Privy Council Appeal No. 62 of 1937

Rowland Ady and others - - - - - *Appellants*

v.

The Administrator-General of Burma, Administrator to the Estate of Hosain Hamadanee, deceased - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MAY, 1938.

Present at the Hearing:
LORD WRIGHT.
SIR SHADI LAL.
SIR GEORGE RANKIN.
[*Delivered by* LORD WRIGHT.]

The question in this appeal relates to a promissory note executed by the appellants dated the 12th September, 1933. This note was a renewal of an earlier promissory note executed in 1930, but as it is common ground that the considerations which would have applied to the original note, applied to the renewal, no distinction need be drawn between the two documents. The question to be determined is, what were the conditions on which the earlier promissory note was executed.

The appeal is by Rowland Ady, who will be referred to as the appellant, Rowland Ady & Co. being merely the firm name under which he carries on business so that it may be disregarded in this appeal. The respondent, the Administrator-General of Burma, is the administrator of the estate of one Hosain Hamadanee, deceased.

In 1927 the appellant, Hamadanee and one James Cyril Ashe, who was a mining engineer, formed a syndicate to operate certain mining rights, here referred to as Booth's Grant, for the purpose of dealing with these rights. Shortly afterwards on the 7th October, 1927, the syndicate registered a limited liability company under the name of Ashe's Minerals, Limited and under an agreement of the same date agreed to transfer all their assets to the company in consideration of Rs.18,000 to be satisfied by the allotment to Hamadanee, the appellant, and Ashe of 600 shares each. These shares were duly allotted. The necessary finance was advanced by Hamadanee on the footing that he and the appellant were each to bear half the expenses

and that they and Ashe were each to receive one-third of the profits.

Hamadanee put up approximately Rs.30,000. In addition to Booth's Grant, the company also acquired other properties, one of which was a bamboo reserve.

On Hamadanee's death in April, 1928, the respondent, the Administrator-General of Burma, who was then Mr. Hormasji, was appointed administrator of the estate and so continued at all material times. In the course of administering the estate, the respondent got into touch with the appellant and in his endeavours to settle up the complicated affairs of Hamadanee, discussed by conversation and correspondence the transactions in connection with Ashe's Minerals, Ltd., which was one of the numerous matters to be liquidated. That company had, shortly after Hamadanee's death, realised a profit and had distributed the proceeds by way of dividend.

In the course of the discussions between the appellant and respondent, the state of the accounts in respect of Ashe's Minerals, Ltd., was examined and as a result of an interview between these two parties a statement was prepared which showed a balance due by the appellant to the respondent as administrator of the estate amounting to Rs.13,608-6-9. There are certain other items which it is not necessary to consider. The account was signed by an official in the respondent's office called Natarajan. At the foot of the account, there was a note signed by the appellant in the following terms:—

> " This account is correct and I am willing to execute a pro note for 13,608-6-9 on condition that payment is not demanded until as originally arranged, Booth's Grant deal goes through when the amount is to be paid by me without interest.
>
> This account excludes the item of 1,500 due to me as ½ share in the marble quarries and 2,000/- paid by me as H.H.'s share of Government rent for same also 150/- due to the estate by me for cows. These matters to be settled later on as soon as proofs are adduced in support of my claim."

Under the appellant's signature there appears the date 17.9.30. Under Natarajan's signature there was inserted the date 18.9.30 but it has now been agreed that that had been originally 17.9.30 and that the 17 was altered to 18. It has not been explained when, how or why this alteration was made.

The next documents to be considered consist of a letter dated the 20th September, 1930, sent by the respondent to the appellant, and two documents which it enclosed. The letter requested the appellant to execute two promissory notes, one for Rs.13,608-6-9 and one for Rs.150. The latter promissory note may here be disregarded because it relates to the purchase of a cow or cows. The appellant was also requested to have the former promissory note signed by his firm. The two documents enclosed were described as being (1) an office report of the respondent's dated the 18th September, 1930, of the balance due from Rowland Ady & Co., Ashe and Ashe's Minerals Limited and (2) the statement

of account showing the balance due from Messrs. Rowland Ady & Co., Ashe and Ashe's Minerals, Ltd. That has been taken to be the account already referred to, but it is not clear whether this document included not only the account itself but also the endorsement made and signed by the appellant to which reference has been made. The document No. 1 is a copy of part of the actual office report which had been prepared and initialled by Natarajan. The greater part of this report deals with figures of account. It recites that the appellant was claiming that there should be certain adjustments in his favour and states that when he produced papers in support of his claim and the office was satisfied with the claim, the necessary credit would be given. But the report next contains a passage which is most material to the decision of this case, in the following terms:—

> " In the meanwhile he has agreed to execute a P.N. for the sum of Rs.13,608-6-9 found due from him on condition that the money is not demanded till he receives the next distribution from Ashe Minerals Ltd. and that no interest is demanded. He will execute the pro note to-morrow if A.G. approves of the account. He has already seen it and has signed at foot of the account."

Against this passage on the original office report there was a note in red pencil, " Appd.—let him sign on above terms." This note was made by the respondent and is initialled by him under the date 18.9.

The remainder of the Office Report consists of details of the account and there is a further note in red pencil made by the respondent, " Appd. I remember the transaction. Mr. Ady's statement to be accepted." Initialled " J.H. " 18.9. There was also on the document a note initialled by Natarajan that a separate P.N. for Rs.150 was taken from the appellant. What was described as the office report in the letter of the 20th September, 1930, to the appellant was a copy of the actual Report excluding the red pencil notes made by the respondent and also the note about the separate promissory note for Rs.150, and also excluding the statement of account appended.

On receipt of these documents, the appellant executed the original promissory note in his own name and in his firm's name. The note was in the following terms:—

> " On demand we, Rowland Ady and Rowland Ady & Co. of No. 55 Mogul Street, Rangoon, jointly and severally promise to pay to the Administrator-General of Burma and Administrator to the estate of Hoosain Hamadanee the sum of Rs.13,608-6-9 being the amount due by us and by Mr. Ashe to the estate of Hoosain Hamadanee, deceased."

The action was brought on the renewal of this promissory note.

The claim was resisted and the defence set out in the written statement was as in the following terms:—

> " The said promissory notes [that is to say, the original and the renewal], were executed subject to the condition precedent that no liability was to attach thereto until the defendants received the next distribution from Ashe's Minerals Ltd. and until certain adjustments of account in the defendants' favour had been made to the extent of Rs.3,350."

By an amendment the word " unless " was substituted for the word " until " in both places where it occurred.

The Trial Judge stated that he accepted the appellant's account and was satisfied that to the best of his ability he endeavoured to assist the Court by telling the truth as he understood it. The Judge held that the promissory note was made subject to the account of the 17th September, 1930, and the endorsements thereon signed by the appellant, and that the condition of the sale or disposal of the Booth's Grant had been fulfilled or at least that the appellant had failed to prove that it had not been satisfied. He accordingly made a decree against the appellants for Rs.13,608-6-9 less such sum, if any, as might be found upon taking the account of the subject matters referred to in the appellant's endorsement of the 17th September, 1930.

This decree, subject to a variation, now immaterial, was affirmed by the High Court on appeal, and the appeal was dismissed with costs.

It is, however, most unfortunate that the High Court on appeal in arriving at that conclusion fell into a curious misconception of fact because they dismissed from their consideration the copy of the office report which, as already stated was enclosed in the said letter of the 20th September, 1930. They held that the appellant or his legal advisers had concocted their defence from material improperly obtained from the inspection of the documents. They appear to have been of opinion that the copy of the office report had been improperly made by the appellant or his legal advisers on the inspection of documents during the action and had then been put forward as a relevant document. The respondent's Counsel has most properly disclaimed any reliance on this view of the Appellate Court. Their Lordships have seen the original letter of the 20th September, 1930, and the actual enclosures and have set out above what happened. There is no ground whatever for imputing any impropriety to the appellant or his legal advisers; any such imputation has been unreservedly withdrawn before their Lordships on this appeal. The Appellate Court may perhaps have been confused by the fact that the appellant's legal adviser or his clerk in comparing the copy of the office report sent with the letter of the 20th September, 1930, had written the various notes which appeared, as have already been explained, upon the office report itself and were naturally not reproduced in the copy sent to the appellant. The unfortunate result of this misconception on the appeal to the Appellate Court is that their Lordships have not got the benefit of the judgment which the High Court on appeal would have arrived at if they had not fallen into this misconception.

In their Lordships' opinion this appeal ought to be decided on the written documents referred to above but in view of the arguments addressed to them, they think it desirable that they should also discuss the oral evidence. There were two witnesses of importance, the appellant him-

self and the respondent, Mr. Hormasji. Their evidence deals with the circumstances when the promissory note was executed. The appellant deposed that he had several interviews with Hormasji in which the accounts were discussed. He stated that the statement of account on which he wrote his endorsement was the result of one of these interviews and that it was decided at that interview that no demand should be made on the note until Booth's Grant deal went through and the proceeds were derived from the Company; but he said that that arrangement was altered at the suggestion of Mr. Hormasji who on the next day sent an altered form of wording to the effect that no demand would be made on the note and no liability would attach until the assets of Ashe's Minerals, were next distributed. The appellant said that he agreed to the change and asked for an agreement to be sent and that on the following day he was sent a copy of the office report.

The respondent is not so clear in his evidence but eventually, according to the Judge's note he said, "I agree to what is written down on p. 2 of Exhibit 'C' and against which I have written down the word Appd." He is there referring to the passage quoted above from the office report. He further said that in his mind there was no difference between the two forms of the condition and that he had agreed not to make a demand on the pro note until one of these conditions was fulfilled. Natarajan's evidence is not of importance.

Taking the position as a whole, their Lordships are of opinion that the documents enclosed in the letter of the 20th September, 1930, were intended to embody the conditions under which the appellant was to execute the promissory note and they are of opinion that these conditions were substituted for the conditions contained in the endorsement which the appellant added to the statement of account and signed on the 17th September, 1930. The appellant, by executing the promissory note on the basis of the letter and enclosures of the 20th September, 1930, accepted these conditions so proposed by the respondent. Accordingly the complete transaction between the parties was embodied in these documents, namely, the promissory note on the one hand containing the promise to pay and on the other hand the conditions embodied in the letter of the 20th September, 1930, and its enclosures. The result of that position is that the respondent is not entitled to demand payment of the promissory note until the next distribution from Ashe's Minerals, Ltd. As this has not yet taken place, the action based on the promissory note was premature and cannot succeed on the present state of affairs since there had been no next distribution from Ashe's Minerals, Ltd., when the action was started, that is no distribution of profits subsequent to that referred to above before the date of the agreement. If, as it is suggested may happen, there never is any such distribution it will follow that no demand for payment can ever be made on the promissory note. That latter point is, however, immaterial in these proceedings.

Mr. Roxburgh in his able argument for the respondent did not seriously contest that if this view of the documents was taken, that is to say, if their Lordships were of opinion that the letter of the 20th September with its enclosures constituted a written offer from the respondent to the appellant, capable of being accepted and, in fact, accepted by the appellant, by the execution of the promissory note, it would follow that the terms of the promissory note must be read along with and as qualified by the written agreement on the part of the respondent not to demand payment until the condition was fulfilled. He, however, strongly contended that that was not the true view and that the letter with its enclosures constituted merely a record of what was in truth before the date of the documents an oral agreement arrived at between the parties and that evidence of such an oral agreement was not admissible by reason of section 92 of the Indian Evidence Act. Against this it was contended on behalf of the appellant that even if the agreement not to demand payment was merely a collateral oral agreement, it was still admissible in evidence as falling within the third proviso of section 92 which provides that the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any written contract grant or disposition of property may be proved.

Their Lordships, as already stated, are of opinion that the accompanying or collateral agreement which was the condition of the execution of the promissory note was a written agreement and therefore outside section 92. But even if the collateral agreement was an oral agreement so as to come within section 92, they are of opinion that it would fall within the third proviso of the section which states the Indian law in terms which are in accordance with English law. 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 it 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. In their Lordships' judgment this collateral agreement comes under the latter description and is within the proviso. As an illustration for example reference may be made to the *New London Credit Syndicate, Limited* v. *Neale* [1898] 2 Q.B. p. 487, where it was sought to prove an oral agreement to renew a promissory note payable at 3 months date, and that was held to be an agreement altering the terms of the written contract. In the earlier case of *Free* v. *Hawkins* (8 Taunt. p. 92) the evidence which was excluded was of a parol agreement said to have been made at the time of making a note. The note was expressed to be payable 8 months after the date. The evidence which was rejected was that payment should not be demanded until after the sale of certain assets.

The present case falls into the other category. The promissory note is, by its express terms, payable on demand, that is at once. The obligation under the note attaches immediately. But the agreement not to make a demand until the specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of proviso 3 of section 92. A case like the present is to be distinguished from that dealt with in *Ramjiban Serowgy* v. *Ogore Nath Chatterjee* (I.L.R. 25 Cal. p. 401) in which the promissory note, though absolute in its terms, was said to be subject to an oral agreement, providing that it was not to be enforceable by suit until the happening of a particular event. Sale J. in rejecting this evidence expressed his opinion that the proper meaning of proviso 3 was that the contemporaneous oral agreement to be admissible must be to the effect that a written contract was to be of no force at all and was to constitute no obligation until the happening of a certain event. This description in their Lordships' judgment applies to the present case. To the same effect Page J. in *Mitchell* v. *Tennent* (I.L.R. 52 Cal. p. 677) held that the collateral agreement alleged in that case constituted a condition precedent to the attachment of any obligation under the cheques in question so that they remained inoperative until the condition was fulfilled. The same view has been applied in other cases, which it is not necessary here to cite specifically.

In their Lordships' judgment if the collateral agreement in the present case were held to be an oral agreement, evidence of it would be admissible on the principles they have stated but they prefer to decide the case on the ground that the actual position of the parties depends on the written documents, namely the promissory note and the letter and enclosures of the 20th September, 1930, and that accordingly no question of admissibility of evidence under section 92 arises.

For these reasons, with all respect to the Courts below, their Lordships are unable to agree with them in the conclusions at which they have arrived; they are of opinion that the appeal should succeed; that the decrees appealed from should be set aside and that judgment should be entered for the appellants with costs before this Board and in the Courts below. They will humbly so advise His Majesty.

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In the Privy Council.

ROWLAND ADY AND OTHERS

v.

THE ADMINISTRATOR-GENERAL OF BURMA, ADMINISTRATOR TO THE ESTATE OF HOSAIN HAMADANEE, DECEASED

DELIVERED BY LORD WRIGHT

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