(1931) 04 BOM CK 0012

Bombay High Court

Case No: O.C.J. Suit No. 120 of 1930

Burjorji Jivanji Todywalla		APPELLANT
	Vs	
Hormusji Nowroji Davar		RESPONDENT

Date of Decision: April 14, 1931

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17, 153

Citation: AIR 1932 Bom 394 : (1932) 34 BOMLR 643

Hon'ble Judges: Blackwell, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Blackwell, J.

This case originally came before me on April 2, 1931. It is a suit to recover a sum of money alleged to be due on a promissory note with interest at one per cent, per mensem. The plaint alleges that on May 10, 1929, the plaintiff lent and advanced to the defendants the sum of Rs. 2,50 but there is no cause of action whatever based upon the loan. As appears clear from the latter part of paragraph 1 and from paragraph 3, the only cause of action relied upon in this plaint is the cause of action upon the promissory note.

2. Two written statements were filed. In both of them the point is taken that the promissory note is improperly stamped, and as such is inadmissible in evidence. Apart from that, the written statement of defendant No. 1 alleges that no consideration passed for the promissory note, and that he was made by the plaintiff to put his signature to the promissory note, which had already been previously executed by defendant No. 2, who is the son of defendant No. 1 on the representation that in no event was defendant No. 1 to be held liable. So far as both written statements are concerned, it is alleged that the promissory note in suit was passed in respect of losses incurred by defendant No. 2 in playing at dice with the

plaintiff at a certain club, that the consideration for the promissory note was a loss arising out of a wagering transaction, and that therefore the consideration is a void consideration and the promissory note is unenforceable.

3. On those pleadings, six issues were raised, there being no issue based upon any cause of action in respect of a loan, or on any defence to such cause of action, because no such cause of action had been raised in the plaint.

4. Mr. Davar, who appeared for the plaintiff, asked for an adjournment in order that his clients might approach the revenue authorities upon the question of stamping of the promissory note. Mr. Manekshah, who appeared for the defendants, did not object to an adjournment, and by consent this suit and suits Nos. 121 and 122 of 1930, which were on the board on that day immediately below this suit, and are on the board today immediately below this suit, were ordered by me to stand over upon the terms that the plaintiff should in all the three suits bear his own costs of the adjournment, and that defendants'' costs in each suit should be reserved.

5. On the matter coming again before me on April 13, Mr. Davar informed me that his client had been unable after consulting the revenue authorities to get over the stamp difficulty, and he thereupon admitted that the promissory note in suit was inadmissible in evidence upon the ground that it was improperly stamped.

6. Thereupon Mr. Davar applied for an amendment by pleading the original cause of action based upon the loan. He asked leave to delete from the plaint all reference to the promissory note and to found his cause of action upon a loan alleged to have been made in Bombay.

7. Mr. Davar submitted to me that such an amendment could properly be allowed. He referred me in this connection to Section 153 of the CPC and to Order VI, Rule 17. He drew my attention to a large number of English authorities such as Tildesley v. Harper (1878) 10 Ch. D. 393 Clarapede & Co v. Commercial Union Association (1884) 32 W.B. 262 and Cropper v. Smith (1884) 26 Ch. D. 700 Those authorities no doubt establish that in order to determine the real question or issue between the parties, any amendment of the pleadings ought to be allowed even at a very late stage, provided that costs can adequately compensate the other party.

8. Mr. Manekshah for the defendants does not dispute this general proposition. What he says is this, that the matter in question or in issue between the parties in this suit is the alleged liability of the defendants or either of them upon this promissory note. He does not dispute that if any amendment of the plaint had been necessary to determine that question between the parties, the Court could even at this late stage have allowed the amendment, subject to payment of costs.

9. Mr. Manekshah, however, contends that the amendment sought for by Mr. Davar is an amendment which will introduce an entirely distinct cause of action between the parties, and he submits that this is not permissible. In support of that

submission he has referred me to a decision of the Privy Council, Ma Shwe Mya v. Maung Mo Hnaung ILR (1921) Cal, 832 In that case the Privy Council discussed the question whether the amendment there asked for could properly be given in accordance with the rules. It was pointed out (p 835):-

All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and-should always be liberally exercised, but non the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suits.

10. Reference was made in the course of the judgment of their Lordships both to Section 153 and to Order VI, Rule 17. But their Lordships held that, the contract sued upon having been negatived to permit the plaintiff to set up and establish another and independent contract altogether would be going outside the provisions established by the Code of Civil Procedure, and accordingly, in the case before them, their Lordships took the view that no such amendment should be permitted,

11. Mr. Manekshah also referred to an appeal Court decision of this High Court in Sitaram Krishna Padhye Vs. Chimandas Fatehchand, . where the Court expressed the view that a summary suit brought on hundis ought not to be allowed on appeal to be converted into a suit for moneys lent on the ground that it would introduce an entirely new and different cause of action requiring extensive amendment of the pleadings and a new trial and different evidence.

12. Mr. Davar relied upon a full bench decision of the Rangoon High Court in Maung Shwe Mya v. Maung Po Sin ILR (1924) Ran, 183 In that case the plaintiff had sued two defendants for Rs. 174-9-6 on a promissory note alleged to be executed by them. The first defendant denied the execution as well as the loan, but the second defendant, while denying execution, admitted that he took a loan of Rs. 100. The trial Court held that execution was proved, and gave a decree in favour of the plaintiff. The defendant appealed and the District Court held execution not proved, and dismissed the plaintiff''s suit. The plaintiff then applied to the High Court in revision, and contended that the District Judge had failed to exercise the jurisdiction vested in him by not giving the decree against the second respondent, who admitted the loan of Rs. 100 though he had denied the execution of the document in suit. On the matter coming before Mr. Justice Young, he referred the matter to a full bench for the determination of the question whether, when a plaintiff sues upon a promissory note simply and solely without adding an alternative cause of action based on the original loan, he should be allowed to succeed on such original cause of action. The learned Chief Justice in the course of his judgment said as follows (p. 185):-

In the present case there was no prayer for a decree based on the original loan but the matter appears to us to be covered by the previous Full Bench ruling for an amendment of the pleadings can be allowed at any stage of the proceedings and could have been allowed in this case. After amendment, the case will be covered by the previous Full Bench decision. Amendment could clearly be allowed in a case where the original loan is admitted and where the sole result of refusing it would be to force plaintiff to another suit, to avoid which is one of the principal objects of the much wider rule as to amendment which has now been introduced.

13. With great respect to the learned Judges, who were parties to that judgment, I am unable to agree that, where a suit is brought on a promissory note, an amendment could at the trial of the suit be allowed in order to entitle the plaintiff to sue on the original cause of action, that being a cause of action wholly distinct from the cause of action based upon the promissory note. It is to be observed that, so far as appears from the report, no reference was made in the course of the arguments to the Privy Council decision, to which I have already referred, and it is a little difficult to see how that decision is reconcileable with the Privy Council decision. It is not possible to determine what was the precise nature of the pleadings in that suit. It seems, however, clear from the fact that an amendment was necessary that there could have been no cause of action upon the pleadings based upon the loan. It is, therefore, difficult to say how it came about that defendant No. 2 admitted that he took a loan, because such an admission would not appear to be relevant upon any issue arising out of the cause of action before the Court. Consequently, with great respect to the learned Judges, I find it difficult to see how an amendment could properly have been allowed even as the result of the admission of defendant No. 2. That decision is not binding upon me, and I find myself unable to agree with it.

14. It is to be borne in mind that the cause of action based upon a promissory note is entirely distinct from the cause of action which may arise from the loan as the result of which a promissory note has been taken. A number of very different legal incidents flow from these different classes of contracts. Thus, a. promissory note is a negotiable instrument. Moreover, as appears from Section 118 of the Negotiable Instruments Act, it will be presumed that there was consideration for a promissory note, until the contrary is proved. Thus, the burden of proof may be very down went in the case of a cause of action based upon a promissory note from what it would be in a cause of action based upon the original loan. If a suit is brought upon a promissory note, and execution is admitted, as it was in the case before me, all that the plaintiff is bound to do is to put in the promissory note. The burden is then shifted upon the defendant to prove want of consideration or some ground which would entitle him to attack the validity of the note. In the case of a cause of action based upon the loan, the position is very different. There it is for the plaintiff to establish the consideration which justifies him in seeking to enforce his contract. These points of difference show clearly that although there may be in one sense a close connection between the original cause of action and the cause of action based

upon a promissory note, they are wholly distinct causes of action with very different legal incidents attached thereto,

15. Mr. Davar referred me to Kisandas Rupchand v. Rackappa Vithdba I.L.R (1909) Bom. 644 : 11 Bom. L.R. 1042 and Saral Chand Mitter v. Mohun Bibi ILR (1998) Cal. 371

16. Both those cases are, however, of a date much earlier than the Privy Council decision; and must now be read in the light of that decision. He also referred me to a decision of Mr. Justice Shingne in Manchersha Ardesar Vs. Govind Ganesh Joshi, , where on a question whether, where a suit was brought upon a promissory note against one member of a joint Hindu family, an amendment could be allowed by converting the suit into a suit on the original debt against all the members of the family, Mr. Justice Shingne stated that if such an amendment had been asked for in the lower Court, he would have considered it a fit case for an amendment The Privy Council case, however, to which I have referred, does not appear to have been cited in the arguments. The remarks of the learned Judge are merely obiter, because he refused to sanction the amendment in the circumstances of the case. With very great respect, I am unable to agree with his obiter dictum, and I prefer to found my judgment upon the decision of the Privy Council.

17. In the case before me it must be remembered that it was pleaded in the written statements of both defendants filed as long ago as March 5, 1930, that the promissory note was not duly stamped and was not admissible in evidence. The plaintiff could quite well then have made the enquiries from the revenue authorities which he has made now, and having found that he would be precluded from putting the promissory note in evidence, could have at that time withdrawn his suit at very little cost to himself and started another on the cause of action based upon the loan. He did not choose to do that, but has put the defendants to the expense of preparing for trial in order to meet the cause of action based upon the promissory note alone,

18. At an early stage of the case, Mr. Davar stated that as an alternative to his request for an amendment, he would ask to be allowed to withdraw the suit under the terms of Order XXIII, Rule 1. I pointed oat to him at a later stage that if he did that, he might preclude himself from appealing against my decision if it should be adverse to him on the question of the propriety of allowing the amendment asked for. Upon that Mr. Davar abandoned his application to withdraw the suit under Order XXIII, Rule 1, and pressed for the amendment simpliciter.

19. For the reasons given by me above, in my opinion, I ought not to allow the amendment. Accordingly I refuse it. It follows, therefore, that I must answer the first issue, whether the promissory note in suit is duly stamped and otherwise admissible in evidence, in the negative. The answer to that issue admittedly ands the suit, and the other issues, therefore, do not arise. Accordingly, I dismiss this suit with costs,

including costs reserved upon the last occasion.