

(1920) 03 CAL CK 0021

Calcutta High Court

Case No: None

Abdul Hakim Ear Mahomed

APPELLANT

Vs

Ebrahim Solaiman Salehjee and
Co.

RESPONDENT

Date of Decision: March 3, 1920

Hon'ble Judges: Ernest Fletcher, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

Asutosh Mookerjee, J.

This is an appeal by the plaintiff in a suit to recover money due on two promissory notes; they were executed on the 27th March 1915 by the defendant company, each for a sum of Rs. 15,000 in favour of Abdul Hakim Ear Mahomed, The plaintiff, whose name is Abduul Hakim Ear Mahomed, instituted the suit on the assumption that the promissory notes had been executed in his favour; the defendants pleaded, however, that they had been executed in favour of a firm which had the same name as the plaintiff and was owned by his father. Mr. Justice Greaves has dismissed the suit, as, in his opinion, the evidence shows that the promissory notes were executed in favour of, not the plaintiff, but the firm. No serious endeavour has been made to challenge this finding before us, as the evidence on the side of the plaintiff himself shows that the money which was advanced to the defendant was taken from the firm. But it has been suggested that as the Judicial Committee have recently recognized the right of a benamidar to maintain a suit *Gur Narayan v. Sheo Lal Singh* 49 Ind. Cas. 1 : 46 C. 566 : 23 C.W.N. 521 : 17 A.L.L.J. 66 : 36 M.L.J. 68 : 9 L.W. 335 : 28 C.L.J. 521 : 1 U.P.L.R. (P.C.) 1 : 12 Bur. L.T. 122 : 46 I.A. 1 (P.C.) the plea raised by the defendants is irrelevant. This contention is manifestly fallacious. If the notes had been executed in favour of the plaintiff, an allegation that he was not the beneficial owner of the money, might not have afforded a defense to the suit. But the defendants urge that the notes were given, not to the plaintiff, but to a firm which happens to possess the same name as the plaintiff and is the property of his father. This raises a question, not of benami, but of identity of the person to whom

the note was given; and the plaintiff cannot succeed till the matter has been determined in his favour.

2. The plaintiff has not contended that, if the notes are held to have been executed in favour of the firm, he is entitled to succeed as the firm belonged to him and not to his father. In our opinion, Mr. Justice Greaves has given sufficient reasons in support of his conclusion that the father was the real owner of the firm, which was started with the funds of a previous firm owned by him. In this view, the plaintiff cannot possibly succeed. The case is really one of conflict of oral testimony. The learned Judge, who had the opportunity of seeing the witnesses, has expressed the opinion that the testimony of Mullick Hossain Mullick Rasul and Ismail Saleji was reliable and satisfactory, and has added that he could not say the same of the testimony that was given before him on behalf of the plaintiff. We see no reason to form a different estimate of the value of the oral testimony. If then the evidence on the side of the defendants is accepted, as we hold it must be accepted, there can be no doubt that the plaintiff has laid no foundation for his claim.

3. From another point of view, the claim is equally untenable. The defendants have satisfactorily proved that before the father of the plaintiff died, he sent for the defendants, discharged their liability under the promissory notes and directed them to apply the sum in their hands for the benefit of his four infant children, two sons and two daughters. This would clearly operate as a discharge of the notes: *Cooch v. Lister* (1863) 13 C.B. (N.S.) 543 : 184 R.B. 643 : 32 L.J.C.P. 121 : 7 L.T. (N.S.) 712 : 9 Jur. (N.S.) 823 : 11 W.R. 869 : 143 E.R. 215; *Hirachand Punamchand v. Temple* (1911) 2 K.B. 330 : 80 L.J.K.B. 1155 : 105 L.T. 277 : 56 S.J. 519 : 27 T.L.R. 430.

4. From whatever point of view the case may be examined, it is thus clear that the decree of the Court below cannot be disturbed.

5. The appeal is accordingly dismissed with costs.

Ernest Fletcher, J.

6. I agree.