

(1950) 10 MAD CK 0011

In the Madras High Court

Case No : City Civil Court Appeal No. 55 of 1949

T.K. Shanmugasundara Mudaliar

APPELLANT

Vs

S.C. Sivalinga Mudaliar and Another

RESPONDENT

Date of Decision : 03-10-1950

Acts Referred:

Contract Act, 1872 — Section 63
Evidence Act, 1872 — Section 92

Citation : AIR 1952 Mad 675 : (1951) 64 LW 151 : (1951) 1 MLJ 292

Hon'ble Judges : Raghava Rao, J

Bench : Single Bench

Advocate : C. Narasimhachariar and M.E. Rajagopalachariar, for the Appellant;
M.S. Ramaswami Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Raghava Rao, J.—This appeal arises out of a suit for recovery of the amount due under a promissory note executed by the defendants in

favour of the plaintiff on 2-3-1948 for Rs. 2750 payable with interest at 9 per cent, per annum. The answer of the defendants was that although

they had executed the promissory note it was unenforceable on account of an agreement in bar of the suit, which they detailed as follows in their

written statement:

(2) ""The plaintiff along with Rudrakoti Mudaliar, Kuppuswami Mudaliar and Arumuga Mudaliar are carrying on business in partnership under the

name and style of Ganapathi Palaighat Company. They owned a casuarina tope planted on land belonging to the local temple. The first defendant is

carrying on business in firewood in Madras and the second defendant is only working under him. In or about February 1948, the plaintiff and his

partners agreed to sell the tope to the first defendant for Rs. 7750 with an advance of Rs. 500. At this time there was considerable dispute

between the trustees of the temple and the villagers that land belonging to the temple was leased out for a nominal rent in the name of a son of one

of the trustees and they sub-leased it to the plaintiff and his partners and made a huge secret profit. There was also control restrictions about the

sale of firewood. In this state of things the plaintiff and his partners insisted on a separate agreement showing that the sale of the tope was for Rs.

2000 only and two pronotes for Rs. 5000 and Rs. 2750 making it appear that the pronotes were executed for cash consideration borrowed for

business. Accordingly the second defendant herein executed an agreement of sale of the tope in favour of Arumuga Mudaliar. Two pronotes, one

for Rs. 5000 dated 26-2-1948 and the suit pronote for Rs. 2750, dated 3-3-1948, were also executed by the defendants, the former in favour of

Rudrakoti Mudaliar and the latter in favour of the plaintiff herein. It was then distinctly agreed and understood between the parties that in case

these defendants sustained any loss owing to relaxation of control and other causes the plaintiff and his partners should remit Rs. 2000 out of the

sale price.

(3) Within a month or two after the sale all control restrictions were removed and the defendants sustained very heavy loss. The plaintiff and his

partners in the presence of respectable panchayatdars reiterated the original agreement that they would forego Rs. 2000 and receive the balance of

Rs. 5500 only. The defendants paid various amounts from time to time amounting to Rs. 5000 and the pronote for Rs. 5000 was returned to him

on 2-12-1948. As regards the suit pronote the plaintiff agreed that on payment of Rs. 750 only he would discharge the suit pronote and return the

same to the defendants. As the defendants could not make up the said sum immediately there was some delay. In the meanwhile at the instigation

of others and for reasons not known the plaintiff sent a notice dated 11-11-1948, demanding the full amount and before the defendants had time to

reply the plaintiff has instituted this suit on 17-11-1948.

4. These defendants submit that though there was a recital in the pronotes for interest it was agreed between parties at the time of the execution of

the pronotes that no interest should be charged and the terms will not be

enforced. Rs. 5000 was paid without interest and it was accepted.

The issue framed on the pleadings was: ""whether the agreement pleaded is true & valid."" As the suit was taken up for trial, there was a preliminary

objection taken on behalf of the plaintiff that no proof of such agreement could be adduced by the defendants in bar of his suit. The objection

found favour with the Judge below who accordingly decreed the suit as prayed for. It was contended in this appeal by Mr. Narasimhachariar that

the view taken by the Court below is wrong.

2. Learned counsel placed strong reliance on a ruling of this Court reported in "Mathew Henry Abraham v. The Lodge ""Good Will"". 34 Mad 156,

in support of his attack against the judgment of the Court below. In that case the learned District Judge of Bellary dismissed the suit there in

question brought by Mr. Henry Abraham as executor of Mathew Abraham for recovery of money due on a promissory note executed on the 12th

November 1891 in the latter's favour by certain office bearers of the Lodge ""Good Will"", No. 465, of Bellary on the ground that although the

document marked as Ex. IV in the case and executed by Mathew Abraham on the 21st February 1902 was not operative as a release, yet, since

the Lodge regarded it as such, being led so to regard it by the conduct of Mathew Abraham at the time of its execution and completed the building

of the Lodge premises on the faith of such belief, the plaintiff was estopped from enforcing his claim. No estoppel having been pleaded in the suit

or raised by the issues or at any rate, proved by any evidence, this Court held that the District Judge was wrong in dismissing the suit on the ground

of estoppel. The real question which thereupon this Court (Munro and Abdur Rahim JJ) had to consider was whether the District Judge was right

in holding that Ex. IV was not a good and effective release. The judgment of the Court was delivered by Abdur Rahim J. who at page 157 of the

report sets forth the document in these words in which it ran:

Know all men by these presents that I, Mathew Abraham, proprietor of Messrs. Abraham and Co. Bellary, do covenant and agree with the

Worshipful Master and Wardens of Lodge Good Will No. 465, for the time being, that if the Masonic Lodge building which has been burnt down

is resuscitated, I shall have no claim, whatever, upon the building or any of the property of the said Masonic Lodge.

Dealing with the argument that the document could not be treated as a good release because there was no mention of the promissory note there, the Court held that where a deed of release was silent as to the claim released, evidence "aliunde" was admissible u/s 95 of the Evidence Act to show what claim was intended to be released. After coming to the conclusion that the promissory note claim was intended to be released by the document in question the Court proceeded to consider the further question of law -- which is the one material to the present case--whether u/s 63 of the Indian Contract Act, the release in question could be regarded as invalid. The Court ruled, after discussing the authorities bearing upon the point, that it was not the intention of the legislature in enacting Section 63 of the Contract Act to depart from the English law, under which releases, contingent on the happening of a future event are valid, and that such releases are valid under the Contract Act, the only difference between the English Law and the Indian Law being that the former requires consideration in the case of releases not under seal, while the Contract Act requires no consideration in the case of releases.

3. The distinction sought to be made by Mr. Narasimhachariar on the basis of this decision between a remission in "praesenti" which is suspended until a certain future event occurs and an agreement to remit "in future." which clearly requires consideration, if it is to be a binding contract, is no doubt well-founded, however tenuous it may be on the facts of a particular case to which it may have to be applied. The distinction in my opinion is nonetheless real because thin. Reference may in this connection be made to Pollock and Mulla's Commentary on Indian Contract and Specific Relief Acts (7th edn.) at page 339:

An agreement to remit "in future" clearly requires consideration, if it is to be a binding contract. But this must be distinguished from a remission or dispensation which is made contingent on the happening of a future event. In such a case the remission is "in praesenti", though it is suspended until the event occurs. The holder of a promissory note from the officers of a masonic lodge agreed in writing to make no claim if the lodge building which has been burnt down is resuscitated". He cannot sue on his note after the lodge is rebuilt. It would be monstrous if he could.

4. To turn to the agreement pleaded in the written statement in the present case

in order to see how far the ruling relied upon by learned counsel is applicable, we have first to take note of the fact that so far as the agreement pleaded in paragraph 2 is concerned, it is something contemporaneous with the execution of the promissory note and directly offends against Section 92 of the Indian Evidence Act. So far as the agreement referred to in paragraph 3 of the written statement is concerned, it is said to have been a reiteration of the original agreement that the plaintiff and his partners would forego Rs. 2000 and receive the balance of Rs. 5500. Assuming that notwithstanding the reference in paragraph 3 of the written statement to a reiteration of the original agreement within a month or two after the sale, the agreement referred to in paragraph 3 has to be treated as something distinct and different from that referred to in paragraph 2 of the written statement, there still remains the obstacle in the way of the appellant arising out of the allegation in paragraph 3 that as regards the suit promissory note the plaintiff agreed that on payment of Rs. 750 only he would discharge the promissory note and return the same to the defendants. The plea deducible from, the written statement is therefore one of agreement to remit and not of remission. The distinction between the two is lucidly drawn by Ramesam J. in the judgment delivered by him on behalf of the Court consisting of himself and Jackson J. in "Balasundara Naicker v. Ranganatha Aiyar", 53 Mad 127. of the Report we have these observations of the learned Judge which are relevant:

What Section 63 of the Contract Act permits is not an agreement to remit but an actual remission. That is, when a portion of the sum is paid, the creditor may say "I do not want the rest. You need not pay any more". This last thing is therefore the essence of the transaction. A discharge extinguishing a debt, though on receipt of a smaller sum than that strictly due, is not an agreement substituting different terms for the original terms which will govern the further working out of the obligation but an extinction of the obligation itself. Though such a discharge extinguishing a debt is generally effected by creditors on the importunity or the request of the debtors, still it cannot be said to amount to a contract which binds two persons and puts them to further obligations. Where there is nothing more to be done the whole thing is practically an act of grace on the part of the creditor. The request of the debtor is immaterial, and in law it is not a case of

consensus of two minds ending in a contract, but merely a liberal act on the part of the creditor only..... The observations of the Privy Council in "Firm Chhunnamal Ramnath v. Firm Mool Chand Ram Bhangat", 55 Mad L J 1 disapproving the decision in "Abaji Sitaram v. Trimbak Municipality", 28 Bom 66, show that a remission of debt u/s 63 is not an agreement between two persons, it is really the act of one person discharging at his will and pleasure the obligation of another.

In view of this distinction I am clearly of opinion that although the agreement pleaded in paragraph 3 of the written statement being not contemporaneous with the execution of the promissory note but subsequent thereto is capable of being proved without the provisions of Section 92(4) of the Indian Evidence Act being offended against, such proof must of course be unavailing to the defendants.

5. Learned counsel has drawn my attention to a decision of Venkataramana Rao J. reported in Lakshminarasimharao v. Raghavamma". 1936 Mad

W N 205. Therein answer to a suit on a mortgage, the mortgagor pleaded an arrangement by which the mortgagee was to enjoy one item of the

mortgaged property for five years in full satisfaction of the mortgage. The plaintiff mortgagee contended that the arrangement was inadmissible in

evidence u/s 92(4) of the Evidence Act. It was held that the arrangement was admissible, for Section 92(4) of the Evidence Act prohibits only the

admissibility of a subsequent oral agreement to rescind or modify any contract, grant or disposition of property which is by law required to be in

writing or which has been registered according to the law in force for the time being as to the registration of documents, but does not preclude the

admissibility of any transaction or contract in satisfaction or discharge of the obligation arising thereunder. No question as to the legal inefficacy of a

mere agreement to remit as contrasted with an actual remission fell to be considered in that case.

6. One other decision which has been cited to me is "Krishnaswami Rao v. Srinivasa Desikan", 71 Mad L J 850. That decision of Varadachariar

& Horwill JJ. is practically to the same effect as the decision in "Lakshmi-Narasimharao v. Raghavamma", 1936 Mad W N 205, already dealt

with. There what the learned Judges decided appears from the head note which is as follows:

Section 92 of the Evidence Act does not preclude evidence being let in in proof of an oral agreement, otherwise valid and enforceable, under

which the mortgagee orally agreed that the mortgage amount should be settled at a certain figure--somewhat less than the amount due on the

mortgage on a proper calculation--and that in full discharge or satisfaction of the claim under the mortgage deed he would take certain properties

by way of a sale for the amount. This arrangement does not contradict, vary, add to or subtract from the mortgage document.

The words ""otherwise valid and enforceable"" occurring in the sentence quoted are worth nothing, and if it is perfectly clear, as I have already held it

is, that in view of the law as laid down in "Balasundaka Naicker v. Ranganatha Aiyar", 53 Mad 127, an agreement to remit has no legal efficacy

about it, no useful purpose will be served by allowing evidence to be adduced of an agreement which is bound to fail. In the case in "Krishna-

Swamirao v. Srinivasa Desikan", 71 Mad L J 850, it is true that the question whether even if it should be found that the agreement pleaded was

true and valid, the agreement could be a defence to the action, when admittedly the agreement remained executory, was left expressly open. In my

opinion the evidence of the agreement sought to be adduced by the defendants was rightly ruled out by the learned Judge below.

7. I may add one word in conclusion with reference to the agreement referred to in paragraph 4 of the written statement, namely, that

notwithstanding the recitals in the promissory notes for interest the parties at the time of their execution agreed that no interest should be charged.

That clearly is an agreement contemporaneous with the execution of the promissory note which varies the terms of the original contract between

the parties as reduced to writing. Clearly it is within the mischief of Section 92 of the Evidence Act, and there could be no evidence in proof of it.

As ruled by Lord Wright in delivering the judgment of the Judicial Committee in AIR 1938 198 (Privy Council) ,

It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not

be an effective instrument until some condition is fulfilled, or to put in another form, it is necessary to distinguish an agreement in defeasance of the

contract from an agreement suspending the coming into force of the contract contained in the promissory note.

The agreement as to the non-liability for interest pleaded in paragraph 4 of the written statement is, in my opinion, one which falls under the former category and is outside the latter category of agreements referred to by Lord Wright in that case. For the reasons indicated in the foregoing I am clearly of opinion that the evidence sought to be adduced by the defendants was rightly shut out and the suit was rightly decreed by the Court below.

8. The appeal fails and is dismissed with costs.