

CALCUTTA HIGH COURT

Ramjibun Serowgy

Vs

Oghore Nath Chatterjee

(Sale ,J.)

19.03.1897

JUDGMENT

Sale, J.

1. The point which is raised in this case has been elaborately argued, but I think it would be of no advantage if I took further time to consider the arguments, because it seems to me that the authorities, both English and Indian, are pretty clear. The claim in this suit is based on a promissory note executed by the defendant, under the terms of which there is an absolute engagement on the part of the defendant to pay on demand the sum of Rs. 7,000. The defendant admits the execution of the note, and admits consideration for it, and the only defence is that which is set up in the 4th paragraph of his written statement. That paragraph runs as follows: That in the year 1895 a settlement of accounts was come to between the plaintiff and the defendant, and it was thereupon agreed between them that the said hundis should be cancelled, and that the defendant should pay the plaintiff the sum of Rs. 4,000 in cash and give him a promissory note for the sum of Rs. 7,000 in full discharge of all his claims against the defendant in respect of the said hundis and of all other claims against the defendant up to that; and it was further agreed between the plaintiff and the defendant that the plaintiff should not bring any suit to enforce payment of the said promissory note until the defendant's share in the compensation money awarded in Original Civil Suit No. 307 of 1896. the Land Acquisition ease No. 181 of 1892 in the Court of the District Judge of 24-Pergunnahs should be received by him.

2. The question is whether evidence in proof of the alleged contemporaneous oral agreement set up in that paragraph of the written statement is admissible, having regard to the terms of Section 92 of the Evidence Act.

3. It was suggested on the part of the defendant that the more convenient if not the right course would be to admit the evidence in the first instance, reserving the question of law as to its admissibility until the final judgment in the case. No doubt that course has advantages and is a proper enough course to follow in certain cases, but having regard to the observations of the

Appeal Court in the case of *Jadu Rai v. Bhotaran Nundy*¹, I do not think that course is open to me in the present instance.

4. Their Lordships expressed the view that questions as to admissibility of evidence should be determined as they arise, and the particular question as to which that opinion was expressed was a question under Section 92 of the Evidence Act. It seems to me therefore I ought to proceed to determine the question of law which has now been raised.

5. The oral agreement which is set up in the 4th para, of the written statement, and which is sought to be proved for the purpose of limiting the defendant's liability under the promissory note, must, it seems to me, be read in one of two ways. Either it must be read in the literal sense of the words, as constituting an undertaking on the part of the plaintiff not to enforce the note by suit until the happening of a certain event, or else it must be read as meaning that the legal obligation of payment was to be postponed to, or made conditional upon, the happening of a certain event. In whichever sense the words are read, the agreement appears to me to have the effect of varying the terms of the contract as contained in the promissory note, and I think the result is the same whether the section be read in the light of the English cases which have been cited, or whether it be construed apart from those authorities.

6. Under the promissory note the engagement is an absolute engagement to pay on demand. The defendant seeks to set up a contemporaneous oral agreement, the effect of which is to qualify or restrict that engagement.

7. The case of *Moseley v. Hanford*² is clear authority to the effect that in England the evidence of such an oral agreement would be inadmissible. In that case, which was a suit on a promissory note payable on demand, the defendant set up a stipulation that it was to be paid on the sellers giving up possession of certain premises sold to him. Tenterden, C.J., regarded the stipulation as having the effect of providing that the promissory note was not to be put in suit till a given event happened, and he held that the evidence of such an agreement was inadmissible.

8. There are numerous other English authorities to the same effect to which I need not refer, inasmuch the argument for the defendant is not so much that under the English law the evidence is admissible, but that proviso 3 to Section 92 of the Evidence Act has the effect of altering the English law.

9. Proviso 3 is as follows: The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

10. What Mr. Dunne contends is that the general law laid down by Section 92, viz., that no contemporaneous oral agreement can be proved to vary the terms of a written contract, is

qualified by proviso 3 to this extent, that the terms of written contract may be varied by proof of a contemporaneous agreement if the effect of such agreement is to postpone a certain obligation under the contract, or to make it conditional upon the happening of a certain event. I am of opinion that this is not the meaning of the proviso. I do not think it can be read as saying that something may be done under certain circumstances, which Section 92 says cannot be done. I do not think that it was intended by proviso 3 to permit the terms of a written contract to be varied by a contemporaneous oral agreement; but having regard to the illustrations (b) and (i), I think the proper meaning of proviso 3 is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation, at all until the happening of a certain event, may be proved.

11. Placing that construction on proviso 3 brings it into general harmony with the terms of the section, and I think this view of the proviso finds support in the opinion expressed by Garth, C.J., in the case of *Jugatanund Misser v. Nerghan Singh*³ and also in the opinion expressed by Mr. Justice Straight in the case of *Cohen v. Bank of Bengal*⁴ It is to be observed, moreover, that Mr. Justice Spankie, who considered that the evidence of the oral agreement sought to be proved in that case was admissible under the proviso, proceeded upon the view that such agreement did not vary the terms of the written contract on which the suit was based.

12. Now, in the present instance, the oral agreement sought to be proved does not provide that the promissory note was to have no force or effect until the happening of the particular event mentioned, but it purports to provide that the promise to pay on demand, though absolute in its terms, was not to be enforceable by suit until the happening of that event, or, in other words, that the legal obligation to perform the promise was to be postponed. I think it clear that such an agreement does not fall within proviso 3 of Section 92, and that being so, the defence fails, and there must be a decree in favour of the plaintiff for Rs. 7,000, with interest at 6 per cent, from date of the n(sic) to the date of decree with costs on scale 2 and interest on decree.

Cases Referred.

1(1889) I.L.R. 17 Cal. 173

2(1830) 10 B. & C. 729

3(1880) I.L.R. 6 Cal. 433

4(1880) I.L.R. 2 All. 598