Lakshmi Narain vs Mst. Aparna Devi on 6 January, 1953

Equivalent citations: AIR1953ALL535, AIR 1953 ALLAHABAD 535

JUDGMENT

Agarwala, J.

1. This is a defendant's second appeal arising out of a suit for recovery of money. The plaintiff-respondent claimed a sum of Rs. 1,500/- on the basis of a promissory note dated 8-9-1941 executed by the defendant-appellant in favour of the plaintiff's father, Chanara shekhar, for a sum of Rs. 1,250/- with interest at 6 percent per annum. In the alternative it was pleaded that the plaintiff was entitled to the decree claimed on the basis of, the original loan of Rs. 1,250/-which was, advanced to the defendant-appellant before the promissory note was executed by the defendant for the amount of the loan. It was admitted in the plaint that the promissory note bore a stamp of one anna and was, therefore, under-stamped. The receipt accompanying the promissory note was, however, duly stamped.

2. In defence, the defendant admitted that the sum of Rs. 1,250/- was. borrowed by him from the plaintiff's father but it was pleaded that the promissory note was executed simultaneously with the advance of the loan and the loan having been made on the basis of the promissory note which embodied all the terms of the contract of loan and which was not admissible in evidence, the suit was not maintainable on /the , basis of the original loan. The trial Court dismissed the suit on the ground that the transaction of loan was simultaneously made with the execution of the promissory note and that all the terms of the transaction of loan were embodied in the promissory note, with the result that the terms of the contract of loan could only be proved by the production of the promissory note, which could not be done because it was insufficiently stamped. The lower appellate Court, however, took a contrary view. It held that although the transaction of the loan and the execution of the promissory note took place simultaneously nevertheless, when the promissory note could not be relied upon because it was insufficiently stamped, it was a mere collateral security and the plaintiff could sue on the basis of the original loan. The lower appellate Court, therefore, decreed the suit.

Against this decree the defendant has appealed to this Court and the sole question for determination is whether the plaintiff-respondent is entitled to sue on the basis of the original loan when the contract of loan was simultaneously made with the execution of the promissory note and the loan was given on the basis of the promissory note which was intended to be by way of a collateral security. The promissory note was in the following terms :

> "We Lakshmi Narain, Rama Shankar, and Kundan Lal Avasthi having borrowed Rs. 1,250/-from Chandra Shekhar Vaid Aganhotri for the purpose of depositing the pre-emption money, agree that we shall, on demand, pay the said amount with

> interest at the rate of 8 per cent. per annum to the said creditor. Therefore this promissory note has been executed, so that it may remain as 'sanad' (evidence) and may be of use when needed.
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> Dated: 8th September, 1941."

3. On the point under consideration there has been considerable divergence of judicial opinion.

In --'Nazir Khan v. Ram Mohan', AIR 1931 AH 183 (PB) (A), a suit was brought for the recovery of a loan on the allegation that the loan had been advanced on foot of .a promissory note. The claim was based on the original contract, of loan, because the promissory note being insufficiently stamped could not be admitted in evidence. In defence the taking of the loan as alleged by the plaintiff was denied. It was pleaded that a sum of Rs. 50/- alone was borrowed which had been repaid. The Full Bench held that: (a) where there was a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note was given as a collateral security, the creditor could sue for the recovery of money on the original cause of action even if the promissory note was not, for any reason, admissible in evidence; (b) but where the making and handing over of the promissory note and the-advance of the loan were part and parcel of the same transaction, this could not be done.

4. The Full Bench made a distinction between a case where a transaction of loan was antecedent to the execution of the promissory note and a case in which the two transactions were simultaneous.

5. In a subsequent Full Bench case in -- 'Sheo Nath Prasad v. Sarjoo Nonia', AIR 1943 All 220 (FB) (B) it was held that it was immaterial that the promissory note and the loan of money were part and parcel of the same transaction and were made simultaneously, and that even in such a case a promissory note ordinarily and presumably is given as a conditional payment or as a collateral security and the advance of the loan was a distinct and separate cause of action by itself which could be sued upon and proved by other evidence, even though the promissory note was not admissible in evidence. The facts of the case were that a loan was alleged to have been advanced simultaneously with the execution of the promissory note. The promissory note was inadmissible in evidence because of insufficiency of stamp. The defendant denied the taking of the loan. Two leading judgments were delivered, one by Dar, J. and the other by Mathur, J. Dar, J. held:

> (a) When a promissory note is given in consideration of an advance of a loan, the presumption is that the promissory note is given in-conditional payment of, or as collateral security for, the loan;
>
> (b) It makes no difference if in relation to a loan of money a promissory note is given subsequently to the advance of the loan or contemporaneously with the loan as a part of the loan transaction with the avowed object of creating evidence of the loan;
>
> (c) If the promissory note is not admissible because of insufficiency of stamp, the loan can be proved by other evidence and Section 91 does not operate as a bar to such

proof.

6. The learned Judge also expressed his opinion that in cases in which a promissory note is given in consideration of a loan, the promissory note does not express all the terms of the loan.

7. Mathur J. agreed, with the conclusions of Dar, J. but rested his decision on the fact that usually the promissory note does not contain all the terms of the contract of loan.

8. Collister and Bajpai, JJ. agreed generally with Dar and Mathur, JJ.

9. The matter again came up for decision in another Full Bench, -- 'Major Mistri v. Binda Devi', AIR 1946 All 126 (PB) (C). In that case the plaintiff lent a sum of four hundred rupees to the defendant, simultaneously with the loan, the defendant gave the plaintiff an ordinary promissory note. The plaintiff did not exhibit the promissory note in the plaint, because it was insufficiently stamped. The defendant admitted that he borrowed the sum of four hundred rupees from the plaintiff but he urged that the promissory note not being admissible in evidence, the suit was not maintainable. It was observed by the Pull Bench that "in a case of simultaneous loan and promissory note, where the plaintiff's cause of action on the promissory note fails, his cause of action in debt, in the absence of special circumstances, survives."

10. It may be noted that in the last Full Bench case, the Full Bench apparently did not consider that it would make any difference whether the promissory note contained all the terms of the loan or not. The Full Bench based its decision upon the view that the advance of the loan was a separate cause of action from the execution of the promissory note. It did not base its decision upon the fact whether the promissory note contained all the terms of the contract of loan or not. This decision is fully in Keeping with the two pronouncements of the Privy Council which have been brought to our notice.

11. In -- 'Payana Reena Saminathan v. Pana Loana Palaniappa', 41 Ind App 142 (PC) (D), a promissory note was given in lieu of a liability which was created contemporaneously by an award and the action on the promissory note failed on the ground of material alteration in the promissory note. In a second suit brought for the recovery of money due on the award it was held that the award could be proved.

12. In -- 'Sadasukh Janki Das v. Kishen Pershad', AIR 1918 PC 146 (E), a suit on the basis of hundis failed because their due execution could not be proved, Lord Buckmaster, however, in delivering the opinion of the Board, observed:

> "It would, of course, have been open to the plaintiffs had they thought fit to have framed their case in an alternative form, and to have sued both on the hundis and alternatively upon the consideration."

13. It is true that when the loan is advanced on the basis of a promissory note which is intended to be merely by way of conditional payment or as collateral security, all the terms of the contract are not 'usually' contained in the promissory note.

14. The terms of the contract in such a case would be as follows :

(a) A certain sum of money is advanced by A to B.

(b) The advance is by way of loan.

(c) B promises to pay to A an equivalent sum of money with or without interest.

(d) The amount is payable on demand.

(e) The promissory note is to be given as a conditional payment or by way of collateral security only for the advance of the loan.

15. Now promissory note is an instrument in writing containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to or to the order of, a certain person, or to the bearer of the instrument (Section 4, Negotiable Instruments Act). A promissory note, therefore, need only contain terms (c) and (d) mentioned above. It need not contain any other term. It may contain terms (a) and (b) also as in the case of the pronote in dispute but it seldom, if ever, embodies the term (e) mentioned above.

This was pointed out by Page, C. J. in the Full Bench case of -- 'Chit Maung v. Roshan N. M. A. Kareem Oamer & Co.', AIR- 1934 Rang 389 (FB) (F);

> "Now, in my experience it rarely, if ever, happens that the whole of the terms of the agreement under which a loan is made are embodied in a promissory note or other negotiable instrument given to the lender by the borrower except in cases in which the parties contract that the negotiable instrument shall itself be the consideration for the loan, and the lender is content to accept the negotiable instrument in satisfaction of the debt whether or not negotiable instrument is dishonoured at maturity or is otherwise unenforceable. In cases in which the parties agree that the negotiable instrument shall be taken as conditional payment only and not in accord and satisfaction of the original debt, I have myself never known or heard of an instance in which 'that term' of the agreement has been embodied in the negotiable instrument."

16. But with all respect one may be permitted to ask as to what would happen if the term that the promissory note is to be given as a conditional payment or by way of collateral security only were also to be recorded in the promissory note. Would the loan be provable by evidence other than by the production of the promissory note or not? It would be anomalous indeed if the loan can be proved when the promissory note does not expressly say that it was executed by way of conditional payment or as collateral security merely and not in absolute discharge of the loan, but the loan cannot be proved when express mention is made of the aforesaid nature of the promissory note. Whether the promissory note recites this fact or not. the presumption of law, in the absence of contrary evidence, is that a promissory note is by way of conditional payment or as collateral

security merely and not in absolute discharge of the loan. Where this term is not mentioned in the promissory note, it can be implied. The mention or non-mention of the said term in the promissory note should not, therefore, make any difference.

17. We think that the true reason why a contract of loan is provable by evidence other than that of the promissory note when the promissory note is given by way of conditional security or as collateral security merely for the loan, is not that all the terms of the contract of loan are not embodied in the promissory note and consequently Section 91, Evidence Act, is not applicable. The real reason is that Section 91 has no application to such a case at all and it is immaterial whether all the terms of the contract of loan are embodied in the promissory note or not.

18. Section 91, Evidence Act, runs as follows :

> "When the terms of contract, or a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or to such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

19. The important words in the section are "reduced to the form of". The word 'reduced' is used generally in two senses; (1) putting some person or thing to an inferior rank or position and (2) changing the form or order of a thing.

Obviously the word 'reduced' in Section 91 is not used in the first sense. It is used in the second sense. When we speak of reducing a thing to another form or order what we mean is that the previous form or order of the thing has been changed into that other form or order. For instance, we speak of reducing grain into flour or reducing a thing into pulp, when a certain thing is reduced to another form or shape or order the previous form of the thing merges into the new form op order : it does not still continue to exist separately.

To our minds Section 91 has reference to a case in which, the document in which the terms of an oral agreement are embodied, is intended to replace the original contract. It is only then that it can be said that the original contract has been 'reduced' to the form of a document. Section 91 has no application when such is not the intention. It has no 'application when the intention is that the original cause of action should survive and subsist even though its terms have been embodied in a document. The expression "reduced to the form of" is not used in the sense of merely "mentioned or noted in". The mere fact, therefore, that certain terms of an oral contract are mentioned or contained in a document does not always mean that the oral contract cannot be proved otherwise than by the document itself. It will depend upon what the intention of the parties was in mentioning the terms of an oral agreement in a document. If the intention was that the document alone hence forward should govern the relations between the parties, the oral contract has merged in the document and has been superseded by it and obviously the document alone is to 'be looked into and

oral evidence of the original transaction cannot be adduced. But if such was not the intention Section 91 should not and does not debar the proof of the original contract. In our opinion Section 91 is not a technical rule but embodies a rule of intention.

Whenever the terms of the contract are merely mentioned in a document for a mere collateral purpose and the document is not intended to be a substitute for or in replacement of the original contract, the document is not one to which the provisions of Section 91 apply. For instance, where the terms of an oral family settlement are embodied in an application made to a revenue Court but which application is not registered and is merely intended to give information to the Court that the parties had arrived at a settlement, the application is not a document, contemplated by Section 91, Evidence Act, vide -- 'Bam Gopal v. Tulshi Ram', AIR 1928 All 641 (FB) (G),

20. A promissory note is, normally, by its very nature a document which is not intended to take the place of an oral contract of loan, but is a document which is merely by way of collateral security or as conditional payment. The loan still subsists, unless there is a contract to the contrary. On the other hand when a bond is taken for a loan, the loan usually merges in the bond and ceases to exist independently of it.

21. In Chitty on Contracts (16th Edition) pp. 52 and 653 it is stated:

> "If the loan is secured by a covenant in a deed, the speciality merges the simple contract, and the lender can only sue on the speciality covenant; if there is a promissory note he will during the currency of the note be estopped from suing otherwise than in accordance with its terms; but after it has become due, he can sue on the note, and add a claim for , money lent, and the promissory note may be used as evidence in support of money lent."

22. In Halsbury's Laws of England (Hailsham Edition) Vol. VII at page 242, it is stated:

> "If a bill of exchange or note be taken on account of a debt, and nothing be said at the time, the legal effect of the transaction is that the original debt remains, but the remedy for it is suspended till the maturity of the instrument in the hands of the creditor. If the security is paid when it becomes due, this is equivalent to payment of the original debt, & if it is paid in part, the original debt is discharged 'pro tanto'. If the instrument is dishonoured, payment of the original debt may be enforced as if no security bad been taken, unless the bill has been negotiated and is outstanding at the time of action brought in the hands of a third party, in which case the creditor's remedy continues to be suspended."

23. It is clear that a promissory note or other negotiable instrument may be taken in supersession of or, absolute discharge of, an oral debt. But in the absence of the evidence to the contrary, the presumption is that it is as a conditional payment or as a collateral security only. Where it is in absolute payment or discharge of oral debt, the document alone can be used to prove the terms of the debt because in that case the debt has been "reduced to the form of a document". But where the

document is not taken in absolute discharge or in satisfaction of the debt, the debt has not been "reduced" to the form of a document and therefore Section 91 is no bar to the proof of the debt otherwise than by production of the document. It is conceded on all hands that where a promissory note is taken in lieu of a pre-existing debt, it is usually taken merely by way of collateral security, and in such a case where the promissory note cannot be produced, the original oral contract of loan may be proved by other evidence. This was so held even in -- 'AIR 1931 All 183 (F. B.) (A)'. But since then it has been held that it makes no difference whether the contract of loan Is simultaneously made with the execution of the promissory note or precedes it.

24. Learned counsel for' the appellant relied on three decisions of this court -- 'Ram Nath v. Bhagwati Prasad', AIR 1946 All 150 (H), -- 'Kanhai Lal v. Brij Nandan', AIR 1952 All 509 (I), and -- Lila Singh v. Chhajju Singh', AIR 1952 All 877 (J).

25. In 'Ram Nath's case, (H)', the suit was for recovery of a sum of money on the allegation that the defendant had borrowed the principal amount on the basis of a promissory note from the predecessor-in-interest of the plaintiff and that the promissory note had been assigned by the holder thereof in favour of the plaintiff. It was held that since the promissory note contained all the terms of the loan, the plaintiff was unable to prove the original loan when the promissory note could not be produced in evidence being insufficiently stamped. This decision was given before the Full Bench decision reported in -- 'AIR 1946 All 126 (C)', came into existence and must be held to have been overruled by it.

26. In--'AIR 1952 A11 509 (I)', Dayal, J. followed 'Ram Nath's case (H)', and no reference was made at all to 'Major Mistri's Full Bench case, (C)'. in -- 'AIR 1952 All 877 (J)', the plaintiff sued on the basis of a loan. The defendant denied the taking of the loan. It was found that a promissory note was also executed simultaneously with the loan but that it was insufficiently stamped. It was observed-that since the promissory note contained an unconditional undertaking to pay the amount, this undertaking could not be proved by oral evidence because of the bar of Section 91, Evidence Act. With great respect we find ourselves unable to agree with this dictum as the unconditional undertaking to pay the amount is merely one of the terms of the contract of loan and Section 91 admittedly has no application when all the terms of the contract are not reduced to the form of a document. This decision in the aforesaid case is directly in conflict with the ruling of the Pull Bench reported in -- 'Sheo Nath Prasad v. Sarjoo Nonia', (B) (ubi supra) which does not seem to have been cited. 'Major Mistri's Full Bench case, (C)', (ubi supra) was distinguished on the ground that in that case the taking of the loan was admitted.

Assuming that the Full Bench decision was not binding because of this distinction, the 'ratio decidendi' of the Full Bench case was not based upon the circumstance that the taking of the loan was admitted. It was based on a genera ground, namely that the taking of the loan and giving of the promissory note were two different causes of action and the admissibility of the promissory note merely disabled the plaintiff from suing upon the promissory note, but did not prevent him from suing upon the separate and distinct cause of action on the advance of the loan.

27. We think that when a promissory note is not taken in discharge of an oral contract of loan but is taken only by way of conditional payment or collateral security, as it will be presumed to have been so taken unless there is a contract to the contrary, Section 91 has no application to the case and the terms of the original contract of loan can be proved if the promissory note is not admissible in evidence or for any other reason cannot be proved. The facts that the promissory note was executed simultaneously with the advance of the loan or that the loan was advanced on the basis of the promissory note or that the promissory note contained all the terms of the contract of loan are all immaterial, provided only that the promissory note is not in absolute discharge of the original contract of loan.

28. A promissory note or other negotiable instrument is taken in discharge of a loan only when the contract is that the debtor will not be liable if the promissory note or other negotiable instrument could not be enforced. It is to such cases that illustration (b) to Section 91 applies.

29. There is no force in the appeal.

30. There is a cross-objection with regard to costs. The lower Court did not award costs to the plaintiff. We are unable to say that the lower Court did not exercise its discretion properly. The cross-objection is dismissed.

31. In the result we dismiss the appeal with costs. But in the circumstances of the case, we make no order as to costs of this appeal.