PRIVY COUNCIL.*

MOTABHOY MULLA ESSABHOY, DEFENDANT, *v.* MULJI HARIDAS, PLAINTIFF.

P.C.* 1915. *February* 2, 3, 4, 26.

[On appeal from the High Court of Judicature at Bombay.]

Evidence Act (I of 1872), section 92, and proviso (2)—Suit on promissory note—Plea of an oral agreement purporting to vary note—Admission in pleadings—Admission subject to condition—Absence of substantive proof of oral agreement—Onus of proof.

Although there are cases where it is allowable to urge an oral agreement which would have the effect of leaving matters otherwise than if they had depended on the written agreement alone, the oral agreement must be clearly proved, and the onus of doing so is on him who sets it up.

In a suit on a promissory note dated 23rd December 1907, executed by the defendant (appellant) and a firm of H. C. and payable on demand, the defendant pleaded that by an oral agreement between the parties his liability on the note was to cease on 30th January 1908, a simple acknowledgment by H. C. being then substituted for the note. The plaintiff stated in his plaint that the defendant's liability was only to come to an end at the date named provided he had then received full security for advances he had made to H. C., which were only partially secured. The parties went to trial and were allowed to give evidence, on which the Trial Judge in the High Court taking it as admitted that the defendant's liability ceased on 30th January 1908, and not accepting as proved the allegation of the plaintiff as to further security, decided in favour of the defendant, and dismissed the suit. The Appellate Court reversed that decision holding that evidence of the oral agreement was inadmissible under section 92 of the Evidence Act (I of 1872).

Held by the Judicial Committee that a mere amendment of the pleadings would have brought the defendant's contention within proviso (2) of section 92, as being an oral agreement as to which the promissory note "was silent, and which was not inconsistent with its terms." In that view their Lordships were of opinion that it would not be satisfactory to decide against the defendant without considering the evidence, and they held that the failure of the plaintiff to prove his version of the transaction did not necessarily (as held by the Trial Judge) imply that the defendant's case was

* *Present* :—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

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thereupon established. The agreement alleged by the defendant must be substantively proved, and that had not been done. It was permissible for a tribunal to accept part, and reject the rest of a witness' testimony; but an admission in pleading cannot be so treated, and if it be made subject to a condition it must either be accepted with the condition attached, or not accepted at all. An admission therefore that the note was to be held as satisfied on 30th January 1908 by a new debt on the part of H. C., provided that full security was found for the whole debt by that date, could not be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

APPEAL 40 of 1914 from a judgment and decree (8th October 1912) of the High Court at Bombay in its appellate jurisdiction, which reversed the decree (11th April 1912) of a Judge of the same Court in the exercise of its original civil jurisdiction.

The suit out of which this appeal arose was brought by the respondent on 5th December 1910 to recover from the appellant the sum of Rs. 50,000 with interest from that date upon a joint and several promissory note dated 23rd December 1907, and executed by the appellant and the firm of Hyderally Cassumji Sons and Company. The terms of the note were as follows :—

"*Bombay, 23rd December 1907.*

On demand we M. M. Essabhoy and Hyderally Cassumji Sons and Company, jointly and severally promise to pay to Mulji Haridas or order the sum of Rs. fifty thousand (50,000) for value received.

M. M. ESSABHOY.

HYDERALLY CASSUMJI SONS AND CO."

The execution of the note and the consideration for it were admitted by the appellant, but he set up a contemporaneous oral agreement by which his liability was, notwithstanding the express terms of the note, to cease on the 30th January 1908. This was denied by the respondent.

The main dispute between the parties was as to the circumstances under which the note was executed which were shortly as follows :—

The firm of Hyderally Cassumji Sons and Company was in 1907 desirous of being appointed the Managing Agents of The Queeen Spinning and Weaving Company, Limited, and with that view wished to acquire a sufficient number of shares in that Company to qualify the firm for the appointment; for which purpose the firm had borrowed Rs. 1,50,000 from the appellant; and also at the same time and for the same purpose had taken loans to a large extent from the respondent, and was then indebted to him in a sum of Rs. 4,00,000 as part security for which the partners in the firm had in addition to depositing with the respondent the title deeds of certain immoveable properties, agreed to assign to him a certain share of the commission to be earned in respect of the agency if it should be obtained by the firm of Hyderally Cassumji. In July that firm, in which the active partner was one Abdul Hussein Abdul Currim, with a view of paying off their debt to the appellant, applied to the respondent for a further loan of Rs. 1,50,000, which he eventually agreed to [illegible] on the terms of a written agreement, dated 1st August 1907. The firm of Hyderally Cassumji then also (as alleged by the respondent) orally undertook to deposit with him certain other title deeds so as to fully secure him for the total sum of Rs. 5,50,000, and that such deposit was to be a condition precedent to the advance of the additional sum of Rs. 1,50,000. The respondent advanced one sum of Rs. 50,000 immediately after the date of that agreement, and another similar amount at the end of the month, both of which were paid over to the appellant. The balance, Rs. 50,000, it was arranged between Hyderally Cassumji and the respondent, should not be advanced until the end of January 1908; but in December 1907 the appellant being in difficulties for want of ready money, and there being a hundi for Rs. 50,000 which Hyderally Cassumji

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had endorsed for his accommodation, and which became due on 23rd December 1907, Abdul Hussein Abdul Currim, at the instance of the appellant, applied to the respondent, to advance the balance of Rs. 50,000 (though not due until the end of January) on that date; and this the respondent eventually agreed to do upon the appellant and the firm of Hyderally Cassumji executing the promissory note now in suit. The note was accordingly executed and made over to the respondent, and the sum of Rs. 50,000 was received by the appellant and applied by him in paying off the hundi.

Except the note the respondent obtained no security for the Rs. 50,000, and the firm of Hyderally Cassumji having, in November 1910, been adjudicated insolvent, filed the present suit against the appellant for recovery of the amount.

The plaintiff's case was that inasmuch as, at the time the advance of the amount (Rs. 50,000) was made and the note executed, he was not fully secured in respect of his previous advances to Hyderally Cassumji's firm (the additional title deeds promised not having been deposited), the understanding was that if full security was furnished to him by the firm before the end of January 1908 the defendant should be discharged from all liability on the note; but that as that condition had not been fulfilled the defendant's liability continued.

The defendant's contention was that his liability on the note was automatically to cease on 30th January 1908, the date on which according to him the sum of Rs. 50,000 was to have been, under the original arrangement, advanced by the plaintiff to Hyderally Cassumji's firm.

The suit was heard by Davar J. who accepted the account of the matter given by the defendant, and

holding that he had on the evidence discharged the onus which was upon him, and had proved the oral agreement alleged by him, dismissed the suit with costs.

An appeal by the plaintiff was heard by Sir Basil Scott C. J. and Chandavarkar J., who reversed the decree of Davar J. and gave the plaintiff a decree for the amount sued for with interest. The material portion of the judgment of the Appellate Court was as follows :—

"The plaint in the suit stated certain circumstances under which the promissory note had been passed and in effect alleged an agreement between the parties under which if a certain condition was performed by Hyderalli Cassumji Sons and Company, the liability on the note would cease.

The defendant put in a written statement denying the allegation of the plaintiff as to the contemporaneous agreement. He alleged certain other circumstances under which the note had been issued and stated in paragraph 6 that it was agreed that the liability of the defendant on the said note should cease on the day on which the last of certain payments for Rs. 50,000 previously mentioned became due, that is on the 30th January 1908, the plaintiff, as above stated, having agreed to advance the money to pay the amount of the said instalment to the defendant on that day. That is an allegation of a contemporaneous oral agreement inconsistent with the terms of the promissory note, being an allegation of an agreement that although the note purports to be a note without any limitations payable upon demand, it is in effect a note, the liability on which is to cease on a particular date, the 30th January 1908, not subject to any condition depending upon human agency but merely on the expiration of a certain limited period of time, which is not mentioned in the promissory note. That, it appears to us, is an agreement which cannot be proved having regard to the terms of section 92 of the Evidence Act, and it is the only defence to the claim on the promissory note which is before the Court in this appeal.

The learned Judge has held that no agreement between the defendant and the plaintiff in the terms alleged in the written statement has been proved, but he comes to the conclusion that on the evidence the plaintiff is not entitled to succeed. The evidence has not been discussed before us except on behalf of the plaintiff commenting upon the judgment, but in our opinion any discussion of the evidence is unnecessary, because upon the face of the pleadings in support of which the evidence was adduced, no legal defence is forthcoming to the claim on the promissory note."

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On this appeal,

Upjohn, *K. C.* and *E. B. Raikes*, for the appellant, contended that notwithstanding the terms of section 92 of the Evidence Act, it was open to the appellant to plead and prove his defence that by a separate contemporaneous oral agreement his liability on the promissory note was to cease on 30th January 1908. That would be, it was submitted, such an oral agreement as was referred to in proviso (2) of section 92, which formed one of the exceptions to the general terms of the section. It was admitted by the respondent in his plaint that a condition was attached to the execution of the note on the fulfilment of which condition the liability of the appellant on it was to cease. The condition alleged by the respondent to have been made, as to the giving of further security, was found by the Court of the Trial Judge not to have been proved; and that Court held that the appellant's account of the circumstances which preceded the execution of the promissory note was the correct one: but the admission as to the cessation of the appellant's liability held good. Reference was made to section 91 of the Evidence Act, it being contended that the words "the terms of a contract", meant "all the terms of a contract", whereas the promissory note related to payment only of the final instalment of the amount agreed to be paid: section 92, illustration (*b*), was also referred to [MR. AMEER ALI referred to *Bholanath Khettri* v. *Kaliprasad Agurwalla*[1]]. The Court of appeal erred in making for the respondent a new case which he had never put forward. The judgment of the Trial Judge was, except so far as he had held the onus to be on the appellant, right both in law and fact.

[1] (1871) 8 Ben. L. R. 89. at p. 92.

Sir R. Finlay, K. C. and *G. R. Lowndes*, for the respondent, contended that the oral agreement pleaded and relied upon by the appellant was inconsistent with the terms of the promissory note sued upon, and did not constitute a legal defence to the suit. No evidence existed of the account given by the appellant as to the circumstances immediately prior to the execution of the promissory note. The Trial Judge for, it was submitted, very inadquate reasons, discredited the respondent's story, but was not justified in presuming that the appellant's account of the matter was thereby proved. There was nothing to show that the respondent ever consented to the alleged oral agreement that the liability of the appellant should unconditionally come to an end on 30th January 1908. The respondent's statement in his pleading was that the appellant's liability was to cease at that date only if he (the respondent) was before that time fully secured. That could not be taken as an admission that the liability in the note ceased if the condition remained unfulfilled. There was by section 92 of the Evidence Act no defence to the suit. [LORD DUNEDIN referred to and read illustration (*j*) of section 92.] Reference was made to *Pym* v. *Campbell*[1]; Taylor on evidence, 10th Ed., Vol. II, sections 1132, 1135; and *Wallis* v. *Littell*[2]. [LORD DUNEDIN referred to *Bholanath Khettri v. Kaliprasad Agurwalla.*[3]]

Upjohn, K. C. called upon to reply referred to *Holt* v. *Miers*[4], and submitted that section 92 was not applicable, the evidence contended to be admissible not being evidence of any oral agreement between the parties which contradicted, varied, added to or subtracted from the terms of the promissory note. Re-

(1) (1856) 6 El. & Bl. 370.
(2) (1861) 11 C. B. N. S. 369.
(3) (1871) 8 Ben. L. R. 89. at p. 92.
(4) (1839) 9 C. & P. 191.

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ference was made to *Bholanath Khettri* v. *Kaliprasad Agurvalla*[1]; *Harris* v. *Rickett*[2]; and *Lindley* v. *Lacey*[3]. [*Lowndes* said those cases did not touch respondent's case at all.]

1915 February 25th:—The judgment of their Lordships was delivered by

LORD DUNEDIN:—The plaintiff-respondent, Mulji Haridas, sues the defendant-appellant, Motabhoy Mulla Essabhoy, upon a promissory not jointly executed by the defendant and the firm of Hyderally Cassumji Sons & Co., hereinafter called Hyderally, for Rs. 50,000. The note was made in the following circumstances. Mulji, before July 1907, had made advances to Hyderally amounting in all to Rs. 4,00,000, the consideration for making such advances being certain shares in an agency commission in a certain company. The advances were partially but not wholly covered by security. In July 1907, Hyderally applied for a further advance of Rs. 1,50,000 in order to pay off Motabhoy a debt of that amount due to him. Mulji agreed to make the loan, a condition being an increased share in the commission agency, and to make it in three equal instalments. Two of these instalments were paid and the money handed on by Hyderally to Motabhoy, and the third instalment fell to be paid on 30th January 1908.

At the end of December 1907 Motabhoy was in want of money to meet a bill. He accordingly applied to Hyderally to ask if the balance of the debt, namely, Rs. 50,000, could be paid immediately. Hyderally then approached Mulji to see if he would prepay his instalment due on the ensuing 30th January. He consented to do so on being given the joint promissory note in

(1) (1871) 8 Ben. L. R. 89 at p. 92. (2) (1859) 4 H. & N. 1 at p. 7.
(3) (1864) 34 L. J. C. P. 7.

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question of date 23rd December 1907, and the money was handed to Motabhoy. So far there is no discrepancy between the view of the parties, but now arises the difficulty. The defendant Motabhoy alleges that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the instalment promised to be paid by Mulji to Hyderally on that date, and that the note should be replaced by a single acknowledgment on the part of Hyderally. The plaintiff Mulji says that all he agreed to was that he would surrender the note if at 30th January 1908 Hyderally had given sufficient security for the whole debt as then due by him, that on the 30th January no such sufficient security was given, that accordingly he is entitled to maintain Motabhoy's liability under the note.

The learned Judge of first instance allowed the parties to go to trial and examine witnesses; and coming to the conclusion that it had not been proved that any arrangement had been made for the giving of security by Hyderally gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at because in their view the promissory note constituted a written contract binding the defendant to pay on demand, and section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement.

Now if the defendant's pleading is to be dealt with in absolute strictness that view is right, for what the defendant says is this: he admits the execution of the note, and then he says that it was verbally agreed that his liability on it should cease on the 30th January 1908. That is a bald averment of a verbal contract contradicting the written contract, and would be inadmissible under section 92. But this bald averment does not

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represent the defendant's true case. His true contention has been already stated, and in the form of averment it might be put thus:—"It was agreed that on 30th January 1908 the advance then to become due by Mulji to Hyderally should be held as made by the monies paid on 23rd December 1907, and that the liability under the note should be held as satisfied by a fresh note to be granted by Hyderally for the advance of 30th January 1908." That would be an agreement in terms of proviso 2 to section 92, which allows to be proved "the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms."

Their Lordships have felt that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings, and that in a case where the parties had been allowed to go to proof. They have, therefore, felt themselves entitled to consider the evidence led.

Although, however, there are cases, of which this is one, where it is allowable to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, it is obvious that such oral agreement must be clearly proved and that the onus lies on him who sets it up. Their Lordships are of opinion that this has not been sufficiently realised by the learned Judge of first instance. Coming to the conclusion that the plaintiff had failed to prove that he had stipulated for security being given for the whole debt by Hyderally by the 30th January, the learned Judge takes it as a necessary *sequitur* that the defendant's case is established. But the agreement alleged by the defendant must be substantively proved, and it is here, in their Lordship's judgment, that the defendant fails.

The agreement must be an agreement to which the plaintiff Mulji is shown to have assented either himself or by an agent with power to bind him. Now there was no one who had power to bind Mulji. Further, Motabhoy and Mulji never met at the time at which the alleged agreement was concluded, and there is absolutely no evidence which shows that Mulji ever consented to anything except to advance the money if he got the promissory note. In the argument the defendant's Counsel sought to put his case thus: He said that Mulji himself admitted in his pleading that the promissory note was not to represent the true state of matters after 30th January, that no doubt he adhibited the condition that security was by that date to be given, but that as the Judge of first instance disbelieved the story that any such condition was made the matter rested on his own confession that the promissory note lost its efficacy after 30th January. The fallacy here consists in so treating an admission. It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all. Therefore the admission that the promissory note was to be held as satisfied on 30th January by a new debt on the part of Hyderally, provided that security was found for the whole debt by that date, cannot be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

Their Lordships are therefore of opinion that the decree of the Court of Appeal was right, although to be supported on other grounds than those stated in the judgment of that Court, and they will humbly advise His Majesty to dismiss the appeal with costs.

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Solicitors for the appellant: Messrs. *Ranken, Ford, Ford and Chester.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

Appeal dismissed.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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GAJANAN BALKRISHNA DESHPANDE (ORIGINAL PLAINTIFF), APPELLANT, *v.* KASHINATH NARAYAN DESHPANDE (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu Law—Adoption—Half-brother—Mitakshara.

The adoption of a half-brother is not invalid under Hindu Law.

SECOND appeal from the decision of J. D. Dikshit, District Judge of Thana, reversing the decree passed by R. B. Khangaonkar, Subordinate Judge at Mahad.

Suit to recover a share in certain cash allowance.

The cash allowance belonged originally to one Yeshvant. He had two wives. By one of them, he had a son Venkatesh; and by the other, he had three more sons, Ganpat, Madhav and Narayan.

Venkatesh being childless adopted his half-brother Narayan. After the adoption, a son (Kashinath, defendant) was born to Narayan.

Madhav had a son Balkrishna, who had a son named Gajanan (plaintiff).

Ganpat died issueless. At his death, a dispute arose between Gajanan and Kashinath as to who was entitled to Ganpat's share in the cash allowance.

* Second appeal No. 652 of 1913.