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[335] ORIGINAL CIVIL.

Before Mr. Justice Scott.

COWASJI RUTTONJI LIMBOOWALLA (*Plaintiff*) v. BURJORJI
RUSTOMJI LIMBOOWALLA AND OTHERS (*Defendants*).*
[10th January, 1888.]

Evidence—Evidence Act, I of 1872, s. 92—Oral agreement inconsistent with written document.

Ruttonji Nowroji prior to his death was a partner with defendants in the firm of Nowroji Cursetji & Co. He died on 8th November, 1884. On the 9th November, 1885, his executors passed a release to the defendants, which recited that Ruttonji's share in the firm and future business had ceased on his death; that the surviving partners had requested the executors to settle the account of their testator with the firm, and that after examining the books and taking accounts, &c., a balance of Rs. 8,395-11-0 was found due, on payment whereof the executors released the defendants from all claims in respect of the share and interest of Ruttonji, &c. On the 7th April, 1887, the executors assigned over to the plaintiff a one-anna share in the said firm, and the plaintiff, as assignee, brought this suit for a declaration of his right to the share and for an account. He alleged that there had been no accurate examination of the books at the time of the release; that the amount really due to the testator's estate by the firm had not been ascertained; and that it had been agreed on by the partners, at the time of the release, that, in addition to the sum therein mentioned, the executors as representing the testator's estate should receive a one-anna share in the partnership.

The defendants denied the right of the plaintiff, and contended that the interest of Ruttonji and his estate in the partnership ceased at his death. They relied on the release, and denied any agreement to give the executors a share; and contended that, under s. 92 of the Evidence Act I of 1872, no evidence could be given of the alleged agreement. For the plaintiff it was contended that the agreement as to the one-anna share was quite independent of the release.

Held, that evidence of the agreement that the executors should continue to have a one-anna share in the partnership was inadmissible, as being inconsistent with the written release (Evidence Act, s. 92). By the release the executors of Ruttonji released the partners from all claims whatever in respect of Ruttonji's share, and the consideration for that release was stated in the document to be a lump sum, on payment of which, under the writing, all claims arising out of the old partnership ceased and determined. The oral agreement added another term to the consideration for the release in respect of the past accounts, *viz.*, the continuance of a one-anna share in the partnership. Such an agreement was not a purely collateral or additional agreement. It was an addition to the terms of a contract that had been reduced to writing, and was inconsistent with those terms.

[336] *Held*, also, on the evidence, that it had not been proved that all the partners consented to the alleged new partnership, and that on this ground alone the plaintiff could not succeed in his suit.

THE plaintiff, as the assignee of a one-anna share in the profits of a business carried on under the name of Nowroji Cursetji & Co., sued the defendants, as co-partners in the said firm, praying that it might be declared that he was entitled to the said share in the firm as from the 19th October, 1884; that an account of profits from the said date might be taken, and plaintiff's share therein paid over, &c.

The plaintiff claimed the said share under an assignment thereof executed to him on the 7th April, 1887, by Pirozbai and Bapuji Ruttonji, the executrix and executor of one Ruttonji, Nowroji Limboowalla, a former partner in the firm, who died on the 8th November, 1884.

* Suit No. 323 of 1887.

The deceased Ruttonji Nowroji and all the defendants, except defendant No. 5, were members of the same family, to which the firm had belonged for many years.

The following paragraphs of the plaint set forth the allegations material to this report, as follows :—

"4. The accounts of the said partnership had remained unadjusted for many years prior to the death of the said Ruttonji Nowroji; and his co-partners, the defendants, had before his death been very anxious to obtain the signature of the said Ruttonji Nowroji to some release or adjustment. After his said death the said defendants were anxious to obtain such release from the said executor and executrix, and negotiations were carried on in that behalf. Ultimately it was agreed between them as follows :—that is to say, that the said executor and executrix should accept a certain lump sum offered by the defendants as the amount due to the estate of the said Ruttonji Nowroji, without further examination of the past accounts of the firm, and should pass a release in respect thereof; and that the interest of the said executor and executrix as representing the estate of the said Ruttonji Nowroji should be continued as a one-anna share, and should be calculated as from the beginning of the *Samvat* year 1941. It was also arranged, for convenience, that [337] such share should be continued in the name of the said Bai Pirozbai.

"5. In accordance with the said settlement, the said executor and executrix on the 9th November, 1885, received from the defendants the lump sum agreed upon, and passed the release as arranged.

"6. Subsequently the defendants have entirely repudiated the arrangement as to the one-anna share, and have declined to recognize the same or pay any share whatever to the said executor and executrix thereunder, and claim that they (the defendants) are alone interested in the said business.

"7. By an assignment in writing, dated the 7th April, 1887, the said executor and executrix have assigned over to the plaintiff all their said interest in the said firm. The plaintiff claims under the said assignment to be entitled to a one-anna share in the profits of the said firm of Nowroji Cursetji & Co., from the 1st *Kartika Sud Samvat* 1941, (19th October, 1884), but the defendants have declined and still decline to pay any portion of the said profits to the plaintiff, or to recognize his interest therein."

The defendants denied the plaintiff's right to any share in the partnership. They alleged that, subsequently to the death of Ruttonji Nowroji, they paid his executors, who had previously examined the partnership books, the full amount ascertained to be due to his estate by the firm; and that, on such payment being made, the said executors, as such, had executed a formal release to the defendants, dated 9th November, 1885, "of and from the share and interest of him, the said Ruttonji Nowroji Limboowalla, in the said firm of Nowroji Cursetji Limboowalla & Co., and of and from all claims and dividends whatever, &c., &c., for or in respect of the sum and all other matter and things in any wise relating to the premises."

The defendants denied all the allegations contained in the fourth paragraph of the plaint above set forth, and contended that the share and interest of the said Ruttonji Nowroji and his estate in the partnership ceased on his death.

[338] The release, dated 9th November, 1885, which was put in evidence, recited (*inter alia*) that Ruttonji's share in the firm and in the

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future business thereof had ceased on his death, and that the surviving partners had requested the executor and executrix to settle the account of their testator with the firm, and that *after examining the books and taking accounts, &c., &c.*, a balance of Rs. 8,395-10 was found to be due, on payment whereof "they, the said Pirozbai and Bapuji Ruttonji, as such executors as aforesaid, do hereby release and for ever discharge, &c."

The plaintiff admitted that the executors had taken the sum mentioned in the release, and had executed the release; but he adduced evidence to show that there had not been an accurate examination of the books; and that the amount really due by the firm had not been ascertained, so that it had been agreed on by the parties *at the time of framing the release that*, in addition to the sum therein mentioned, the executors should receive a one-anna share in the partnership.

The only issue tried at the hearing was "whether the plaintiff's claim was not barred by the release." The defendants contended that, under s. 92 of the Evidence Act I of 1872, no evidence of the alleged agreement as to the one-anna share was admissible.

Latham (Advocate-General) and *Lang*, for the defendants.—No evidence can be given as to the alleged agreement made at the time of the release. We rely on s. 92 of the Evidence Act I of 1872: see proviso 2; *Ram Doolal v. Radha Nath* (1); *Banapa v. Sundardas Jagjwandas* (2).

Farran and *Jardine*, for the plaintiff.—The agreement as to the one-anna share which was to be given to the executors was an agreement quite independent of the release. The release only dealt with the past interest of the testator in the firm. This agreement gives a new share to the executors.

JUDGMENT.

10th January, 1888. SCOTT, J.—The plaintiff in this case claims, as assignee of the executrix and executor of Ruttonji Nowroji, deceased, to be entitled to a one-anna share in the business carried on by the defendants under the name of [339] Nowroji Cursetji & Co., of which firm the deceased Ruttonji was a partner.

The facts on which the plaintiff relies are set out in the fourth paragraph of the plaint, as follows:—"The accounts of the said partnership had remained unadjusted for many years prior to the death of the said Ruttonji * * * The defendants were anxious to obtain the signature of the said Ruttonji to some release or adjustment. After his said death the said defendants were anxious to obtain such release from the said executor and executrix * * * Ultimately it was agreed between them as follows:—that the said executor and executrix should accept a lump sum offered by the defendants as the amount due to the estate of the said Ruttonji, without further examination of the past accounts of the firm, and should pass a release in respect thereof, and that the interest of the said executor and executrix *as representing the estate of the said Ruttonji* should be continued as a one-anna share."

It was contended that the plaint in this paragraph set up two agreements: one that a lump sum should be taken in satisfaction of past claims, concerning which a written release was passed; another that a new partnership, consisting of a one-anna share, should be given to Ruttonji's heirs, which separate agreement was not in writing. As regards the nature of that separate agreement, we have the evidence of Mr. Wadia

and the accountant. Mr. Wadia told us that when he advised Bapuji against the insertion of the sentence in the release about the examination of the books, Bapuji said "they had made some arrangement, and this insertion would settle the matter."

The independent and trustworthy evidence of the accountant shows what the arrangement was. He says that Bapuji and Burjorji settled, in his presence, "the accounts of the old partnership were to be finally adjusted, and a new one-anna partnership was to be made for the heirs." Soon after this the release was made. It appeared to me, from the accountant's evidence and still more clearly from the evidence of the plaintiff and the others who appeared on his side, that the adjustment of the accounts, without further examination, was the real consideration for this alleged new partnership. The words in the plaint, "as [340] representing the estate of the said Ruttonji," seem also to set up this case. The first question that arises is, whether this evidence is admissible under s. 92 of the Evidence Act I of 1872.

The operative words of the release are as follows:—"In consideration of the payment of Rs. 8,000, they, the said Pirozbai and Bapuji, as such executrix and executor, do hereby release the parties from the share and interest of Ruttonji in the said firm." Together with these words must be read the recital that the sum of Rs. 8,395 was arrived at *after examination of the books*. Is the alleged oral agreement inconsistent with this written agreement, and excluded by the rule of law, that parol evidence cannot be tendered for the purpose of altering the terms of a written contract? I admitted evidence of the alleged oral agreement—not that I was satisfied on this point, but because I wished to know the precise terms of the agreement before I came to a decision. Now that I find all the plaintiff's witnesses concurring in saying that the one-anna share was agreed to be given in consideration of the accounts *not being examined*, this agreement seems to me inconsistent with the writing whereby the representatives of Ruttonji released the partners from all claims whatever in respect of Ruttonji's share and interest. It seems to me impossible to hold that this new agreement did not arise out of Ruttonji's share and interest.

The case, then, stands thus:—The consideration in the writing for the determination of that interest, is the payment of a lump sum. The sum was paid and, under the writing, all claims arising out of the old partnership ceased and determined. The *oral agreement* adds another term as the consideration of waiving all claims on the past accounts—to wit, the continuance of a one-anna share in the partnership. Under s. 92 of the Indian Evidence Act I of 1872, I feel bound to exclude this oral agreement. It is not a purely collateral or additional agreement. It constitutes an addition to the terms of a contract that had been reduced into writing, and is inconsistent with those terms.

It may be useful to add my opinion, that the plaintiff would fail on another and less technical ground. It is one of the [341] fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who, for the time being, are members of the firm. An exception to this rule might be found in India, as regards deceased partners' sons, in a strictly family partnership. But there is no sufficient evidence that this firm bore that hereditary character. Sons of other partners had been admitted, but as working partners, and not always in the same share. It was not shown that they came in as of right. Moreover, the release distinctly states that Ruttonji's share ceased from

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the date of his death. The consent to this new one-anna share was given, according to the most trustworthy witness, the accountant, by Burjorji only a few days before the release. I do not think the alleged agreement of July is proved satisfactorily. The oral evidence on the point is contradictory, and the correspondence negatives any distinct arrangement such as that now set up. I am of opinion, on the evidence, there were negotiations, but nothing more. It is not proved to my satisfaction that the others consented to this new partnership, nor that Burjorji had authority to act for all. If, then, Burjorji alone consented, his consent would not bind the rest of the partners, especially Jamsetji, whose interest equalled that of Burjorji, and who denies consent altogether. I may add, that, even, if Burjorji had the power to act for others, it is doubtful whether this agreement would not be without consideration; the claim on behalf of Ruttonji was released, and his representatives had no claim of their own. The sons did not work for the firm, and their money in the firm bore interest. But I do not think it necessary to decide that point. Although I agree with Mr. Farran that there probably was some arrangement made, I think the plaintiff's assignors put themselves legally, if not morally, out of Court, first by their signatures to the release; and secondly, by their neglect to obtain the consent of all the partners.

Judgment for defendants, with costs.

Attorney for the plaintiff:—Mr. J. C. Cama.

Attorneys for the defendants:—Messrs. Chalk, Walker and Smetham.

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[342] INSOLVENCY JURISDICTION.

Before Mr. Justice Bayley.

In re DEWCURN JEWRAJ AND HEERJEE DEWCURN.
(Insolvents). [11th and 25th January, 1888.]

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic., C. 21)—Expunging names of creditors from schedule—Official Assignee a trustee for creditors admitted in schedule.

The applicant was a creditor of the insolvents, who filed their schedule in Bombay in July, 1868. The schedule contained the names of twenty-six creditors, twenty of whom were residents in Karachi and six in Multan. The debts amounted, in the aggregate, to Rs. 51,819-13-0, and were all admitted, some of them being of trifling sums. The applicant was the largest creditor on the schedule, his debt amounting to Rs. 27,500. The insolvents obtained their personal discharge in March, 1869. Since the date of the insolvency one dividend had been declared, viz., a dividend of one per cent., in 1870. Only one creditor had applied for and received that dividend. On the 15th July, 1886, the applicant for the first time applied for a dividend on his claim. He was then, after so long a time, unable to adduce any proof in his own possession, in support of his claim, but was ultimately allowed by the Official Assignee to prove his claim from the insolvent's books. Having thus proved his claim against the estate, the applicant obtained a rule on the 5th October, 1887, calling on the other creditors of the insolvents to show cause why they should not come in and prove their claims, or, in default, why their names should not be expunged from the insolvents' schedule.

Held, discharging the rule, that the Court had no power to expunge the name of a creditor where no fraud was proved or alleged in regard to their claims.

The Official Assignee holds the assets of an insolvent as a trustee for all the creditors admitted on the insolvent's schedule, whether or not they have actually proved their claims.

[R., 20 B, 636 (645).]