Original Appellate Jurisdiction(a)

Appeal No. 14 *of* 1872.

GUDDALUR RUTHNA MUDALIYAR.....*Appellant.*

KUNNATTUR ARUMUGA MUDALIYAR.....*Respondent.*

Suit for balance of principal due for money lent, with interest thereon at 5 per cent. per mensem. It appeared that the defendant, being indebted to plaintiff on a promissory note for Rs. 500, applied to him for a further loan of Rs. 1,500, proposing to lay out the whole amount of Rs. 2,000 in the performance of a contract then subsisting between himself and the Madras Railway Company and offering to give plaintiff a share in such contract: that plaintiff consented to lend the said sum payable with interest at 6 or 7 per cent. per mensem, in lieu of becoming a partner, and also to give defendant two months' previous notice on requiring repayment of the loan. Defendant demurred to the rate of interest, which he said he would further consider on his return to Cuddapah, but, being in immediate want of the money, proposed to borrow it on a promissory note. Plaintiff, accordingly, on the 13th October 1870, lent defendant Rs. 1,500, and obtained, in lieu of the note for Rs. 500, which was returned, a promissory note for Rs. 2,000, payable on demand, with interest at 12 per cent. per annum, which note, plaintiff alleged, it was agreed should be cancelled on receipt of a letter from the defendant fixing the rate of interest (this was denied by defendant). Defendant subsequently wrote two letters to plaintiff, agreeing to pay interest at 5 per cent. per mensem, and plaintiff endorsed the said note as cancelled. Plaintiff also alleged that he received interest at the rate of 5 per cent. per mensem for two months, and produced a witness who deposed to that effect. This defendant denied.

Held, by the Original Court (following *Abrey* v. *Crux*)(b) that the oral evidence was inadmissible to show the rate of interest *dehors* that of the pro. note, and that the subsequent letters, offering a higher rate of interest, were without consideration, for there was not any evidence of forbearance, and that the plaintiff had a right to sue on the promissory note the very day after it was made.

Plaintiff appealed on the ground that the evidence was admissible.

Held, by MORGAN, C. J., that the evidence was admissible. That the law is that notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find, upon sufficient evidence, that this writing is not really the contract. And the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it. That, in this case, at the time of the advance of the money there was an agreement touching the transaction of loan, although the rate of interest was still unsettled and under discussion. The plaintiff declined to lend on the terms of a joint interest in the venture as proposed by the defendant, and the latter refused to pay the rate demanded. Before any final agreement, and while the transaction was still incomplete, the note was given, not as a writing which expressed or was meant to express the final contract, but rather as a voucher, or a temporary and provisional security

(a) Present: Morgan, C. J. and Kernan, J.

(b) L. R., 5, C. P., 37.

for the money pending the discussion respecting the rate of interest. And that if the note was thus given and received, it should not be regarded as the contract between the parties, or as a written contract excluding other evidence of the true contract.

By KERNAN, J., (concurring with the Chief Justice as to the admissibility of the evidence) that assuming that the promissory note did represent a complete contract between the parties, such contract was waived and discharged by the acts and agreement of the parties before breach, and a new contract, namely, the contract for larger interest, substituted.

Abrey v. *Crux*, distinguished.

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THIS was an appeal from so much of the decree of Holloway, J., made in Suit No. 90 of 1872, as disallowed the sum of Rs. 1,467-15-1.

The plaintiff claimed payment of Rs. 1,675-12-1, balance of principal due for money lent, and interest at 5 per cent. per mensem on the balance from 6th February 1872 until payment.

The plaint set forth that the defendant, being indebted to the plaintiff on a promissory note for Rs. 500, applied by letter from Cuddapah, dated 4th October 1870, for a further loan of Rs. 1,500, proposing to lay out the whole amount of Rs. 2,000 in the performance of a contract then subsisting between himself and the Madras Railway Company, and offering to give the plaintiff a share in such contract, on learning by telegram that he was willing te accept the same. The plaintiff accordingly telegraphed, and, on the return, almost immediately afterwards, of the defendant to Madras, the plaintiff consented to lend the defendant the said sum of Rs. 1,500, payable with interest at 6 or 7 per cent. per mensem, in lieu of his becoming a partner with the defendant in his contract aforesaid, and also to give the defendant two months' previous notice on requiring repayment of the loan.

The defendant agreed to all the above terms, except so much as related to the rate of interest, which he said he would further consider on his return to Cuddapah and write to the plaintiff accordingly, but in the meanwhile he wanted the plaintiff to lend him the money on a promissory note.

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The plaintiff, accordingly, on the 13th October 1870, lent the defendant at Madras the said sum of Rs. 1,500, and obtained, in lieu of the note for Rs. 500 which was returned, a promissory note for Rs. 2,000, payable on demand, with interest at 12 per cent. per annum, and which note, it was agreed, should be subsequently cancelled on the receipt of a letter from defendant fixing the rate of interest.

The defendant subsequently wrote two letters to the plaintiff, dated respectively the 19th October and the 10th November 1870, agreeing to pay interest at 5 per cent. per mensem, whereupon the plaintiff endorsed the said note for Rs. 2,000 as cancelled.

The plaintiff in April 1871 gave the defendant two months' notice as agreed upon.

The defendant, by his written statement, admitted applying to plaintiff for a further loan of Rs. 1,500, proposing to give plaintiff a share in a contract which then subsisted between himself and the Madras Railway Company. Plaintiff did not accede to his proposal, but agreed to lend defendant the aforesaid sum on his executing a promissory note for Rs. 2,000 including the former loan due to plaintiff, namely, Rs. 500.

He denied having made any such arrangement as to interest as in paragraph 7 of the plaint alleged, and asserted that he had agreed to pay interest at 12 per cent. per annum, as appeared on the face of the promissory note. The defendant further denied the agreement mentioned in the latter portion of the plaint as to cancelling the said promissory note on receipt of a letter from him fixing the rate of interest.

Defendant further stated that, on or about the 16th October 1870, plaintiff came to him at Moodanoor, in the Cuddapah Zillah, represented that plaintiff's parents were very angry with him for advancing the above sum at a low rate of interest, and requested defendant to write to him a letter by post proposing to pay interest on the aforesaid note, at the rate of 5 per cent. per mensem, which letter plaintiff was to show to his parents for their satis-

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faction, and at the same time promised that he would not claim interest at a higher rate than that stipulated in the said promissory note. Defendant, relying on plaintiff's promise and assurance as a friend, did accordingly post a letter, and also another at the request of the plaintiff.

The Issues settled were :—

1*st*.—Whether the rate of interest on the loans of 500 and 1,500 Rs., making 2,000 Rs., was agreed between the plaintiff and defendant to be 12 per cent. per annum or 60 per cent. per annum ?

2*nd*.—Whether the defendant agreed with plaintiff to cancel the promissory note for Rs. 2,000 ?

3*rd*.—What sum is due and owing by the defendant to the plaintiff.

At the trial before Mr. Justice Holloway, the plaintiff stated that he lent the 1,500 Rs., but before he did so he got the following letter, (A.) of the 4th October 1870, from defendant.

" I will come to Madras. As soon as I come to Madras, I will pay Rs. (100) one hundred due from me individually: the remaining Rs. 300 may have been paid to you. Besides this, if you, in addition to Rs. (500) five hundred received by me on note of hand, lend Rs. 1,500, we both may then lay out 2,000 Rs. in ballast work. If you have a mind to stand in Rassi Reddi's share, and if you immediately telegraph to me " Right," I shall immediately come to Madras, settle the matter, come back and manage the business. If you do not like to do so, you need not answer.

Thus Arumugam :—

If you give me a reply, I shall immediately come on Saturday. Money is wanted—Rs. 1,500."

That on receipt of the letter he telegraphed " Right," and the defendant came down to Madras, and that some conversation took place, and that he, the plaintiff, not wishing to take a share in the contract, said he would lend the Rs. 1,500, if interest at 7 per cent. per mensem were given, and that the defendant then said if the money were paid

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he would go to Cuddapah and see if he could afford giving 7 per cent. and would write and let plaintiff know, and that he would give a promissory note for the Rs. 1,500 and Rs. 500 lent before—in all Rs. 2,000, stating interest at 12 per cent., and that on hearing from him the plaintiff was to cancel the note. That he advanced the Rs. 1,500, and took a promissory note from him as follows:—

"On demand I promise to pay to G. Ruthna Mudaliyar, or his order, the sum of Rs. (2,000) two thousand, with interest at the rate of 12 per cent. per annum for value received. Rs. 2,000. ARUMUGAM."

That the defendant left Madras for Cuddapah, and, on the 19th October 1870, wrote the following letter to plaintiff.

"Written by the servant Arumugam. Whereas with regard to Rs. 2,000 for which I came and spoke, and which I got on the 10th instant, I do not consent to pay interest at 6 per 100, but I am willing to pay at the rate of five. If you write to me immediately, telling me whether you consent thereto or not, I will lay that money on business and pay as stated above. You should write a reply at once.

Thus C. ARUMUGAM."

That on receipt of this letter, he (the plaintiff) wrote at the foot of the note—

"Cancelled this day, as a posted voucher for the same sum from the same party on different terms has been received.

G. R."

The plaintiff then stated that on the receipt of this letter he wrote a registered letter to the defendant asking him to put down the terms in a form which he sent him. This registered letter was not produced, but the defendant wrote in reply as follows:—

"The registered letter and the separate post letter written by you reached me yesterday, and I made myself acquainted with all circumstances. As there is too much flow

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of water now in the river to register and launch it, therefore after water abates in the river I shall register it and write accordingly to what you have written. Thus Coo. Arumugam."

"You consider (*i. e.* apprehend) something and write thus. Nothing of the kind would take place."

That the defendant, on the 10th November 1870, wrote the following letter to the plaintiff:—

"I kept on my own business Rs. (2,000) two thousand which I got from you. I will pay at 5 Rs. per 100. I consent to pay interest in this manner from the 13th day of October month—there is no objection to this. Don't get angry because I did not write a reply to you immediately. Excuse me. Thus your servant,

C. ARUMUGAM.

On the 28th day of December month, I shall come to Madras.

C. ARUMUGAM."

That he, the plaintiff, received 5 per cent. per mensem interest for two months, and further sums for interest at the same rate which he gave credit for in his plaint. He produced a witness as to the payment of two months' interest at 5 per cent. per mensem.

The defendant denied all this, said that no such agreement took place, that he wrote the letter under the circumstances referred to in his written statement, and denied paying money as interest.

Mr. Justice Holloway held, following *Abrey* v. *Crux* (L. R., 5, C. P., 37) that the oral evidence was inadmissible to show the rate of interest *dehors* that of the promissory note, and that the subsequent letters, offering a higher rate of interest, were without consideration, for there was not any evidence of forbearance, and that the plaintiff had a right to sue on the promissory note the very next day after it was made. He disbelieved the story of the defendant as to the origin of the letter, and gave judgment for Rs. 191, being the sum due after crediting some sums which under the cir-

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cumstances he held should go towards principal, and a sum of money paid into Court by defendant.

The plaintiff appealed upon the ground, among others, that the evidence adduced by him was admissible.

Johnstone, for the plaintiff (appellant) submitted tha t the learned Judge was wrong, and that the evidence was admissible, as the conduct of the parties and the letters showed that the promissory note was not the entire contract. He referred to the following cases *Harris* v. *Rickett,* 28, L. J., Exch., 197—*Davis* v. *Jones,* 25, L. J. C. P., 91 ; *Wallis* v. *Littell,* 31, L. J. C. P., 100 ; *Morgan* v. *Griffith,* L. R. 6, Exch., 70, and *Abrey* v. *Crux,* L. R., 5, C. P., 37.

Ruthnavélu Mudaliar, for the defendant, contra.

On the 16th July 1872, the date of the argument, the learned Judges stated that, as far as the facts went, they were convinced that the evidence and letter showed that defendant agreed to pay 5 per cent. per mensem interest on the money, and that the true contract was not contained in the promissory note alone, but they wished to consider the Authorities, and on the 15th August 1872 they delivered the following judgments—

MORGAN, C. J. :—There can be no doubt as to the handing over of the money by plaintiff to the defendant by way of loan and at a certain rate of interest : the only question is as to the precise rate of interest which the parties ultimately fixed upon. The plaintiff claimed 5 per cent. per mensem, and the Court awarded only 12 per cent. per annum. The view of the learned Judge was that the promissory note which bore interest at 12 per cent. per annum was *the* only contract, and that he could not look outside that, and on the authority of *Abrey* v. *Crux(a)* he ruled that the other evidence was inadmissible and decreed for the note and interest at 12 per cent. On appeal, the question of the admissibility of this evidence was argued, and we intimated our opinion at the hearing that it was admissible, and we further stated that, on the facts, our conclusion was that the ultimate and only binding agreement was that the defendant should pay interest at 5 per cent. per mensem, but we reserved our final judgment.

(*a*) L. R., 5, C. P., 37.

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The real contract was that shown by the letters and the oral evidence, and I am satisfied that there was never an intention on the part of the plaintiff to advance the money unless at the higher rate of interest. The letters have a great bearing on the case.

The defendant made an attempt, which we disbelieved, to account for, and explain away, these letters which show the rate the defendant agreed to pay.

But it is said there is a written contract, the promissory note, and that no addition to, or variation from, its terms can be made by parol. With respect to this, I take the law to be that notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find upon sufficient evidence that this writing is not really the contract. And the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it.

In *Pym* v. *Campbell*, 6, E. & B., 370, Erle, J. says, "The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted "to show it was conditional: and if that had been so, it "would have been wrong. But I am of opinion that the "evidence shewed that in fact there was never any agreement at all. The production of a paper purporting to be "an agreement by a party, with his signature attached, "affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *Animo Contrahendi*, the terms contained in it are conclusive, and "cannot be varied by parol evidence: but in the present "case the defence begins one step earlier: the parties met "and expressly stated to each other that, though for convenience they would then sign the memorandum of the "terms, yet they were not to sign it as an agreement until "Abernethie was consulted. I grant the risk that such a "defence may be set up without ground; and I agree that "a jury should, therefore, always look on such a defence "with suspicion: but, if it be proved that in fact the paper "was signed with the express intention that it should not

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be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible." And Lord Campbell says, "I agree. No addition to, or varia-"tion from, the terms of a written contract can be made "by parol: but in this case the defence was that there "never was any agreement entered into. Evidence to that "effect was admissible; and the evidence given in this case "was overwhelming. It was proved in the most satisfac-"tory manner that before the paper was signed it was "explained to the plaintiff that the defendants did not "intend the paper to be an agreement till Abernethie had "been consulted, and found to approve of the invention; "and that the paper was signed before he was seen only "because it was not convenient for the defendants to re-"main. The plaintiff assented to this, and received the "writing on those terms. That being proved, there was "no agreement."

At the time of the advance of the money there was an agreement touching the transaction of loan, although the rate of interest was still unsettled and under discussion. The plaintiff declined to lend on the terms of a joint interest in the venture as proposed by the defendant, and the latter refused to pay the rate demanded. Before any final agreement, and while the transaction was still incomplete, the note was given, not as a writing which expressed or was meant to express the final contract, but rather as a voucher or a temporary and provisional security for the money, pending the discussion respecting the rate of interest. And if the note was thus given and received, it should not be regarded as the contract between the parties, or as a written contract excluding other evidence of the true contract.

KERNAN, J.:—I agree with the Chief Justice in the result arrived at, though I am not prepared to say that the promissory note did not at any time represent some contract between the parties. The view I take is this. Assuming that the promissory note did repre-

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sent a complete contract between the parties, such contract was waived and discharged by the acts and agreement of the parties before breach, and a new contract, namely, the contract for larger interest, substituted. In *Goss* v. *Lord Nugent*, 5, B. & Ad., 58, Lord Denman, after referring to the rule excluding parol evidence of what passed between the parties before or contemporaneous with a written contract says, "but after the agreement has been reduced "into writing, it is competent to the parties, at any time "before breach of it, by a new contract not in writing, "either altogether to waive, dissolve, or annul the former "agreement—and thus to make a new contract." In *Stead* v. *Dawber*, 10, A. & E., 57, Lord Denman, referring to an agreement to alter the days of delivery in a prior written agreement says(*a*) "Nor does any difficulty arise from the "want of consideration for the plaintiff's agreement to "consent to the change of days; for the same consideration "which existed for the old agreement is imported into the "new agreement which is substituted for it."

Foster v. *Dawber*, 6, Exch. Rep., 839, shows that the contract on a note may be waived and discharged by parol before breach and without any new consideration. The evidence, both documentary and oral, of what took place after the promissory note was delivered to plaintiff, can leave no doubt that the contract on the promissory note, if there was a contract, was, as a matter of fact, discharged and waived by the parties.

The above view of the facts and law is sufficient to dispose of this appeal.

But I have no doubt, as a matter of fact, on the whole of the evidence, that the promissory note was not and never was intended to represent the entire contract, and that the plaintiff lent his money on an agreement for a higher rate of interest than 12 per cent.

As to the admissibility of the parol evidence prior to, and contemporaneous with, the making and delivery of the note, the case of *Harris* v. *Rickett* was referred to by Mr. Johnstone, and I think that, with reference to the remarks

(*a*) p. 66.

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of Pollock, C. B., and Bramwell, B., the evidence was admissible. Pollock, C. B. says, "We are of opinion that the rule should be discharged, on the ground that the writing does not contain and was not intended to contain the entire obligation of the bankrupt. They have not found, nor does it appear to us, that the writing was intended to contain the whole agreement, and we are, therefore, of opinion that the rule relied upon by the plaintiffs only applies where the parties to an agreement reduce it to writing and *agree or intend to agree that that writing* shall be their agreement;" and Bramwell, B. says, "The principle of the rule is that it must be assumed that the parties agreed that the written agreement should be the evidence of the contract. The difficulty is that in this case there was evidence that the parties did not agree that the written agreement should be the evidence of the contract."

In the case of *Abrey* v. *Crux(a)*, the defendant endeavoured to set up an agreement that the plaintiff should pay himself the amount of the bill drawn by the defendant by selling some securities, and until he, the plaintiff, did so, the defendant was not to be sued on the bill, and it was there rightly held that the oral evidence of this was inadmissible. In that case the defendant admitted *the* contract contained in the bill, but set up something inconsistent with the mode of payment expressed on the bill. Here the plaintiff's case is, the promissory note was not *the* contract.

It is to be observed that this action is not on the note, but on the consideration of it, viz., money lent.

Decree of the Lower Court reversed, and decree for plaintiff for Rs. 1,390-3-2, with costs of original hearing and appeal, with interest on debt and costs at 6 per cent. till payment.

(a) L. R., 5, C. P., 37.