The East Bengal Commercial Bank, Limited Vs Prasanna Kumar Saha and Others

Court: Calcutta High Court

Date of Decision: Feb. 13, 1935

Citation: 164 Ind. Cas. 775

Hon'ble Judges: Derbyshire, C.J; M.N. Mukerji, J

Bench: Division Bench

Judgement

Derbyshire, C.J.
This is an appeal from a judgment of the Officiating Sub-Judge of the 3rd Courts Mymensingh, dated May 29, 1930, in

favour of the defendants. The plaintiffs are a Banking Company which has its head office at Mymensingh and a branch at Sarisabari. The

defendants are dealers in jute and other commodities carrying on business at Sarisabari. The defendants'' business appears to be managed by

Jatindra Narayan Saha who is one of the partners of the concern, and a son of the founder Prasanna Kumar Saha. The plaintiff''s business

premises at Sarisabari adjoin those of the defendants, and there have been from time to time business dealing between the parties in which the

plaintiffs have lent money to the defendants. This suit arises out of an alleged transaction whereby the plaintiffs are said to have lent Rs. 7,000 to

the defendants on certain terms which will appear below.

2. The defendants deny that the loan alleged was ever made.

3. Paragraph 2 of the plaint reads as follows :

On September 7, 1925 last, the defendant No. 8 (Jatindra) on account of the business of the said Prasanna Kumar Saha at Sarisabari, having

signed his father''s name Bakalam on behalf of the, said P.K.S. borrowed the sum of Rs. 7,000 from the plaintiffs'' branch office at Sarisabari on

executing the hand note filed herewith, and agreed and promised that the sum together with interest at the rate of Rs. 1-12 as per mensem, would

be paid on demand.

4. The defendants say the correct translation from the Bengali original hand note is not ""on executing"" but ""by means of.

5. The plaint then goes on to set out the principal and interest claimed. The written statement filed on behalf of the defendants in para. 1 states that

the hand-note alleged only bears a stamp of value 1 anna whereas it should bear a stamp of value 4 annas, and that in consequence the plaintiffs

suit is not maintainable on the basis of the said hand-note. Paragraph 2 of the defence denies the borrowing of the money and the giving of any

promise to pay either that money or any interest on it.

6. Paragraph 3 admits that Jatindra is the manager of and has carried on the business of the defendants, but denies that any money is owing by the

defendants to the plaintiffs.

7. Paragraph 4 says the claim is collusive and fraudulent. Paragraphs 5 and 6 gives particulars of the alleged fraud and collusion.

8. It is alleged (hat Subodh Roy, the plaintiffs'' manager at Sarisabari misappropriated monies of the Bank, and that to make good the losses the

plaintiffs and the said Subodh have conspired together and made this claim ; that the plaintiffs had taken out a warrant for the arrest of Subodh but

had not proceeded to execute it because it would damage their business reputation, and also because it would deprive them of Subodh''s help in

making this claim, further that the plaintiffs have been financing Subodh in a business presumably in order to pay him for his help in making this

claim.

9. Paragraph 7 states that the defendants have been doing business with the plaintiffs for many years, borrowing money and giving hand-notes for

the same and that the plaintiffs have not returned some of the notes.

10. Paragraph 8 gives some description of these hand-notes, and again denies the plaintiffs'' claim.

11. Paragraph 9 refers to a schedule of account which the defendants set out as annexed to their defence and shows the true state of account

between the parties.

12. Paragraph 10 refers again to the schedule of account and states that it shows that on Kartick 26, 1332 B.S. (November 11, 1925) the

defendants paid to Subodh Roy Rs. 7,500 which paid off their indebtedness to the plaintiffs, and that on that date Subodh gave a receipt to the

defendants acknowledging that all indebtedness had been paid off and that the hand-notes in respect of the debts then wiped out were at the

plaintiffs'' head office and could not be returned. Paragraph 11 repeats the allegations of fraud and collusion against the plaintiffs.

13. On April 4, 1929, plaintiffs filed a petition asking the leave of the Court to amend their petition in the following respect :

(1) that at the beginning of the plaint, is place of the heading ""suit on the basis of hand-note"" should be substituted: ""suit on the basis of loan

account/on account of Dadan

(2) that in para. 2 of the plaint the words ""by means of the hand-note filed herewith"" should be struck out, and that the following words should be

added at the end of the para, viz :

and signed the hand-note and memo filed along with the plaint as vouchers.

(3) that in para. 5 of the plaint in col. 1 of the remarks the words ""of the execution of the hand-note in suit"" should be struck out, and the words

of the loan stated in the plaint"" should be inserted.

(4) that in the prayer the sum of Rs. 9,915-3-0 be substituted for the sum of Rs. 11,405-15-6, by reason of the bona fide omission on the plaintiffs

part to give credit for Rs. 1,490-12-6 in the account filed with the plaint.

14. The Judge rejected this petition on the ground stated in p. 3 of the paper book that ""attempt is being made to change the whole character of

the suit.

15. A similar petition was filed again by the plaintiff on December 9, 1929, and this, too, was rejected on the same ground (pp. 4 and 5 of the

paper-book). At the trial in the Court below the Judge considered the verbal and the documentary evidence, and said that if the suit had been

otherwise maintainable he would have held that the defendants really borrowed Rs. 7,000 from the plaintiffs on September 7, 1925. The Judge

held, however, that the contract made between the parties on September 7,1925, was merged into the hand-note of the same date, and that no

other evidence of the contract either verbal or from the voucher of the same date could be given of the contract. He further held that the hand-note

itself was not properly stamped, and for that reason was not admissible in evidence.

16. The suit, therefore, failed.

17. The matter there upon came before us on appeal, and was strenuously argued for some days.

18. After considering all the evidence I have come to the conclusion that the plaintiffs'' story of the matter is the correct one.

19. The plaintiffs'' case is as follows :

On September 7, 1925 the defendants borrowed from the plaintiffs Rs. 7,000. At the time of borrowing the defendants by the said Jatindra signed

a promissory note in respect of the said sum, in the following terms :

I, Prasanna Kumar Saha, son of Banch-haram Saha, deceased, at present residing'' at Mokam Sarisabari, P.S. Sarisabari. District Mymensingh,

take a loan of Rs. 7,000 seven thousand only to-day from the Tabil (funds) of the aforesaid Bank. On demand 1 shall pay the Bank or the bearer

of this hand-note under the direction of the Sank this sum together with interest at is. 1-12 as per cent. per mensem. Finis. Dated September 7.

Year 1925. (Signed) Prasanna Kumar Sana

in the pen of

Jatindra Narayan Saha.

(The signature of Jatindra was in Bengali script and over a one anna stamp). At the name time a Bank clerk made out a document (hereafter

referred to as the Voucher) in the following terms:

(Exhibit 3)

The East Bengal Commercial Bank, Ltd.

Paid

September 7, 1925.

S.R.

Sarisabari

Rs. 7,000

Debit Loan a-c

Prasanna Kumar Saha advance on Loan Bond

S. 19-25 at 1-12 P.C.P.M.

Rupees seven thousand only.

Sarisabari

Pay

S. Roy.

Entered (illegible) Manager.

September 7, 1925

On the back of the above voucher was the following writing in Bengali ""Prasanna Kumar Saha in the pen of Jatindra Narayan Saha.

20. The defendant Jatindra denies receiving this loan and says the signature purporting to be his on the back of the voucher is not his.

21. On the other side Subodh swears that Jatindra borrowed the money and wrote the signature on the back of the voucher. So does Sarat

Chandra Pandit, a poddar in the employ of the Bank who says he was there at the time and saw Jatindra borrow the money and sign the

indorsement.

22. The plaintiffs'' books record the making of the loan, and the book entries appear in order.

23. The defendants books do not show the loan.

24. Under these circumstances one has to look at the signature.

25. To my eyes the signature is similar to other signatures, admittedly Jatrindra''s on the backs of vouchers made when Jatindra previously

borrowed money from the plaintiffs.

26. My brother Mr. Justice Mukerji, who reads and writes Bengali script, is of the opinion that the signature on the back of the voucher of

September 7, is Jatrindra''s, The defendants, although they allege that the signature is not genuine, have not called any expert witness to speak to

the non-genuineness of it. I have come to the conclusion that the signature on the back of the voucher of September 7, is Jatindra''s, and that,

therefore, the voucher is genuine and made in respect of a loan by the plaintiffs to the defendants on that date.

27. As regards the defendants plea in para. 10 of the defence, that all their indebtedness was wiped out by their payment of Rs. 7,500 on

November 11, 1925, it is obvious that if Rs. 7,000 was lent to them on September 7, 1925, this cannot be so.

28. I wish, however, to say something about the receipt for Rs. 7,500 which the defendants produce in respect of their contention. This receipt

reads:

I have received to-day through your officer, See Keshav Chandra Saha, the sum of Rs. 7,500 (rupees seven thousand and five hundred) to my

satisfaction. All the hand-notes executed by you being at the Sadar cannot be returned. There is nothing, further due to the Bank from you. Dated

Kartick 26, 1332 B.S.

For the Bast Bengal Commercial Bank, Ltd.

S. Roy.

Manager.

29. Subodh Roy whose name is at the foot of that receipt swears he did not sign it. Keshav who took the money to the Bank, and Jagadananda

Saha who went with Keshav say he did.

30. Here again no handwriting expert was called to speak as to the signature in question.

31. After comparing the signature with other signatures of 8. Roy which appear in the books kept by Subodh, I am satisfied that the signature

called in question is that of Subodh Roy the plaintiffs'' manager. Further it is written in the peculiar blue ink in which Subodh was writing up the

Bank''s cash book just about that time.

32. On the other hand I am not satisfied that the document is an honest one.

33. It is not written on Bank paper, but on ordinary cheap writing paper.

34. Further the hand-notes referred in the receipt were never returned to the defendants. The latter say they asked for them verbally but never got

them. But they never wrote either to the Sarisabari branch or to the head office for them. If that receipt were a genuine one, then they were entitled

to the return of those notes, and it is, therefore, inconceivable to me that they would not have pressed in every way possible for their return.

35. Again it is odd that a round sum of exactly Rs. 7,500 should on that date just wipe out the defendants" indebtedness. That indebtedness was

the result of moneys lent with interest, and the chances that on that day the principal and interest should amount to Rs. 7,500 are very small indeed.

36. Two sheets of account were produced to the Court in the appeal by the defendants showing that on November 11, 1925, the exact amount

that was due was Rs. 7,500-1-1. These account sheets show this figure is arrived at.

37. In the sheets the plaintiffs are given credit for 4 items which do not appear in the plaintiffs books, i. e., give plaintiffs credit for 4 sums of money

which the plaintiffs have never said were lent and have never claimed.

38. They are:

Rs.

December 8, 1922 2,000

December 12, 1922 1,000

July 17, 1925 1,000

October 25, 1925 3,000

39. These sums together with interest at varying rates for varying lengths of time on the several sum total as shown on the account sheet to Rs.

7,500-1-1.

40. The calculations of the various items of interest would take some time.

41. Yet says Jatrindra in his evidence (page 98)

when Rs. 7,500 was paid a rough accounting was made by mo. Subodh said Rs. 7,500 was due on rough accounting. I found that would be due

and so I paid.

42. Also Keshav says (page 101)

I forgot how we calculated the interest roughly. We made no account on paper. We calculated orally.

43. I find it difficult to see Low Subodh could say the indebtedness was Rs. 7,500 on a rough accounting, because none of the loans which on the

defendants" story go to make up the Rs. 7,500 are mentioned in the plaintiffs" books.

44. The difficulty of the calculations make it impossible for me to believe Jatindra, on this matter.

45. I am, therefore, led to reject the defendants'' story that the Rs. 7,500 were paid in settlement of the account.

46. I find that this money was paid on account of the general indebtedness of the defendants to the plaintiffs.

47. The payment of the Rs. 7,500 corroborates the plaintiffs'' story.

48. The question arises why did Subodh Roy give that receipt of November 11 ? Subodh seems to have become an unsatisfactory person by the

year 1925.

49. According to the defendants'' witness Arindam (page 102) Subodh had been borrowing money as his cash was short, his character had

become bad, he had been seen frequenting the prostitutes quarters, and he and Jatindra were on intimate terms. Jaladbar De another of the

defendents"" witnesses also says that Subodh were on intimate terms. The conclusion that I draw is that Subodh gave that receipt in fraud of his

employers, to oblige Jatindra. In this connection it must not be forgotten that according to the defendants'' own story the plaintiffs had issued a

criminal complaint against Subodh for alleged misappropriation of the Bank''s funds in other matters.

50. Throughout, 1 have placed little credence on Subodh''s evidence, preferring to rely on the documents and the circumstances of their making.

51. The next question is as to what legal consequences follow from the above facts. In the first place it is quite clear that the so-called hand-note is

a promissory note, and as such, it ought to be stamped with a 4 anna stamp. It is only stamped with a one anna stamp and is, therefore,

inadmissible in evidence. See the Stamp Act, 1899, Section 33. The question then arises: Can the contract of loan be proved by other evidence?

52. The English Law on the matter is summarised in Halsbury''s Laws of England, 2nd Edition, Vol. 7, page 244, para. 334:

If a document is given in payment which purport to be a bill, note, or cheque, but turns out to be a forgery or to be invalid for want of stamp or

otherwise, the creditor is entitled to enforce payment of the debt as if no such, instrument had been taken by him.

53. Some difficulty has arisen because of a decision of a former Chief Justice of this Court Sir Richard Garth in Akbar v. Sheikhan 7 C 256 : 8

CLR 528.

54. The latter case was discussed and distinguished by Sir Coomer Patheram, C.J. in Pramanatha Nath v. Dwarka Nath Dey 23 C 851, which''

was a case where a promissory note had been given for money lent, but the note was insufficiently stamped and, therefore, inadmissible in

evidence. There the plaintiff was held to have a cause of action independently of the promissory note. In a case in the Allahabad Court Ram Sarup

v. Jasoda Kunwar 34 A 158 : 13 Ind. Cas. 138 : 9 ALJ 72, that Court declined to follow Akbar''s case 7 C. 256 : 8 CLR 528, but followed

Pramanatha''s case 23 C 851. In Krishnaji Narayan v. Rajmal Manikchand 24 B 360 : 2 Bom. LR 25, Sir Lawrence Jenkins C.J. (afterwards,

C.J. of this Court) referred to Akbar''s case 7 C. 256 : 8 CLR 528.

It is apparent from this (the report) that the actual ratio decidendi was that there was no loan independently of the note, so that it does not govern

this case, if, as I think, there was a loan independently of the note.

55. In a recent case in these Courts Abdul Rabbani v. Shyam Lal 34 CWN 554 : 128 Ind. Cas. 194, Mukerji, J. followed the line of decision just

quoted in preference to Akbar''s case 7 C. 256 : 8 CLR 528.

56. It must, therefore, be taken that the decision in Akbar''s case 7 C. 256 : 8 CLR 528 was peculiar to the facts of that particular case.

57. In this case was there admissible evidence of a loan independently of the note ?

58. In my view there was.

59. At the time the loan was made two documents came into existence, the promissory note and the voucher. The voucher was a document that

came into existence for the purpose of providing an account of the transaction for the head office. On the face of it are contained all the terms of

the loan. Further it is a direction to the Head Office to debit the borrower''s loan account with Rs. 7,000. The defendants (through Jatindra) signed

the voucher on its back. That indorsement meant something, otherwise the lendor would not have asked for it and the borrower would not have

made it. It meant, in my view, that the borrower agreed that the transaction, was as recorded on the face of it and that the borrower recognised

that it was a loan. A loan has to be repaid.

60. In my view, the indorsed voucher meant that the defendants promissed to repay the sum borrowed with the interest mentioned on it.

61. The voucher was intended to be kept by the Bank at its Head Office as record of the transaction. The promissory note was a negotiable

instrument which by its nature could, and very easily might, pass into other hands. The voucher was intended to record of the transaction, the note

was a negotiable instrument given as a collateral security for the loan. There is, therefore, evidence of the loan independent of the band-note, and

as this evidence is admissible upon the authority of the line of cases cited, it seems to me conclusive from the evidence that the defendants had the

loan of Rs. 7,000.

62. As the pleadings stand the plaintiffs cannot recover the Rs. 7,000 or interest thereon, because the claim in the plaint is based not the loan but

on the promissory note given collateral to the loan, and the promissory note is not admissible in evidence. Ought the plaintiffs to be allowed to

amend their pleadings so as to be able to claim on the loan ? The amendment was rejected by the Judge below twice on the ground that it changed

the whole character of the suit.

63. It has to be remembered that the loan, promissory note, and the voucher were made on September 7, 1925. The suit was started, i. e., the

plaint filed on September 4, 1928, within three days of the claim being time-barred. The first application to amend was made on April 4, 1929, at

a time when a fresh suit would have been time-barred. In strict law the suit on the hand-note arises out of the promise to pay on the note, whilst a

suit on the loan arises out of a promise to pay made at the time of the loan but made independently of the promissory note.

64. In the plaint the Pleader seems to rely on the hand-note to establish his claim. If he had followed the rules of pleading, and set out the whole of

the material facts, he could have prosecuted both claims without difficulty.

65. The plaintiffs went to law to recover the money due under the loan. It is inconceivable that the lawyer who drew the plaint had instructions from

the Bank to sue on the hand-note alone, and ignore the loan transaction itself. But for some reason the Pleader did this, and it seems inequitable

that his clients the plaintiffs should be penalised for it.

66. Order XVII of the First Schedule of the CPC is as follows :

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just,

and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

67. The difficulty lies in applying this rule where, as here the defendant claims a time bar under the Statute of Limitations.

68. In Weldon v. Neal (1880) 19 QBD 394 : 56 LJQB 621 : 35 WR 820, Lord Esher said:

We must act on the settled rule of practice, which is that amendments are not admissible when they prejudiced the rights of the opposite party as

existing at the date of such amendments. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but

certainly as a general rule it will not do so.

69. In Charan Das v. Amir Khan 47 IA 255 : 57 Ind. Cas. 606 : 48 C 110 : AIR 1921 PC 50 : 39 MLJ 195 : 28 MLT 149 : 2 UPLRPC 124 :

18 ALJ 1095 : 22 Bom. LR 1370 : 13 LW 49 : 25 CWN 289 :3 PWR 1921 , in the Privy Council Lord Buckmaster said :

Though the power of a Court to amend the plaint should not as a rule be exercised where its effect is to take away from a defendant a legal right

which has accrued to him by lapse of time, yet there are cases: see for example Mohammad Zahir v. Rutta Koer 11 MIA 468 : 2 Slither 107 : 2

Sar. 320 : 9 WR 9 , where such considerations are outweighed by the special circumstances of the case.

70. In Charan Das"s case 47 IA 255 : 57 Ind. Cas. 606 : 48 C 110 : AIR 1921 PC 50 : 39 MLJ 195 : 28 MLT 149 : 2 UPLRPC 124 : 18 ALJ

1095 : 22 Bom. LR 1370 : 13 LW 49 : 25 CWN 289 :3 PWR 1921 , the trial Judge and the First Appellate Court refused to allow the plaint to

be amended by claiming possession on pre-emption, since the time had expired for bringing a suit to enforce that right. Upon a second appeal the

Court allowed the amendment to be made, and the Privy Council confirmed this. Lord Buckmaster said :

All that happened: was that the plaintiffs, through some blundering, attempted to assert rights that they undoubtedly possessed under the statutes in

a form which the statute did not permit.

71. In this present case it seems to me that the claim on the loan itself was not raised through some blundering on a lawyer"s part, and thereby the

plaintiffs clear rights were jeopardised.

72. The defendants will not be, and never were, prejudiced in their defence (which was a total denial of the whole transaction).

73. I am of the opinion, therefore, that having regard to all the circumstances of the case the amendment originally asked for should be allowed,

and the amendment must be made within two days.

74. That amendment being allowed the plaintiffs become entitled to judgment for the Rs. 7,000 with interest at the rate of Rs. 1-12 as per mensem

from the date of the loan.

75. The parties have agreed figures so that there will be judgment for the plaintiffs for Rs. 7.626-7-1 and interim interest at 6 per cent, from

September 4, 1928, down to the date of realisation.

76. The result is that the appeal is allowed. The cross-objection is dismissed. The plaintiffs-appellants will get full costs of the appeal and 8-10th of

their costs in the lower Court. There will be no order as to costs in the cross-objection.

M.N. Mukerji, J.

77. I agree.