Privy Council Appeal No. 75 *of* 1927.

Bengal Appeal No. 35 *of* 1925.

Mahomed Ali Mamoojee - - - - - - - *Appellant*

v.

William Stansfield Grosvenor Harvey and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1928.

Present at the Hearing:

VISCOUNT SUMNER.
LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* VISCOUNT SUMNER.]

This suit was brought by an indorsee of a series of 35 *hoondies* against a prior indorsee and the maker to recover the amount of them. The maker put in a written statement but has taken no further part in the litigation. He is now a bankrupt. The co-defendant set up a collateral parol agreement between himself and the plaintiff appellant that his liability should be dependent on the plaintiff's procuring the maker to give further security by way of mortgage for payment of the notes, a condition which had not been performed. The admissibility of evidence of such an agreement was then argued as a preliminary question and a decision having been given in the respondents' favour, both on the admissibility and on the facts, it became necessary for the plaintiff to plead afresh. Nearly two years and a half thus passed. In the amended proceedings the plaintiff, while denying that any such agreement had been made, claimed to recover half the amount of the *hoondies* under it, while the defendant-indorser insisted that the breach of

the condition was such that the plaintiff could recover nothing at all. In the result the Trial Judge found as follows :—

> " I have already commented upon the plaintiff's evidence, and having had the opportunity of again hearing him in the witness-box I see no reason to correct my previous observations as to the weight to be given to the evidence of Mamooji and Galstaun respectively. I find as a fact that it was agreed that a second mortgage should be taken of the properties, other than the Free School Street property, which the defendant directed before he left for England in May, 1920, should be included. I also find it was agreed that the plaintiff should get such second mortgage executed and registered. No such mortgage was completed as required, and the party or parties liable upon the *hundies* will not obtain the benefit of it, as would otherwise have been the case. For this the plaintiff must be held responsible— though the defendant has not succeeded in proving that in March, 1920, it was agreed, that the mortgage should be in their joint favour, in other respects he has established the agreement, of which particulars have been given."

The suit having been dismissed accordingly as against the defendant, Mr. Galstaun, the plaintiff appealed. In the High Court on appeal both learned Judges affirmed the Trial Judge's conclusion, and from their decision this appeal has been taken. Chatterjee, J., says :—

> " I do not see sufficient reasons for differing from the findings of the learned Judge and accordingly hold that the oral agreement as to the half-risk set up by Galstaun is established."

In this Rankin, J., concurred. Both Judges gave separate and detailed consideration to the question, whether the appellant's undertaking to get the required security was a condition precedent to all liability on the part of the respondent, or, as it was also put, whether the fact that no further security was obtained from the maker of the *hoondies* was a breach going to the root of the agreement between these parties, so as to put an end to any further liability on the part of Mr. Galstaun.

In view of the concurrent findings of both Courts in India, upon evidence on which such findings were competent, it became necessary for the appellant to establish such errors in law as would justify his appeal. The objection which had been taken to the admissibility of any parol evidence as to the liability of these parties *inter se*, on the ground that it varied or contradicted the terms of the *hoondies*, was argued below and was dismissed with a full statement of the Judges' reasons. Before their Lordships, though mentioned, it was not pressed, and it calls for no discussion now. It was also suggested that the agreement as to the security to be given was framed in such indefinite terms as to be incapable of amounting to a condition precedent. This suggestion is not easy to appreciate. It appears to be only an alternative form of the main contention, that the agreement as to this matter was no more than a term, the breach of which sounded in damages and in the circumstances only nominal damages, and could not be of such a character as to go to the root of the whole contract.

The rule as to concurrent findings is such that, unless some exceptional circumstances exist to warrant a departure from it, of which none can be suggested here, any discussion of the merits of those findings is inadmissible, since it can only be fruitless. Their Lordships therefore refrain from stating, still less weighing, a considerable part of the arguments, which counsel sought to press upon them, and as to the residue, may deal with them very shortly. The crucial circumstances are these. The defendant, Harvey, was the owner, jointly with his wife, of a number of buildings and building sites in the Calcutta area, some in various places in Chowringhee, some in Free School Street. This transaction, so far as the respondent was concerned, began in December, 1919. At that time the plaintiff had procured the Central Bank, with which he was connected, to make advances to a considerable extent to Harvey, for which he received a commission. The Central Bank desired a second name in addition to that of the plaintiff, as indorser of the *hoondies*, which they were to discount, and it was for this purpose that the concurrence of the respondent was sought. It was intended that the *hoondies* should be periodically renewed, till Harvey should be able to meet them, but about February or March, 1920, the Central Bank, not desiring to renew, was paid off by the plaintiff, who procured the Karnani Bank to discount the renewals in March. This is the occasion, to which the Trial Judge's finding above quoted refers. When these *hoondies* matured in June, they were renewed, and the plaintiff, having met them at the due date, sued his co-guarantor on this third series. The transaction began, when the speculative movement in building properties in Calcutta was at its height and the possibility of the fall in values, which presently happened, was before the minds of the parties. Till a date subsequent to March, 1920, a good prospect existed that the value of the sites would prove to be such as to enable Harvey to discharge the *hoondies* when they eventually fell to be paid off, but Harvey was considered to be over-sanguine in his estimate of the ultimate value of his sites. He had already mortgaged them, and it was known that over and above these sites he had nothing. In March, 1920, which for this purpose is the crucial date, it was clear that the appellant and the respondent were taking the burden of financing Harvey through this speculative time, that the properties themselves and their realisable value was all that they had to look to, and that it was important to them to get Harvey to mortgage to them all his outstanding interest in full. Time indeed might not press ; that depended on the state of the building market, but it was plain to anyone in Mr. Galstaun's position, who knew Harvey and his affairs, that his protection against ultimate liability lay, and lay solely, in these properties. It follows almost as a matter of course, whether as fact or law may not much matter, that a stipulation that the plaintiff should get these

further mortgages from Harvey, went to the root of the whole contract and that its fulfilment would be the condition of the respondent's undertaking liability. It is true that when the *hoondies* were renewed in June, 1920, it was known that no further mortgage had been obtained. The question of further mortgages continued to be dealt with in a dilatory way, and the respondent or his agents took part in negotiations for them and did not simply leave them to the plaintiff. On these facts a strong case of waiver of the term as a condition precedent and of reduction of it to a mere promise, sounding only in damages, might probably have been made out, if waiver had ever been pleaded or contended for, but if these subsequent occurrences are put forward as an answer to the agreement found, they amount only to reasons for disputing the concurrent findings.

Accordingly, the distinction between questions of law and questions of fact in this connection loses much of its importance, but, in their Lordships' opinion, the conclusions of both Courts, that the stipulation as to further security was a condition precedent to the liability of the respondent, are conclusions of fact and cannot be called matters of law as being a legal construction put upon agreed words. The case was not one, in which it would have been possible to find as facts the precise words used. The agreement itself resulted from conversations in the way of business, of which no note was made, and the time which had elapsed between their date and the hearing in Court was so great as to make the recovery of the actual text of the bargain a hopeless task. In truth, all that was possible was to do as was done and to state the agreement arrived at in terms of its legal effect ; and accordingly it must be taken from these concurrent findings that the words in which the parties agreed were such as would have the legal results, at which both Courts arrived. This is all the simpler because the plaintiff denied that there was any agreement at all, while on the part of Mr. Galstaun the business exigency of the situation pointed unequivocally in the direction of these findings. There are, therefore, no questions of law on the construction of the agreement found, but only concurrent findings of the fact, that the agreement was such as would have the legal effect, which was declared in the decree appealed against. It follows that the appeal must fail and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

In the Privy Council.

MAHOMED ALI MAMOOJEE

v.

WILLIAM STANSFIELD GROSVENOR HARVEY AND OTHERS.

DELIVERED BY VISCOUNT SUMNER.

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