(1870) 07 CAL CK 0003

Calcutta High Court

Case No: None

Nekram Jemadar		APPELLANT
	Vs	
Iswariprasad Pachuri		RESPONDENT

Date of Decision: July 6, 1870

Judgement

Sir Richard Couch, Kt., C.J.

The First Judge of the Small Cause Court has referred, for the opinion of this Court, the question whether the 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu, having held upon the authority of the case of Leroux v. Brown 12 C.B., 801 that it does apply. In that case it was held that the 4th section of the statute, unlike the 17th, had reference to the mode of procedure, and not to the formality of the contract, and consequently that an action would not lie in the Courts of England to enforce an agreement made in France (and valid there), which, if made in England, could not, by reason of the Statute of Frauds, have been sued upon. Although this decision has been questioned on more than one occasion by an eminent Judge, Mr. Justice Willes, it has not been overruled, and the First Judge was no doubt at liberty to found his decision upon it. We must, however, see whether it is really a binding authority upon the question which has been put. The Statute of Frauds must be considered to have been introduced into Calcutta as part of the English law by the charter of George the First, by which, in the year 1726, the Mayor"s Court was established-- The Advocate-General of Bengal on behalf of her Majesty . Now I cannot suppose that, when it was introduced, any distinction was made between the 4th and the 17th sections, and that one was introduced as a law of procedure, and the other as a law affecting the formalities of the contract. No case had then been decided in the English Courts in which such a distinction was made; and Mr. Justice Story, in his Conflict of Laws, section 262, classes the two sections together, as the effect of saying that no action shall be brought whereby to charge any person upon any of the contracts described in the 4th section is practically the same as saying that the contract shall not be allowed to be good; it is not unlikely that the distinction which was made by the Court in Leroux v. Brown 12 C.B., 801; see p. 805 would not occur to him. Mr. Justice Maule in that case says:--"It may be that the words used operating on

contracts made in "England render them void." In the case of Muttiya Pillai v. Western 1 Mad. H.C., 27, in which the defendant was a British-born subject, the Court of Small Causes at Tanjore held that the 4th section of the Statute of Frauds was applicable. This decision cannot be supported if the 4th section is only a law of procedure, as no part of the Statute of Frauds has ever been made part of the procedure of a mofussil Small Cause Court. In Borrodaile v. Chainsook Buxyram 1 Hyde, 63, Mr. Justice Wells says:--"It is remarkable that, from the time of the passing of the 21 Geo. III., c. 70, down to the present time, the Statute of Frauds has never been pleaded as a defence on behalf of a Hindu or Mahomedan; and this is a strong circumstance to show that the view I take of "the law is the correct one, as many cases must have occurred in which the defence might have been raised if applicable to Hindus and Mahomedans." If the 4th section has been considered in India not a law of procedure, but as of the same nature as the 17th section, which it certainly appears to me it has, notwithstanding the difference in the language of the two sections, I do not think we are bound, upon a decision of an English Court, to alter that state of the law when the effect would really be to make the law of contract for Hindus and Mahomedans in the presidency towns different from what it is in the mofussil. I also think that, as the intention of the 17th section of the 21 Geo. III., s. 70, was to preserve to the natives of India their own laws and usages in questions of inheritance and succession, and matters of contract and dealing between party and party, it may be construed so as to include the proofs or authentication of the contract as being necessary to its validity. They differ from the limitation of the time for bringing a suit upon it. In section 260, Conflict of Laws, Mr. Justice Story says:--"Another rule naturally following, or rather illustrative of that already stated, respecting the validity of contracts, is that all the formalities, proofs, or authentications of them, which are required by the lex loci, are indispensable to their validity everywhere else;" and there is a difference of opinion whether the mode of proof is to be deemed part of the vinculum obligation is--Westlake on Private International Law, 160. It remains to mention the case of Manikja Mehervanji v. Rahimtulla Alubhai 1 Bom. H.C. Rep., 2nd. ed. (Appex.), 1, in which it was held by the Supreme Court of Bombay, on a case referred by the First Judge of the Court of Small Causes, that the 4th section of the Statute of Frauds is not applicable to Mahomedans. For the above reasons, I am of opinion that the judgment in the Small Cause Court must be reversed, and a new trial ordered, and that the defendant should pay the costs of reserving this case. Phear, J. I agree with the Chief Justice, but I desire to guard myself from being supposed to throw doubt upon the correctness of the decision in Leroux v. Brown 12 C.R., 801, so far as that decision goes to lay down that the enactment of the 4th section of the Statute of Frauds is substantially a rule of procedure. Indeed, the more closely the section is looked into and considered, the more nearly impossible it becomes, as it seems to me, to class it under any other head.

2. It is paralleled, I think, with such a rule as that which would disqualify parties to a suit from being witnesses in their own behalf. The effect of this rule in cases of any parol contract, to which the party alone could speak, would be precisely analogous to that of the 4th section of the Statute of Frauds, for obviously the aggrieved party would be

deprived by it of the only means which he possessed of proving his contract; and I suppose no one would consider a rule which disqualified a certain class of persons from appearing as witnesses to be anything other than a rule of procedure. But assuming the section to be, strictly speaking, simply a rule of procedure, another question arises, which I take to be the cardinal question in this matter; for let us look at the immediate consequences of the rule. We see that it renders it impossible ab initio for the parties to a certain sort of parol contracts to enforce their rights in a Court of law; it does not come in ipso facto like a law of limitation; it does not leave the party who may desire to make himself safe the opportunity of doing so within any period following on the contract: if the other contractor will sign a memorandum, all well and good; but one of the parties alone cannot of himself do anything to mend his position. A rule of this nature, pregnant with these consequences, does directly affect the potential rights of parties under the contract from the very moment of the inception thereof; and if it thus operates to deprive the parties of rights, which but for it they would enjoy, by virtue of any special law governing the contract, then the rule of procedure is in conflict with that law upon the very merits of the matter between the parties. At such a point it may, I think, well be questioned whether the principles which admittedly guide the Courts of all countries in the administration of justice under a conflict of law, do not in truth necessitate the abandonment of the rule of procedure in favor of the law of the contract. The Court of Common Pleas, in Leroux v. Brown 12 C.B., 801, no doubt went the length of holding that the rule of procedure must still be maintained. I think I should hesitate a long time before I should be able to bring myself to concur in that conclusion. Fortunately, however, the case before us has elements in it which materially distinguish it from that of Leroux v. Brown 12 C.B., 801. The two laws, which are here taken to be in conflict, are laws of the same country and ruling power, not of different countries.

3. The mode in which these laws are to be adjusted, or to be subordinated the one to the other, must be ascertained by giving a reasonable construction to all parts of the law prevailing here which bear upon the point; and I need hardly say that, if possible, the law should be construed in such a way as to give a remedy to aggrieved persons rather than to take it away. Now, looking at the question in this light, we find ourselves immediately in front of the enactment, section 17 of 21 Geo. III., c. 70, the words of which are:--

Provided always, and be it enacted that the Supreme Court of Judicature at Fort William in Bengal shall have power and authority to hear and determine in such manner as is provided for that purpose in the Letters Patent all and all manner of actions and suits against all and singular the inhabitants of the city of Calcutta, provided that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans; and in the case of Gentus, by the laws and usages of Gentus, &c.

4. Now it is at once apparent that, while the first part of this section makes the manner of hearing and determining, which comprises the procedure of the Supreme Court (and

therefore impliedly in my opinion the 4th section of the Statute of Frauds), generally applicable to the actions and suits to which it refers, the latter part expressly cuts this down by the proviso that, in the case of Gentus, all matters of contract and dealing between party and party shall be determined by the laws and usages of Gentus; in other words, the rule of procedure, if it affects the original rights of the parties, must, in the event of conflict, give way to the law and usages of the Gentus. It appears to me that this section makes the present case perfectly clear.

5. The operation of the 4th section of the Statute of Frauds, in the matter of a parol contract between Hindus, would be practically to prevent rights from arising and being recognized, while the laws and usages of Hindus could be supported and enforced, consequently the section must not in such a case be allowed to operate. I concur with the Chief Justice as to the order which must be passed.