Privy Council Appeal No. 6 of 1937

R.B. Lala Karam Chand and another - - - *Appellants*

v.

Firm Mian Mir Ahmad Aziz Ahmad and another - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE NORTH WEST FRONTIER PROVINCE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JANUARY, 1938.

Present at the Hearing :

LORD MACMILLAN.
SIR GEORGE LOWNDES.
SIR SHADI LAL.

[*Delivered by* SIR GEORGE LOWNDES.]

The suit out of which this appeal arises was instituted by the appellants in the Court of the Senior Subordinate Judge of Peshawar, claiming payment by the respondent, sued both as a firm and individually, of Rs.27,867/8/- with further interest until realisation.

The foundation of the claim was alleged in the plaint to be a *sitta* or agreement for sale in the following terms:—

> " That on the 5th of Asuj (a Hindu month) Sambat (Hindu era), 1986, corresponding to 27th September, 1929, the parties entered into an agreement as given in the sitta (agreement to sell) (copy attached) through Sant Amir Chand, broker, as under:—
>
> > ' Sale to R. B. L. Karam Chand Jagat Ram of 200 boxes of tea to be imported from Shanghai. Tea to be sent for by the receiver (of money) himself. Receiver himself to be responsible for profit and loss. Interest at the rate of Rs.11/4/- p.a. Time 10 months.' "

This document in itself, the meaning of which is to say the least of it obscure, obviously laid no foundation for the money claimed by the plaintiffs, but it was further alleged that " for the completion of the agreement " the plaintiffs paid to the defendants by cheques on different banks two sums of Rs.10,000 each on the 20th September and the 8th October, 1929, respectively, and that " the defendants gave other documents by way of memos to the plaintiffs " of which copies were attached to the plaint. The Rs.27,867/8/- were said to be the Rs.20,000 so paid together with interest for the 10 months and at the rate of $11\frac{1}{4}$ per cent. referred to in the *sitta*.

The other documents referred to were two which appear in the record as plaintiffs' exhibits B. and C. They purport

to be signed by the respondent firm and (transcribing only the material portions in each case) run as follows:—

> " Received from you this 5th day of Asuj, 1986, Sambat corresponding to 20th September, 1929, a cheque for Rs.10,000 drawn by you on Messrs. Grindlay & Co., Limited, Peshawar. The amount would be repaid with interest thereon at the rate of Rs.11/4/- p.c. Time 10 months. The principal amount will be paid with interest after 10 months from this date.
>
> " Received from you this 23rd of Asuj, 1986, Sambat corresponding to 8th October, 1929, cheque No. 50284 dated the 8th October for Rs.10,000 drawn on the Imperial Bank of India, Limited, Peshawar. The amount to be paid back with interest at the rate of Rs.11/4/- p.c. after 10 months.
>
> " This principal amount with interest thereon to be repaid after 10 months from this date.

The respondents put in a written defence pleading inter alia that one of the defendants named was not a partner; denying that the sitta was a completed contract and denying that any payment was made to them in pursuance of it. They also pleaded that " the documents the copies of which had been produced by the plaintiffs (meaning thereby the sitta and the two documents abstracted above) amounted to pronotes and by reason of their being inadmissible in evidence no suit could be based thereon."

This last plea was founded on the fact that none of these documents were stamped and if they were held to be promissory notes, section 35 of the Indian Stamp Act precluded their admission in evidence for any purpose. This Act adopted the definition of a promissory note contained in the Negotiable Instrument Act, 1881, section 4—which runs as follows:—

> " 4. A ' promissory note ' is an instrument in writing (not being a banknote or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

The suit went to trial in due course and issues were raised—

> " 1. Did the defendants' firm agree to borrow money from the plaintiffs and executed the sitta dated the 20th September, 1929?
>
> 2. Are the plaintiffs entitled to recover (Rs.20,000 principal and Rs.7,867/8/- interest)?
>
> 3. Are the documents annexed to the plaint admissible in evidence?
>
> 4. Is the suit bad for misjoinder of plaintiffs?
>
> 5. Is Abdul Aziz Defendant a partner in the defendants' firm?
>
> 6. To what are the plaintiffs entitled and against whom? "

The plaintiffs' case was supported by the evidence of the head of their firm and the broker through whom the transactions were negotiated and in whose books the *sitta* was entered.

The Subordinate Judge delivered his judgment on the 29th November, 1934, affirming the appellants' claim and passed a decree in their favour of the same date for Rs.27,867/8/- and costs.

On the third issue he held that the *sitta* was not a promissory note and admitted it in evidence on payment of a penalty. He, however, made no pronouncement as to the other two documents, not, apparently, considering them to be material to the plaintiffs' claim. He found all the other issues in the plaintiffs' favour.

The present respondents (the defendants in the suit) appealed from this decree to the Court of the Judicial Commission, N.W. Frontier Province, who, on the 2nd October, 1935, reversed the decree of the lower Court and dismissed the suit with costs.

The principal argument before the Appellate Court was as to the two documents, exhibits B and C. It was urged that the suit should have been based upon them and not upon the *sitta,* and that the reason for not doing so was that they were in fact promissory notes, and not being properly stamped were inadmissible in evidence. The learned Judicial Commissioners acceded to this contention. They say—

> "On giving the matter our careful consideration we have come to the conclusion that the position taken up by counsel for appellants is sound. The *sitta* does not mention the sum to be advanced; it forms only a preliminary stage of the negotiations. The payment of money and the obtaining of necessary documents for its repayment are in fact the steps which come in for consideration. The cheques undoubtedly proved payment, but mere payment by cheque does not per se give a cause of action for claiming the money back. It does not prove that the amount had been advanced as a loan. The only documents which could have supported the claim and formed its foundation were therefore those which were finally handed over and in which the defendants undertook to repay the money with interest after ten months. Plaintiffs have deliberately avoided to found their case on them."

The judgment did not decide in so many words that the two documents in question were promissory notes, but there is no doubt that when their judgment was pronounced there was a strong current of authority in India to the effect that documents of this character containing a promise to pay (and it could hardly be contended that those under consideration did not contain such a promise) came within the ban of section 35 of the Stamp Act. The Judicial Commissioners evidently thought—and their Lordships are inclined to agree—that the plaintiffs were afraid to found their suit upon exhibits B and C for fear they should be held to be within the ban and that they did "deliberately avoid", as the judgment said, to do this, and they could not be allowed to succeed upon the basis merely of the *sitta* and the cheques.

Their Lordships think that on the supposition that the two documents in question were inadmissible in evidence there was much to be said for this view. What the *sitta* meant in itself is extremely doubtful. It purports to be an agreement for the sale of tea to the plaintiffs, and the plaintiff himself in his evidence says that this was the intention, though his counsel strenuously denies it. But in any case it was in itself an incomplete record of the transaction

between the parties and it alone cannot validate the claim for Rs.27,867/8/-, nor would the mere receipt of the two cheques which were proved in the case help to do so. The missing link between the two showing what the real agreement between the parties was could only be supplied by exhibits B and C and apparently the law refused to sanction the completion of the chain.

But since the judgment of the Judicial Commissioner's Court, a decision of this Board, *Nawab Major Sir Mohammed Akbar Khan* v. *Attar Singh* (63 I.A. 279), has made it clear that the shadow resting upon these exhibits throughout the case was unreal; that documents of this nature which were clearly never intended to be negotiable instruments at all are not promissory notes and are not therefore, for want of a stamp, inadmissible in evidence. If this decision had been before the learned Judicial Commissioners, their Lordships doubt if they would have come to the conclusion they did. They would, it may be admitted, have had before them a plaint inartistically drawn and seeking to rest a justifiable claim upon an unjustifiable basis, but even so they would probably have hesitated in the Frontier Province to give more importance to form than to substance. The object of pleading is to give fair notice to each party of what his opponent's case is, and all the documents being from the beginning before the Court there was no question of the defendants being prejudiced by the form of the plaint. The necessary deduction from all the documents read together with the oral evidence could, their Lordships think, only be that the conclusion come to by the trial Court was right.

It has been suggested before the Board that exhibits B and C were only copies of the original documents and therefore ineffective as evidence. Their Lordships would not be prepared to hold that this suggestion is borne out by the record, but the point was not taken in the Courts in India and they must, therefore, hold that it is not now open to the respondents.

The only other defence which has been raised to the appellants' claim was as to the liability of the respondent Aziz Ahmad as a partner. This was not dealt with by the learned Judicial Commissioners and their Lordships have no doubt that the finding of the Subordinate Judge that he was a partner of the defendants' firm was amply justified.

For the reasons given above, their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Judicial Commissioners should be set aside and that of the Subordinate Judge restored. The respondents must pay the appellants' costs both in the High Court and before this Board.

(47569—3A) Wt. 8151—17 190 2/38 P. St. G. 338

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