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The Subordinate Judge's opinion on the question was in the negative.

Vasudev Gopal Bhandarkar, for the opponent.

Nagindas Tulsidas, for the applicant.

OPINION.

SARGENT, C. J.—The aplication to review the order was not on the ground of the discovery of new and important matter of evidence or of a clerical error apparent on the face of the order, and, therefore, by s. 624, (XIV of 1882) Civil Procedure Code, could not be heard by any other Judge than the one who made it.

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ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

S. A. RALLI AND OTHERS (*Original Plaintiffs*), *Appellants v.* CARAMALLI FAZAI (*Original Defendant*), *Respondent.**

[10th January, 1890.]

Stamp—Stamp Act I of 1879, *sch. I, art. No.* 46, *and sch. II, cl.* 2, *and ss.* 11 *and* 34—*Agreements for sale of goods—Broker's notes—Evidence Act I of* 1872, *s.* 91.

The plaintiffs sued to recover damages for the non-acceptance of wheat which the defendant on the 16th May, 1889, by two contracts agreed to purchase. At the hearing, in order to prove the terms of the contracts, the plaintiffs tendered two notes, or memoranda of the contracts, which purported to be signed by the broker and also by the defendant. These notes were, in fact, the sold notes which the broker had given to the plaintiffs. Each of these notes had been stamped with an anna stamp, but the stamp on one of them had not been cancelled at [103] all, and the stamp on the other was without any mark of cancellation, except a small part of the first letter of the defendant's signature, consisting of a slightly curved line. On these notes being tendered in evidence, it was objected that they were inadmissible, being unstamped, having rsgard to ss. 11 and 34 of the Stamp Act I of 1879. The Court allowed the objection, and rejected the notes. The plaintiffs then sought to prove the contracts by oral evidence, contending that the sold notes did not themselves constitute the contracts, but were only memoranda of parol contracts prepared by the broker for the information of the parties. They further contended that the documents might be regarded as agreements for the sale of goods, and exempt from stamp duty, under cl. 2, sch. II, or at all events admissible on payment of a penalty—ss. 7 and 34.

Held, that the documents in question were documents of the nature of a note or memorandum chargeable under section No. 46 of sch. I, and were not exempt from duty under cl. 2 of sch. II.

Held, also, that the terms of the contracts were reduced to writing, and no evidence, except the documents themselves, could be given in proof of them—s. 91 of the Evidence Act I of 1872.

[**Appr.**, 28 B. 432=6 Bom. L.R. 436; **R.**, 4 Bur. L.T. 171=11 Ind. Cas. 810; 4 Ind. Cas. 1086=U.B.R. (1909) 4th. Qr. (Stamp. 3); 15 Ind. Cas. 202=15 O. C. 58; 2 L.B.R. 103.]

SUIT to recover Rs. 3,062-8-0, with interest, as damages for non-acceptance of certain wheat which the defendant by two contracts, dated the 16th May, 1889, agreed to purchase from the plaintiffs.

The plaint alleged a "contract in writing" in both cases, and copies of both the alleged contracts in writing were annexed to the plaint.

* Suit No. 346 of 1883; Appeal No. 657.

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The documents so described were, in fact, the "sold notes" which the broker had given to the plaintiffs. They were signed by the defendant. The "bought notes," which were admittedly counterparts of the "sold notes," had been signed by the plaintiffs and given to the defendant. They were not produced by the defendant, who alleged that they had been lost.

The sold notes signed by the defendant were as follows:—

"No. 28.

"*Memo. of Contract.*

"From H. GILL,
Bombay.
"Messrs. RALLI BROTHERS.

"I have this day sold on your account to Caramalli Fazal, Esq., (200) two hundred tons of wheat, at Rs. 4-9-0 *per* cwt. delivered, at the buyers' godown or railway station, Bombay, delivered on or before June, July, 1889. Description.—Delhi F. A. quality. Terms net, including No. 2 twill bags 2¼lbs. Refraction [104] 6 *per cent.* and up to 8 *per cent.* usual allowance. Remarks.—Buyers to pay 90 per cent. against rail receipt or godown delivery order.

Stamp One Anna. CARAMALLI FAZAL (in Gujarati)." "(Sd.) H. GILL, Broker.

"No. 29.

"*Memo. of Contract.*

"From H. GILL,
Bombay.
"Messrs. RALLI BROTHERS.

"I have this day sold on your account to Caramalli Fazal, Esq., (200) two hundred tons of white wheat, at Rs. 4-12-9 *per cwt.* delivered at the buyers' godown or railway station, Bombay. Delivery on or before June, July, 1889. Description.—Ekdani 85 *per cent.* white and 15 *per cent.* red. Terms net, including No. 2 twill bags 2¼ lbs. Refraction 4 *per cent.* and up to 6 *per cent.* usual allowance. Remarks.—Buyers to pay 90 per cent. against rail receipt or godown delivery order.

Stamp One Anna. CARAMALLI FAZAL (in Gujarati)." "(Sd), H. GILL, Broker.

The suit came on for hearing on the 30th July, 1889, and the plaintiffs tendered the sold notes in evidence. Each of these notes had been stamped with a one-anna stamp, but the stamp on the first note (No. 28) had not been cancelled at all, and the stamp on the other (No. 29) was without any mark of cancellation, except a small portion of the first letter of the defendant's signature, consisting of a slightly curved line. Counsel for the defendant objected that both the notes were inadmissable in evidence, being unstamped having regard to ss. 11 and 34 of the Stamp Act

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I of 1879. The Court allowed the objection, and held the notes inadmissible (1).

The plaintiffs then sought to prove the contracts by oral evidence, contending that the sold notes did not themselves constitute the contracts, but were only memoranda of parol contracts prepared by the broker for the information of the parties. The [105] Court refused to allow oral evidence to be given (s. 91 of the Evidence Act), and the suit was dismissed with costs. The Court delivered the following judgment:—

JUDGMENT.

PARSONS, J.—This is a suit to recover damages for breach of two almost identical contracts alleged to have been entered into by the defends ant with the plaintiffs for the purchase of wheat. To prove the terms of the contract (for I will treat the transactions as one), the plaintiff-have tendered in evidence two notes or memoranda of the contract, which purport to be signed by their broker and by the defendant. These memoranda require to be stamped under No. 46 of sch. I of the Stamp Act, 1879, and each of them has affixed on it an adhesive stamp of one anna ; but one of the stamps has not been cancelled at all, and the other has but a line on a minute portion of it, so that it cannot be said to be cancelled, much less cancelled in a way so that it cannot be used again. Under s. 11 of the Stamp Act, the instruments must be deemed to be unstamped, and, therefore, under s 34, they cannot be admitted in evidence for any purpose, or be acted upon.

These documents then being inadmissible, the parol evidence of the defendant is sought to be adduced by the plaintiff to show the terms of the contract. The question, therefore, arises whether parol evidence can be given of the terms of the contract. The answer appears plain. Section 91 of the Evidence Act declares that when the terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, except the document itself. Mr. Chitty, for the plaintiffs, has argued that the memos in question do not contain the terms of the contract, but are merely the notes of the broker of those terms and that they do not constitute the contract, and that, therefore, parol or secondary evidence is admissible, and he has attempted to obtain that evidence by various questions and in different ways. Of course, if the terms of the contract can be proved by parol evidence, the simplest way to have proved them would have been to call the broker and prove them by his evidence; and if such a course was at the outset considered permissible, I do not understand why the [106] broker was not present. When, however, it is undisputed, as it is in this case, that a contract was made between the plaintiffs' broker and the defendant, that the terms of that contract were reduced to writing by the broker, and that the document so made was signed both by the broker and by the defendant, it seems impossible to hold that any evidence can be given of the terms of the contract, except the document itself. To do so would be to contravene most directly the provisions of s. 91 of the Evidence Act above quoted. The plaintiffs, indeed, admit that the memos. in question were the contract, for in their plaint they say that the defendant agreed to purchase by "two contracts in writing, dated the 16th May, 1889," and that they rely in support of their case upon these contracts, which they annex to their

(1) Section 11 of the Stamp Aat, cl. 3 is as follows :—"Any instrument bearing an adhesive stamp which has not been cancelled, so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped."

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plaint as Exs. A and E. These exhibits are the actual memos of their broker of the contract with the defendant, which are inadmissible by reason of not being stamped.

There is another view of the question which I must not leave unnoticed. An agreement, or memorandum of agreement, for or relating to the sale of goods or merchandise exclusively is exempted from stamp duty, (sch. II, cl. 2 of the Stamp Act No. I of 1879). Article No. 46 of sch. I mentions only a "note or memorandum sent by a broker or agent to his principal intimating the purchase or sale, on account of such principal, of any goods, stock or marketable security exceeding in value twenty rupees." It seems that a letter mentioning the mere fact of the purchase, without giving any particulars whatever, would come within the provision of this clause. If the broker does more than send such a note,—if he sets out in his note the terms of the contract—if, in fact, as in this case, he makes the actual contract the note, does the accident that the note is unstamped render the document inadmissible in evidence in proof of the terms of the agreement or contract? I have come to the conclusion that it must do so. It may, no doubt, be contended that if the broker had made an agreement to purchase, and reduced it to writing on one piece of paper, and had on another piece of paper written a note to his principal, intimating to him the fact of the purchase and had along with the note sent him the agreement, the fact that the note was not stamped would not render the other document [107] containing the agreement inadmissible. Assuming, however, this contention to be correct, we have in this case not two documents, but one document, and that one the law declares shall not for want of stamp be admitted in evidence for any purpose, or shall be acted upon. To allow it to be used to prove the terms of a contract, would be admitting it in evidence for some purpose, and, therefore, would, in my opinion, be a contravention of the law.

Again, it is not certain that art. No. 46 is as simple in its meaning as its seems. If it be read along with cl. 2 of sch. II, it would appear that the instrument included within No. 46 of sch. I may be more than a mere intimation of purchase. It may be, in fact, as the heading shows itself an agreement, or memorandum of agreement, for or relating to the sale of goods. The law, indeed, seems to be this: the broker may do as he pleases; he may send a mere intimation of the fact of purchase, or he may inform his principal in his note of the terms of the sale agreement, or he may endorse and forward the actual contract of sale itself; but whatever he does, the instrument, which is his note or memorandum, is equally chargeable with stamp duty, and if it is not stamped, it cannot be admitted in evidence for any purpose.

My finding then is as follows:—1. The instruments in question required to be stamped, and are not stamped; they cannot, therefore, be admitted in evidence. 2. The terms of the contract, the breach of which is alleged, have been reduced to the form of documents, and no evidence can be given in proof of the said terms, except the documents. 3. These documents are not in evidence; there is, therefore, no proof of the terms of the contract. Unless the plaintiffs can prove the terms of the contract, they cannot in this case prove breach of them by the defendant; neither can they show that they are entitled to any damage. Even if the alleged settlement is proved—which is extremely doubtful—there is no admission on the record, on the part of the defendant, of the terms of the agreement

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which releives the plaintiffs from proving those terms, or makes it unnecessary that they should prove them. On the contrary, the *onus* of proving them is by the issues cast directly upon them, and they have not satisfied that *onus*.

[108] The issues, therefore, must be found in the negative, and the plaintiff's suit must be, and is thereby dismissed with costs.

The plaintiffs appealed.

Chitty for the appellants :—We contend that the Judge was wrong in holding that the contracts were reduced to writing so as to make s. 91 of the Evidence Act applicable. The contracts were, in fact, parol contracts. The description of them in the plaint as " contracts in writing " is merely a *falsa demonstratio* and ought not to affect the question. The contracts were parol contracts, the terms of which were entered by the broker on the bought and sold notes for the information of the parties, and the signature of the defendant was only taken to the sold notes, to show the plaintiffs that the terms had been communicated to him. Bought and sold notes do not constitute the contract: see Benjamin on sale, (4th ed.) p. 251 *et seq* ; *Sievewright* v. *Archibald* (1) ; *Clarion* v. *Shaw* (2) ; *W. Mackinnon* v. *Shibchunder Seal* (3). But, if the Judge was right in holding that the contracts were reduced to writing, and that s. 91 of the Evidence Act applies, we say, first, that the documents bear two characters, *viz.*, (1) that of the broker's note ; and (2) that of an agreement for the sale of goods. Even if they are chargeable with stamp duty, as broker's notes, under art. 46 of sch. I of the Stamp Act, they are exempt as agreements for the sale of goods, and, therefore, admissible. The case is analogous to that of an unregistered mortgage, which contains a covenant to pay. The deed is inadmissible as evidence of the mortgage for want of registration but it is admissible as evidence of the covenant to pay.

If, however, these documents being agreements do not fall under sch. II, cl. 2 of the Stamp Act, they are chargeable with stamp duty, and we contend that in that case they are " instruments so framed as to come within two of the descriptions in the first schedule, " *viz.*, agreements and broker's notes, and under s. 7 of the Stamp Act are chargeable, not with a one-anna stamp, but with an eight-anna stamp as agreements : see art. 5, [109] sch. I ; and, therefore, are admissible on payment of a penalty—s. 34 of the Stamp Act.

Further we say the terms of the contracts were sufficiently admitted in the correspondence between the parties, and that the plaintiffs ought not to have been put to proof of them. An admission in the pleadings is clearly sufficient-*Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (4) ; *Bhagvan Jhavair* v. *Fredrick Paul* (5). Here there was no written statement, but the terms are admitted in the defendant's letters, and that will exempt the plaintiffs from the necessity of proving them. Lastly, we say that the stamp on the second contract is cancelled within the meaning of the Act. Cancelled "so that it cannot be used again" must mean "used again *without fraud*." It was the defendant's duty under s. 11 to cancel the stamps, if not already cancelled, and he will not be allowed to profit by his own wrong.

Starling :—These are both sold notes, and under art. 46 of sch. I of the Stamp Act I of 1879 require a one-anna stamp. Each bears an anna

(1) 17 Q. B. 103. (2) 9 B. L. R. 245. (3) Bourke's Rep. O. C. 354.
(4) 5 B. 143. (5) Printed Judgments for 1882, p. 279.

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stamp, but it is not cancelled, and, therefore, under s. 11 the notes are to be deemed unstamped. Then, it is alleged they are agreements for sale and exempted under cl. 2 of sch. II, but that exemption only applies to an agreement for sale, which is not chargeable under art. 46. These are chargeable under art. 46, and, therefore, not exempt.

Then, can independent evidence be given of the contract? The evidence is that the terms of contract were put into writing in duplicate. One document was signed by plaintiff and one by defendant, and these were interchanged. Defendant admits he made the contract, the terms of which were so reduced to writing. Plaintiffs in the plaint call it a contract in writing, and refer to the notes. Therefore s. 91 of the Evidence Act applies.

As to the alleged admission, the contract is not fully or accurately set out in plaintiffs' letter. Defendant does not admit or deny any part of it specifically, but says he has not broken his contract by refusing delivery. This is not an admission.

JUDGMENT.

SARGENT, C. J.—It is with regret that we feel obliged to decide against the appellants in this case, for there is no doubt that the [110] respondent did enter into the contracts upon which the suit is brought, and we think the appellants have rightly construed that contract. Whether the contracts are to be found exclusively in the documents which have been produced by the plaintiff, or whether they are to be found partly in those documents and partly in the sold notes which were given to the defendant, is not a matter of much importance. In either case we have the same question raised for decision, *viz.*, whether by cl. 2 of the second schedule of the Stamp Act I of 1879 the documents are exempt from stamp duty.

Now that clause exempts an agreement or memorandum of agreement "for, or relating to, sale of goods or merchandise exclusively not being a note or memorandum chargeable under No. 46 of sch. I." Those words can only mean that where an agreement is contained in a document the nature of a note, or memorandum chargeable under art. No. 46 of sch. I, it should be stamped. It is of no consequence whether the agreement is contained in one or more of these notes. The rule laid down in that clause applies in either case.

Then comes the question, whether the Judge in the Court below having excluded the document should have admitted oral evidence of the contract. From the evidence that was actually given there is no doubt that whatever the contract was it was reduced to writing. It is true, as has been decided more than once in England, there may be a verbal contract, although bought and sold notes have been actually interchanged. Here, however, that was not the case. True, the broker in the first instance negotiated the terms of the contract with the defendant, but he had no power to make a binding contract between the parties. The terms were accordingly put into writing and two documents were prepared, one of which was signed by the vendor and given to the buyer, while the other was signed by the buyer and given to the vendor. It is clear, therefore, that the terms of the contract were reduced to writing, and by s. 91 of the Evidence Act I of 1872 no evidence, except the documents themselves, could be given in proof of it.

[111] With regard to the question of cancellation, we think that whatever may have been intended by the small ink line upon the right side of the stamp in one of these documents, it did not effect such a cancellation of the stamp as is prescribed by s. 11 of the Stamp Act.

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With regard to the alleged admission by the defendant of his liability to the plaintiff, we think there was no such admission as could exempt the plaintiff from the necessity of proving his case. There never was any unreserved admission of liability at all; but we know of no case in which it has been held that an admission by a defendant before suit brought renders it unnecessary for the plaintiff to prove his case.

We confirm the decree with costs.

Attorneys for the appellant:—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the respondent:—Messrs. *Payne, Gilbert and Sayani.*

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

SULLEMAN EBRAHIMJI (*Original Defendant*), *Appellant v.* JOOSUB JAN MAHOMED (*Original Plaintiff*), *Respondent.**

[10th January, 1890.]

Practice—Objections—Civil Procedure Code (XIV of 1882), s. 561—Time for filing objections.

Where a respondent in order to save the costs of copying the judgment of the Court below, the decree and other documents in the case, delayed sending instructions to counsel to draw objections to the decree until the paper books had been received from the appellant, at which date the period allowed for filing objections had expired, the Court refused to extend the time, or permit the objections to be filed.

APPLICATION by respondent to file objections to the decree, under s. 561 (1) of the Civil Procedure Code, notwithstanding the expiration of one month from the date of service of the notice.

[112] The decree against which the appeal was brought, was passed on the 13th August, 1889 and the notice of the filing of the appeal was served on the respondent on the 5th September, 1889.

The respondent filed an affidavit in which he stated the following facts in support of his application, *viz.*, that, in order to save the costs of copying the judgment of the Court below, the decree and other documents in the case, his attoneys had purposely delayed sending instructions to counsel to draw objection to the decree until they had received the paper books from the appellant; that the paper books were only received by them on the 19th December; that instructions to draw objections were sent to counsel on the following day (*i.e.*, the 20th December), and a copy of the objections was furnished to the appellant's attorneys on the 21st December, and on the same day the objections were sent to the Prothonotary's office to be lodged.

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* Suit No. 186 of 1889.

(1) Section "561.—Any respondent, though he may not have appealed against any part of the decree, may upon the hearing not only support the decree, on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has filed the objection in the appellate Court within one month from the date of the service on him or his pleader under s. 553 of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow."