

(1972) 01 OHC CK 0010
In the Orissa High Court
Case No : First Appeal No. 11 of 1965

Madanmohan Jena and Others		APPELLANT
	Vs	
Srinath Samal and Others		RESPONDENT

Date of Decision : 04-01-1972

Acts Referred:

Evidence Act, 1872 — Section 92
Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : AIR 1973 Ori 22

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Advocate : G.C. Jena, for the Appellant; K.M. Swain, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Patra, J.—This is an appeal by defendants 1, 2 and 4 and arises out of a suit brought against them and defendant No. 5 for recovery of Rs. 7,500/- alleged to be due on a registered handnote dated 25-6-1949 executed in favour of the plaintiff by defendant No. 5 and his brother Krushna Chandra Jena. Krushna Chandra Jena is dead. Defendants 1 and 2 are alleged to be his sons and defendant No. 4 is his widow. In execution of a decree which the Raja of Aul had obtained against Krushna Chandra Jena and his brother Gananath Jena (defendant No. 5), he brought the latter's ancestral properties to sale and purchased them himself. Subsequently the two brothers negotiated with the Raja to get back the properties from him on payment of Rs. 3262/-. For executing the sale deed in their favour, they were to purchase stamp and for this and certain other needs of theirs, they had borrowed Rs. 938/- from the plaintiff in several instalments. Both the brothers executed in favour of the plaintiff a handnote for Rs. 4200/-. Rs. 938/- which they had previously taken from the plaintiff was adjusted towards consideration and the balance of Rs. 3262/- was paid by the plaintiff on behalf of Krushna Chandra Jena and his brother defendant No. 5 to the Raja of Aul. Shortly thereafter, the Raja executed the sale deed Ext. A in

favour of the two brothers in respect of several items of property for a consideration of Rs. 2370/- and for the balance of Rs. 892/- which the Raja still had with him he promised to lease out the remaining lands of the family to Krushna Jena and his brother. The Raja, however, died before this lease deed could be executed. The plaintiff's case is that full consideration under the handnote Ext. 1 had been paid in the manner indicated above and that except a payment of Rs. 25/- made on 23-6-1952, the defendants did not make any further payment. He, therefore, brought the suit claiming Rs. 7,500/- the balance amount due with interest at 12 per cent per annum. Defendant No. 5 did not resist the suit. Defendants 1 and 2 in two separate written statements contended that defendant No. 1 had been adopted to Basudeb Jena and defendant 2 had been adopted to one Banshi-dhar Jena and that consequently neither of them was liable to pay the suit debts. In a separate written statement filed by defendant No. 4, she supported the plea of adoption set up by defendants 1 and 2. She stated that although the suit handnote Ext 1 was executed for a consideration of Rupees 4,200/-, it was supported by consideration only to the extent of Rs. 2,370/- which is the amount which plaintiff had paid to the Raja of Aul on behalf of Krushna Jena and his brother. There was no stipulation for payment of interest. It was further stipulated at that time that Krushna would discharge two-thirds of the amount due on the handnote and defendant No. 5 would pay the balance one-third. Accordingly, Krushna Jena paid his two-thirds share to the plaintiff, but in view of the fact that defendant No. 5 was living with the plaintiff, the latter relinquished the share payable by defendant No. 5 and handed over the hand-note to Krushna. Subsequently defendant No. 5 stole away the hand-note from Krushna's house and handed it over to the plaintiff to enable him to file the present suit. It was also contended that the plaintiff has not signed in the plaint and also in the Vakalatnama and consequently the suit as laid is not maintainable.

2. On the application of the defendants, the disputed signatures of the plaintiff on the plaint along with his signatures on the back of the summons were sent to the Handwriting Expert D.W. 6 for opinion and he was also examined on commission. He stated that it is not possible for him to give any definite opinion regarding the genuineness of the signatures on the plaint. The plaintiff who examined himself as P.W. 1 asserted that he had put his signatures in the plaint. In these circumstances, the learned Subordinate Judge rejected the defendant's plea on this point and held that the plaintiff had signed in the plaint. He disbelieved the plea that defendants 1 and 2 had been adopted away to other families and held that they still remain as sons of Krushna Jena. He believed the plaintiff's case that the consideration of Rs. 4,200/- mentioned in the hand-note Ext. 1 had been made up of Rs. 938/- which had been previously advanced to Krushna and his brother and that Rs. 3,262/- was paid by the plaintiff on their behalf to the Raja of Aul. He further held that besides the payment of Rs. 25/- entered in the hand-note, the defendants had paid a further sum of Rs. 1,789/- to Ghanashyam Samal the power-of-attorney-holder of the plaintiff who was

capable of giving a valid discharge of the suit amount He disbelieved the defendant's plea that the hand-note had been fully discharged and had ever been returned to Krushna Jena. He also disbelieved the defendant's plea that there was ever any stipulation not to charge interest on the loan advanced. In the result, he passed a decree for Rs. 5,711/- with proportionate costs on contest against defendants t, 2, 4 and 5 and ex parte against defendant No. 5. Being aggrieved by this decision defendants 1, 2 and 4 have filed this appeal impleading defendant No. 5 as a pro forma respondent

3. There is no cross appeal on behalf of the plaintiff.

4. Almost all the grounds on which the plaintiff's claim was resisted by the contesting defendants had been raised in appeal. The plaintiff has stated on oath that he has himself signed the plaint, the verification and also in the Vakalatnama, and this statement has not been demonstrated to be false in spite of the fact that the signatures of the plaintiff had been referred to a Handwriting Expert for opinion and he had subsequently been examined on commission. In the circumstances, the learned Subordinate Judge was right in believing this statement of P.W. 1 and coming to the conclusion that he had signed the plaint and that the suit had been validly instituted.

5. The execution of the suit hand-note by Krushna Chandra Jena and his brother Gananath Jena defendants No. 5 is not denied. It has also been registered. The consideration mentioned in the hand-note is Rs. 4,200/- and it is recited therein that prior to its execution, the defendants had from time to time borrowed Rs. 938/- from the plaintiff and that the balance of Rupees 3,262/- was to be paid by the plaintiff on behalf of the two brothers to the Raja of Aul. The presumption arising u/s 118 of the Negotiable Instruments Act is that the hand-note is fully supported by the consideration mentioned therein. Regarding the payment of Rs. 938/-, the plaintiff (P.W. 1) had stated that prior to the execution of the hand-note, Krushna and his brother defendant No. 5 had borrowed Rs. 938/- from him in four or five instalments. His evidence on this point gets support from the evidence of P.W. 3 the scribe of the hand-note who stated that defendant No. 5 and Krushna Chandra Jena told him at the time of execution of the hand-note that they had previously received Rs. 938/- from the plaintiff and that the balance of Rs. 3,262/- was to be paid by the plaintiff to the Raja of Aul to get back their properties. It also appears from his evidence that at that time the plaintiff had produced a Tippa made by him wherein these advances had been noted and that the Tippa was handed over to Krushna after registration of the hand-note. Nothing has been elicited in cross-examination of P.W. 3 to show that he is in any way interested in the plaintiff. It may be stated in this connection that the sister of Krushna and defendant No. 5 had been married to the plaintiff's son and as such the parties are also closely related. The execution " of the hand-note not having been denied, it is highly unlikely that the executants would have agreed to the recital about Rs. 938/- if there was no truth in it. In these circumstances, I agree with the finding of the learned Subordinate Judge that prior payment of

Rs. 938/- to the two brothers by the plaintiff before execution of the hand-note is true. It had already been stated that the Raja of Aul had in execution of a decree against the two brothers purchased their ancestral properties but subsequently agreed to convey the same to them on receipt of necessary consideration and that the consideration fixed was Rs. 3,262/-. It is clearly mentioned in Ext. 1 that this amount was left with the plaintiff to be made over to the Raja. The question, therefore, is whether actually the plaintiff paid this amount to the Raja of Aul. The plaintiff has stated that he paid Rs. 3,262/- to the Raja in his launch at Jobra Ghat in the presence of the Raja's Advocate Shri G. C. Jena, Chaturbhuja Mohanty (P.W. 2) the scribe of the hand-note and one Mayadhar Patra (P.W. 2). P.Ws. 2 and 3 corroborate this testimony and nothing has been elicited in their cross-examination to show that they are in any way interested in the plaintiff or they have got any motive to depose against the contesting defendants. Ext. A is the registered sale deed dated 3-9-1949 which the Raja subsequently executed in favour of Krishna and his brother for a consideration of Rs. 2,370/- the amount for which the sale deed was executed. The case of the plaintiff is that in respect of the balance of Rs. 892/-, the Raja had promised to execute a permanent lease deed in respect of some agricultural lands in favour of the two brothers, but before that could be done he died. If, as stipulated in the hand-note, the plaintiff had paid the entire amount of Rs. 3,262/- to the Raja, the mere fact that the latter for some reason or the other could not or did not reconvey to the brothers properties to cover up the balance consideration of Rs. 892/- would not defeat the plaintiff's claim to that extent. Apart from the evidence given by the plaintiff and P.Ws. 2 and 3 already referred to, the plaintiff's case regarding payment of the entire amount of Rs. 3,262/- to the Raja receives ample corroboration from Exts. 3 and 3/a. Ext 3/a dated 28-11-1969 is an application addressed by Krishna Chandra Jena to the Collector of Cuttack who meanwhile had on behalf of the Court of Wards taken over charge of the Aul estate. In this application, it is stated by Krishna Chandra Jena that the Raja had received Rs. 3,262/- from him and had on 26-6-1949 executed a Ka-bala in respect of 11.37 acres of land for a consideration of Rs. 2,370/- and had agreed to execute a lease deed for the balance amount of Rs. 892/- in respect of properties mentioned in that application and requested the Collector to execute the same in his favour. A similar application Ext. 3 was addressed by Krishna Chandra Jena and his brother jointly to the Collector, Cuttack. These two applications lend full corroboration to the plaintiff's case that he had paid Rs. 3,262/- to the Raja on behalf of Krishna Jena and his brother defendant No. 5. Having regard, therefore, to the unimpeachable evidence on record, I entirely agree, with the finding of the learned Sub-ordinate Judge that the hand-note Ext. 1 was fully supported by consideration.

6. It was contended by the defendants that the plaintiff had agreed not to charge interest on the loan advanced under Ext. 1 although there was such a stipulation in the hand-note. Apart from the fact that no such agreement was proved, even if there was such oral agreement, it would not be admissible in evidence by

reason of Section 92 of the Evidence Act. Section 92 provides that when the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved, no evidence of any oral agreement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. Proviso (4) to the section says that a subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered. It follows from the proviso that where a contract is in writing and is registered either because the law requires it to be compulsorily registered or it is voluntarily registered by the parties even though it was not compulsorily registrable, in such a case, no evidence of a subsequent oral agreement to modify or rescind the contract is permitted. Such an instrument can be modified or rescinded only by a registered instrument. It, therefore, follows that even if there was an oral agreement not to charge interest, which however, has not been proved, it would not have the effect of rescinding the stipulation in the hand-note that interest would be charged at 12 per cent. The Court below was, therefore, right in allowing interest.

7. The defence set up by defendants 1 and 2 who are admittedly sons of Krushna Chandra Jena was that they had been adopted away to other families from their childhood. Defendant No. 2 did not examine himself in Court. Although defendant No. 1 was examined as D.W. 4, he did not utter a word in his evidence about his alleged adoption by Basudeb. It was, however, elicited in his cross-examination that he is in possession of the lands which his natural father Krushna Chandra Jena and the latter's brother defendant No. 5 had acquired under Ext. A from the Raja of Aul and that he had also sold under Ext. 6 a portion of the said lands to one Brahmananda Naik. These circumstances completely belie his claim that he had been adopted by Basudeb. No exception, therefore, can be taken to the finding of the learned Subordinate Judge that defendants 1 and 2 have failed to establish their alleged adoptions.

8. There then remains the allegation that there was an agreement between Krushna and his brother defendant No. 5 that Krushna would discharge two-thirds of the debt due to the plaintiff and defendant No. 5 would discharge the balance one-third of the debt, and accordingly Krushna repaid to the plaintiff two-thirds of Rs. 2,370/- which according to him was the debt due to the plaintiff and the plaintiff gave up the balance one-third because defendant No. 5 was living with him and then returned the discharged hand-note to Krushna. No such agreement has been proved. It has been established by the defendants that Krushna in fact repaid Rs. 1,789/- to the plaintiff which is much in excess of two-thirds of Rs. 2,370/-. It is in evidence that Krushna and defendant No. 5 had separated and were living separately from each other each cultivating his own share of the lands. That being so, it is difficult to believe how defendant No. 5 could have the opportunity of coming to the house of Krushna and surreptitiously

and taking away the hand-note which Krushna is alleged to have kept in his box. That no report about the alleged theft had ever been made to the Police is also significant. If the plaintiff considered that the hand-note had been discharged, there would have been either an endorsement of full satisfaction therein or the hand-note would have been torn as a token of full satisfaction. Neither has admittedly been done. In these circumstances, no credence at all can be given to this aspect of the defence set up by the defendants.

9. In the result, I find no merit in this appeal which is accordingly dismissed with costs.