Privy Council Appeal No. 40 of 1914.

Motabhoy Mulla Essabhoy - - - - *Appellant.*

v.

Mulji Haridas - - - - - *Respondent.*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY 1915.

Present at the Hearing:

LORD DUNEDIN. SIR JOHN EDGE.
LORD SHAW. MR. AMEER ALI.
SIR GEORGE FARWELL.

[Delivered by LORD DUNEDIN.*]*

The plaintiff respondent, Mulji Haridas, sues the defendant appellant, Motabhoy Mulla Essabhoy, upon a promissory note jointly executed by the defendant and the firm of Hyderally Cassumji Sons & Co., hereinafter called Hyderally, for Rs. 50,000. The note was made in the following circumstances. Mulji, before July 1907, had made advances to Hyderally amounting in all to Rs. 400,000, the consideration for making such advances being certain shares in an agency commission in a certain company. The advances were partially but not wholly covered by security. In July 1907, Hyderally applied for a further advance of Rs. 150,000 in order to pay off Motabhoy a debt of that amount due to him. Mulji agreed to make the loan, a condition being an increased share in the commission agency, and to make it in three

equal instalments. Two of these instalments were paid and the money handed on by Hyderally to Motabhoy, and the third instalment fell to be paid on 30th January 1908.

At the end of December 1907 Motabhoy was in want of money to meet a bill. He accordingly applied to Hyderally to ask if the balance of the debt, namely Rs. 50,000, could be paid immediately. Hyderally then approached Mulji to see if he would prepay his instalment due on the ensuing 30th January. He consented to do so on being given the joint promissory note in question of date 23rd December 1907, and the money was handed to Motabhoy. So far there is no discrepancy between the view of the parties, but now arises the difficulty. The defendant Motabhoy alleges that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the instalment promised to be paid by Mulji to Hyderally on that date, and that the note should be replaced by a single acknowledgment on the part of Hyderally. The plaintiff Mulji says that all he agreed to was that he would surrender the note if at 30th January 1908 Hyderally had given sufficient security for the whole debt as then due by him, that on the 30th January no such sufficient security was given, that accordingly he is entitled to maintain Motabhoy's liability under the note.

The learned Judge of First Instance allowed the parties to go to trial and examine witnesses; and coming to the conclusion that it had not been proved that any arrangement had been made for the giving of security by Hyderally gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at because in their

view the promissory note constituted a written contract binding the defendant to pay on demand, and Section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement.

Now if the defendant's pleading is to be dealt with in absolute strictness that view is right, for what the defendant says is this: he admits the execution of the note, and then he says that it was verbally agreed that his liability on it should cease on the 30th January 1908. That is a bald averment of a verbal contract contradicting the written contract, and would be inadmissible under Section 92. But this bald averment does not represent the defendant's true case. His true contention has been already stated, and in the form of averment it might be put thus:—"It was agreed that on 30th January "1908 the advance then to become due by Mulji "to Hyderally should be held as made by the "monies paid on 23rd December 1907, and that "the liability under the note should be held as "satisfied by a fresh note to be granted by "Hyderally for the advance of 30th January "1908." That would be an agreement in terms of Proviso 2 to Section 92, which allows to be proved "the existence of any separate oral "agreement as to any matter on which a docu-"ment is silent and which is not inconsistent "with its terms."

Their Lordships have felt that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings, and that in a case where the parties had been allowed to go to proof. They have, therefore, felt themselves entitled to consider the evidence led.

Although, however, there are cases, of which this is one, where it is allowable to urge an oral agreement which will have the effect of leaving

matters otherwise than if they had depended on the written agreement alone, it is obvious that such oral agreement must be clearly proved and that the onus lies on him who sets it up. Their Lordships are of opinion that this has not been sufficiently realised by the learned Judge of First Instance. Coming to the conclusion that the plaintiff had failed to prove that he had stipulated for security being given for the whole debt by Hyderally by the 30th January, the learned Judge takes it as a necessary *sequitur* that the defendant's case is established. But the agreement alleged by the defendant must be substantively proved, and it is here, in their Lordship's judgment, that the defendant fails. The agreement must be an agreement to which the plaintiff Mulji is shown to have assented either himself or by an agent with power to bind him. Now there was no one who had power to bind Mulji. Further, Motabhoy and Mulji never met at the time at which the alleged agreement was concluded, and there is absolutely no evidence which shows that Mulji ever consented to anything except to advance the money if he got the promissory note. In the argument the defendant's Counsel sought to put his case thus: He said that Mulji himself admitted in his pleading that the promissory note was not to represent the true state of matters after 30th January, that no doubt he adhibited the condition that security was by that date to be given, but that as the Judge of First Instance disbelieved the story that any such condition was made the matter rested on his own confession that the promissory note lost its efficacy after 30th January. The fallacy here consists in so treating an admission. It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a

condition it must either be accepted subject to the condition or not accepted at all. Therefore the admission that the promissory note was to be held as satisfied on 30th January by a new debt on the part of Hyderally, provided that security was found for the whole debt by that date cannot be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

Their Lordships are therefore of opinion that the decree of the Court of Appeal was right, although to be supported on other grounds than those stated in the judgment of that Court, and they will humbly advise His Majesty to dismiss the Appeal with costs.

In the Privy Council.

MOTABHOY MULLA ESSABHOY

v.

MULJI HARIDAS.

DELIVERED BY LORD DUNEDIN.

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