Privy Council Appeal No. 25 of 1915.

Haji Umar Abdul Rahiman - - - *Appellant,*

v.

Gustadji Muncherji Cooper - - - *Respondent.*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER 1915.

Present at the Hearing:

VISCOUNT HALDANE. SIR JOHN EDGE.
LORD PARMOOR. MR. AMEER ALI.

[*Delivered by* VISCOUNT HALDANE.]

This an appeal on questions of fact from a judgment of the High Court of Bombay, reversing the judgment of the First Subordinate Judge of Poona, who tried the case. The principal issue is whether a promissory note for Rs. 15,000, on which the appellant brought an action against the respondent, was a forgery. A good deal of the oral evidence was taken, not by the Trial Judge, but before another Judge who acted for him. The case is, therefore, not one in which a Court of Appeal has the full assistance of the impressions of a Judge who in trying the case has seen all the witnesses in the box. The High Court and this Board have had to weigh the evidence as recorded for themselves, with the aid of the views of the Trial Judge on those occasions on which the witnesses were examined and cross-examined before him.

The appellant was a furniture dealer and money-lender at Poona. The respondent was a bookmaker on the turf, who also owned a fibre factory. The latter had frequent occasion to borrow money, and he borrowed from time to time from the appellant among others. Between the Diwali day in November 1906, with which the native financial year commenced, and the 5th November 1907 which ended that year the respondent had borrowed from the appellant on promissory notes sums amounting to Rs. 19,000. Of this debt he had repaid Rs. 5,000 in August, and Rs. 14,000 for principal remained unpaid on the Diwali day in 1907, the 5th November, together with Rs. 332 for interest. As to the security for this indebtedness there has been dispute. A good deal of the money had been advanced for the purposes of building a bungalow on some land at Poona belonging to the respondent, and the evidence of the appellant was that the title deed to this land had been deposited with him as security for the advances, with a promise of a formal mortgage when his building was complete. However, on the 9th March 1907, the respondent got the deed back for the purpose, as he stated in a letter of that date, of showing it to his pleader, and on a promise to return it. He either did not return it, or if he did so he managed to get possession of it again, and he used it to enable himself to mortgage the property in August for Rs. 15,000 to a Dr. Modi. The appellant was not informed of this and after discovering it he brought the action in which this appeal arises to recover the amounts due for principal and interest, and for a declaration that these amounts were charged on the property. The contention of the respondent was that he had never agreed to give the appellant a mortgage, but had only negotiated about

it. It is, however, difficult to reconcile this version of the transaction with the terms of the letter of 9th March in which he appears to treat the appellant as entitled to have the deed.

It is clear that the respondent had been borrowing on a large scale prior to November 1907 from other people as well as from the appellant. Indeed his case is that he so borrowed in order to pay off the latter. But he appears to have been in circumstances of some difficulty. He had sometime previously been declared a defaulter by the local Turf Club, a circumstance which could not but cause him difficulty in borrowing. However, his case is that he succeeded in raising enough money to pay the appellant in cash, two sums of Rs. 14,000 and Rs. 1,000, on the 5th of November, in small notes of Rs. 100 and less. An important question which has to be determined is whether he did this, or whether the appellant merely closed the account for the year by taking a fresh promissory note from him for the balance carried into the new account.

Their Lordships have had before them a translation of the account kept in the books of the appellant, relating to his transactions with the respondent. From the translation it appears that the Rs. 14,000 were credited as "in cash in full settlement of the account up to this day," *i.e.*, the 5th November 1907. At first sight this would seem to mean that the money was actually paid. But an examination of the accounts made out in previous years, shows that the expression "in cash" is far from conclusive, inasmuch as it was the regular practice to enter as sums of cash received and credited the amounts of new promissory notes given by the respondent to the appellant in liquidation of earlier notes, just as though actual cash had been received. Their Lordships think that it

must be taken that the practice was to close each yearly account entirely by treating any debit balance as paid off when there was credited as liquidating the cash balance due, a new promissory note which then became a debit item in the account for the ensuing year. They are confirmed in this view by what was said by the Trial Judge to the effect that he had had a long experience in which he had been familiar with the existence of this practice.

The appellant and his witnesses swear that this was the course adopted when the account was closed on the Diwali day of 1907 and a new account opened for the ensuing year. The respondent swears that he paid the Rs. 14,000 in cash, consisting of small notes which he got, not from his bank but from his house, where the money had been kept ready for three months. Their Lordships think that the probabilities are against the truth of this statement. The respondent had been borrowing money during this period, including a large sum of Rs. 15,000, as late as August from a Dr. Modi, and he had had an execution issued against him for a judgment debt of Rs. 8,000 in October. This debt he had paid, but he says in his evidence that in order to do so he had borrowed Rs. 5,000. Besides this he had incurred other debts. For instance he had borrowed Rs. 1,000 from the appellant on 3rd September. This state of his affairs does not render it probable that he was in a position to keep Rs. 14,000 or any other considerable sum in his house during the three months antecedent to the alleged payment of cash to the appellant. Again the body of the promissory note on which the appellant sues is in the handwriting of the person who signed it, and the handwriting in the case both of the body of this note and its signature appear indistinguishable from the admitted handwriting of the respondent. Indeed,

the Trial Judge came to the conclusion on a comparison of documents and after taking evidence, that the signature was genuine. Further, subject to one important discrepancy which their Lordships will presently deal with, the appellant's books bear out his assertion that the balance was liquidated by means of the promissory note. The respondent ought in the ordinary course to have in his turn produced his books to show the entries made by him at the time and so bear out the case of cash payment which he made. In addition to his business as a bookmaker he had, as already stated, a factory. His excuse for not producing the appropriate books was that they had been destroyed in a fire which took place at the factory on 10th and 11th November, just after the transaction in question. He said that two books only had escaped destruction, but it appears that the entries in neither of these related to the transactions in question. As against this testimony the appellant called one Cawasji, who was agent for the insurance company from which the respondent recovered the amount of the damage caused by the fire. Cawasji said that he had produced to him by the respondent books other than the two referred to, including a cash book. The evidence taken renders it very doubtful whether the room in which the books were was destroyed at all by the fire. Their Lordships cannot accept the story told by the respondent about the destruction of his books.

But on the other side the case made by the appellant was in its turn unsatisfactory. The promissory note on which he sued was for Rs. 15,000, being made out for the balance of Rs. 14,000 and Rs. 332 for interest due, the remainder being stated to have been paid in cash. But the note was dated, not on the Diwali day, the 5th, but on the 7th November. The

appellant and the witnesses whom he called insisted throughout that the date of the transaction was the 7th, and that the note was signed then. They produced books which supported this statement. These books showed the Rs. 14,000 as paid in cash on the 5th November and the debit for Rs. 15,000 on the promissory note as made under date the 7th. But the respondent succeeded beyond question in completely disproving the allegation that he had signed the note on the latter date. He established conclusively that he was in Bombay and not in Poona on that day. It was not until this evidence had been given that the appellant's solicitor suggested in his reply that the date of the disputed note and the date assigned by the appellant for the transaction might have been a mistake, and that the note was post-dated and really signed on either the 5th or the 6th.

The Trial Judge took the view that the appellant and his witnesses had perjured themselves about the date and that his books had been so fabricated as to support this story. But he held that the note was in fact signed by the respondent, and that the transaction had in reality taken place in the form alleged by the appellant, but on the 5th and not on the 7th. He considered that both parties had committed perjury, and to mark his sense of what had occurred, while deciding in favour of the appellant he deprived him of his costs.

The learned Judges of the High Court took a different view. They were of opinion that the Trial Judge's finding that the disputed note was signed on a different date from that alleged by the appellant in his plaint, and the evidence given, constituted a fatal variance from the case pleaded and made. They thought that the receipt in the appellant's account on which the respondent relied, and by which the appellant purported to

acknowledge receipt of cash in payment of the previous debt, was sufficient evidence of payment in cash as alleged by the respondent. They considered that the destruction of the respondent's books in the fire had been proved, and that there had been no suppression by him of facts. They thought that there was evidence that the respondent was in a position to have made the cash payment set up. As to the finding of the Trial Judge that the note was signed by the respondent, they thought that the handwriting was similar to the handwriting of the respondent in other promissory notes produced for comparison and admitted by him, but that this circumstance was not sufficient to rebut what they regarded as the inference irresistibly arising from the other proved facts in the case, that the handwriting was the work of a clever forger. They laid great stress on the principle that it would "introduce the greatest amount of "uncertainty into judicial proceedings if the "final determination of causes is to be founded "on inferences at variance with the case that "the plaintiff has pleaded, and, by joining issue "in the case, has undertaken to prove."

Their Lordships are of opinion that the High Court has applied this principle in an abstract and unsatisfactory way which has misled them in estimating the merits in the controversy before them. In applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised. The question is in ultimate analysis one of circumstances and not of law. In the case which the Board has on the present occasion to consider the fundamental questions are whether the sum due was paid in cash, and whether the note was a forgery. No doubt the appellant was quite wrong in saying that the note was signed on the day on which it was dated, the 7th November 1907. On that date it

is proved that the respondent was not in Poona, but he may have post-dated the note accidentally, or for some purpose, and have signed it on the 5th or 6th. It is going too far, in their Lordships' opinion, to infer, what the Trial Judge inferred, that the books must have been fabricated, and that deliberate perjury was committed. It is quite possible that all that happened was that the appellant and his witnesses, whose testimony was given a year and a half after the event, had not made out the accounts until some interval had elapsed, and were then misled by the documents into making a serious but not conclusive slip. The accounts in the appellant's books may quite naturally have been erroneously, but in good faith, based on the date of the note. The natural inference from the documents and the evidence appears to their Lordships to be that the signature was genuine and that the transaction, like the previous transactions, was not a closing of this account by the payment of cash, but was a liquidation by means of a fresh note. In the view that they take of the evidence what they have stated appears to them to be the proper inference from what is established by the evidence. They are unable to agree with the High Court either in their view of the evidence or in thinking that the general principle on which the learned Judges relied can be decisive of a case in which the cardinal issues are in reality those stated. Their Lordships are not called on to interfere with the discretion exercised by the Trial Judge as to costs, but they think that at all events on the main question he was right, and the High Court wrong.

They will, therefore, humbly advise His Majesty that the judgment of the Court of First Instance should be restored, and that respondent should pay the costs of this appeal and of the proceedings in the High Court.

In the Privy Council.

HAJI UMAR ABDUL RAHIMAN,

v.

GUSTADJI MUNCHERJI COOPER.

DELIVERED BY VISCOUNT HALDANE.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1915.