to whom that zamindári had passed. The prominence given to the purpose of the loan in the plaint seems to render this view very probable. It is clear, however, that in the absence of proof that there was a debt of Fischer the elder, and in the presence of positive proof that there was not, neither the express promise to pay the money as a debt, nor payments on account, can create the obligation which it is here sought to enforce. The same principle is applicable both to the original and the irregularly amended aspect of the case, and this appeal suit must be dismissed with costs.