

1938

Present : Maartensz and Hearne JJ.

NIBLETT v. COORAY.

241—D. C. Avissawella, 2,110.

Account stated—How it may be established—Writing not essential except under special circumstances—Acknowledgment of debt to take case out of prescription—Ordinance No. 7 of 1840, s. 21.

An account stated may be established by express words or by conduct showing that the party to be charged recognized a specific sum as being due from himself.

The admission must be in writing and signed by the party chargeable, where an account stated is pleaded as an acknowledgment of debt to take the case out of the operation of the Prescription Ordinance or as a promise to answer for the debt or default of another within the meaning of section 13 of the Ordinance.

A PPEAL from a judgment of the District Judge of Avissawella.

F. A. Hayley, K.C. (with him *C. V. Ranawake*), for defendant, appellant.

H. V. Perera, K.C. (with him *E. F. N. Gratiaen*), for plaintiff, respondent.

Cur. adv. vult.

April 5, 1938. MAARTENSZ J.—

This was an action to recover from the defendant the sum of Rs. 531.85 and Rs. 1,853.12 aggregating Rs. 2,384.97 alleged to be due on two causes of action.

The defendant admitted his liability subject to his claim in reconvention in respect of the sum of Rs. 531.85 claimed upon the first cause of action.

The averment in regard to the second cause of action is a bald statement in paragraph 4 of the plaint that "the plaintiff employed the defendant as Manager of the plaintiff's depot in Colombo, and upon the termination of the defendant's employment there was found to be due from defendant to the plaintiff the balance sum of Rs. 1,853.12 as appears from the statement of account herewith filed marked "B" and pleaded as part of this plaint, which said sum of Rs. 1,853.12 or any part thereof the defendant has failed and neglected to pay though hereto demanded." There is no averment as to how and why the defendant became liable to pay the sums of money debited to him in the account "B".

The defendant denied that he was the plaintiff's manager or that he owed the plaintiff any sum of money whatever "under the said head".

In reconvention the defendant claimed Rs. 815.31 as commission and travelling expenses due to him and Rs. 1,500 as damages for wrongful dismissal. The latter claim for damages was abandoned. The amount due according to the exhibit D 12 for travelling expenses and commission was reduced to Rs. 410.31.

The plaintiff filed a replication in which he denied that any sum was due to the defendant and for the first time averred a ground upon which the sum of Rs. 1,853.12 could be legally claimed. The averment is as follows: "The plaintiff also joins issue with the defendant upon the denials contained in paragraph 3 of the answer and states that the sum of Rs. 1,853.12 was in or about the month of January, 1936, found to be due upon an account stated at Kosgama between the plaintiff and the defendant."

The action was tried upon the following issues:—

- "(1) Was the defendant employed as Manager of plaintiff's Colombo Depot?
- (2) Did defendant as such manager and as plaintiff's selling agent become indebted to plaintiff in a sum of Rs. 1,853.12 as set out in account particulars B?
- (3) What amount was still due to defendant at the end of his employment by way of travelling allowance and commission?
- (4) Was an account stated between plaintiff and defendant in January, 1936?
- (5) If so, was the sum of Rs. 1,853.12 found due from defendant to plaintiff in respect of the items set out in the account particulars marked B?"

It appears from the evidence that from January to March, 1935, the defendant was employed by the plaintiff in Kandy. In March plaintiff's manager, Mr. Bentley Buckle, appointed the defendant to "run the Colombo Depot". The proposal to appoint the defendant "to run the Colombo Depot" was made by Mr. Buckle in letter P 1 dated March 22. The plaintiff was then not in the Island. He returned in August, 1935. Mr. Buckle was not in the Island when the case was tried and there is no evidence regarding the terms on which Mr. Buckle appointed the defendant "to run the Colombo Depot".

We were invited to infer from the nature of the entries in the account B which is headed "N. J. COORAY CURRENT ACCOUNT" and according to which the defendant was debited with the value of hides sent to the Colombo Depot, that the defendant was liable for the hides debited to him in this account. In short, that he stood in the position of a purchaser of the hides.

The plaintiff's evidence on page 38 of the record that "when leather was sent to the defendant for sale the value of the same was in the first instance debited against him in his current account" rather suggests that the arrangement was that the defendant should stand in the shoes of a buyer of the leather. But Counsel for the defendant pointed out by reference to the consignment dockets P 7 that that was not the case.

And it is clear from the plaintiff's evidence on page 48 of the record read with the dockets that the defendant was debited with the value not of the leather consigned to him but of the leather sold by him.

The sum sued for represents in the main the value of leather sold by the defendant on credit which he has not recovered. In my opinion, apart from the evidence of the account stated to which I shall presently refer, the evidence for the plaintiff does not establish that the defendant was by reason of the terms of his employment liable to make good the value of leather sold by him on credit and which he has not recovered.

The plaintiff's right to recover the sum claimed on the second cause of action must depend on his establishing that there was a mutual agreement that the sum of Rs. 1,853.12 was due from defendant to plaintiff,—thus giving rise to "an account stated" and an implied promise on the part of the defendant to pay the sum agreed to be due from him.

I do not think there can be any doubt as to the amount. The correctness of the balance shown in account B is not disputed. The only question is whether the defendant agreed to pay this amount.

It was urged that the ledger account was not balanced at the time the defendant was alleged to have agreed to pay the amount due and that therefore there was no account stated. There is I think no room for this contention for the defendant admitted receiving the letter P 5 dated January 20, 1936, before he met the plaintiff about the dispute.

This letter sets out the exact amounts claimed on the current account (the second cause of action) and the hides account (the first cause of action).

The District Judge on the issue as to whether there was an account stated has found strongly in favour of the plaintiff and has given convincing reasons for this finding. He also disbelieved the defendant's evidence that he was not a manager of the depot and that he was not told he was considered liable for the value of the hides sold on credit. The appellant's counsel relied on the fact that the plaintiff took steps to recover the amounts outstanding, but I do not think that negatives the defendant's liability. It would seem that as regards the persons to whom goods were sold on credit the plaintiff was in law the creditor and the action had to be brought in the name of the firm. However that may be, it is obvious from the letter P 4 that the plaintiff held the defendant liable for the amounts. In this letter the defendant is requested to bring the money to pay the proctor's account.

I can see no reason for dissenting from the District Judge's findings on the fourth and fifth issues.

"All that is necessary (to give rise to an account stated) is that the defendant should have shown either by express words or by his conduct that he recognized a specified sum as being due from himself to plaintiff."
—*Laws of England (Halsbury)*, vol. VII, section 991, page 489.

No doubt in some cases the admission must be in writing and signed by the party chargeable as when an account stated is pleaded as an acknowledgment of a debt to take the case out of the operation of the Ordinance No. 22 of 1871 regulating the prescription of actions. (See section 13 of the Ordinance) ; or the promise must be in writing to comply with the provisions of section 21 of Ordinance No. 7 of 1840.

It was argued that this was such a case as the account stated amounted to a promise by the defendant to be chargeable for the debt of another. I am unable to agree with this argument. The plaintiff never considered the persons to whom credit was allowed by the defendant as in fact his debtors nor, as I read the plaintiff's evidence, did the defendant. The defendant was held to be liable for the debt *ab initio*. He did not become liable to pay it only if the debtor failed to pay.

In my opinion the appeal fails and must be dismissed with costs.

HEARNE J.—

The plaintiff sued the defendant on a first cause of action for a sum of Rs. 531.85 alleged to be the balance in the hands of the defendant of monies advanced to him for the purchase of hides and the defendant admitted liability.

On a second cause of action it was alleged that "on the termination of the defendant's employment as manager of the plaintiff's business there was a balance of Rs. 1,853.12 due to the plaintiff" in accordance with particulars contained in an account marked B. B is an account which includes items on both sides. It is called the current account of the defendant. On the debit side of the account the chief items refer to the sales of leather effected by the defendant on behalf of the plaintiff, that is to say he was debited with the sale price of the leather sold according to particulars supplied by himself. In his judgment the Judge says that all the leather sent to the defendant "was in the first instance debited against him in his current account". Reference to the ledger P 6 and the account B shows that this is clearly wrong but the Judge's error is pardonable. It is in accordance with the evidence given by the plaintiff in his examination-in-chief and the Judge did not notice that the plaintiff varied this evidence in re-examination when he said "the defendant's current account was debited with the value of the leather shown to have been sold". Other items on the debit side are in respect of alleged shortages in stock, rent, money taken in cash or by cheque, &c. On the other side of the account the defendant is credited with the proceeds of sale brought to account, travelling allowance and commission earned, sums disbursed by the defendant, &c.

The defendant repudiated liability on account B and filed an answer. In his replication the plaintiff set up an account stated, an issue was framed apparently without objection, and the case went to trial. Counsel for the defendant-appellant stated he was not raising any technical objection on the ground that the plaintiff should have applied for leave to amend his plaint, so as to include in it the new cause of action referred to in the replication.

The Judge took a strong view of the credibility of the parties. He was as strongly impressed by the honesty of the plaintiff as he was by the unworthiness of the defendant. He held that in an interview between the plaintiff and the defendant, the latter was given the opportunity of examining the plaintiff's books of accounts, that he was asked to formulate any objections he had, and that he admitted his liability. It is to be noted that prior to the interview the defendant had been informed (P 5) of the specific sums which according to the plaintiff represented the defendant's indebtedness and there could have been no doubt in the

defendant's mind as to the amount of the claim nor as to the basis of the claim, for as the Judge found he was familiar with the accounts in plaintiff's books which he had previously inspected "from time to time". Counsel for the appellant objected that even if there was a promise to pay the balance shown by the plaintiff's accounts to be due, it could not support the claim on the account stated for the reason that the balance in fact represented the sum due by persons to whom the defendant sold plaintiff's leather on credit and that the recovery of this sum from the defendant involved the implication that he was being made liable, in the absence of a written undertaking to pay the debts of third parties. I am unable to accede to this argument. The account stated did not take the form of a mere acknowledgment of a debt the existence of which could be rebutted (*Siqueira v. Noronha*). It was an account in which no reference was made to third parties, "which contained entries on both sides and in which the parties who had stated the account agreed that the items on one side should be set against the items on the other and the balance only should be paid". Now according to the Judge's finding the terms on which the defendant was employed by the plaintiff included the term that if he sold the plaintiff's leather on credit he did so at his own risk. The conditions on which the defendant undertook to sell plaintiff's leather had not been arranged by the plaintiff. They had been arranged by Mr. Bentley Buckle who was in England at the time of the trial and was not a witness. Plaintiff could not, therefore, speak to the conditions from his personal knowledge and I doubt very much, although this was contended, that they could be inferred from the manner in which the accounts were kept. This, however, does not affect the question. The defendant had satisfied himself of the justice of the demands to pay the balance due on the account stated, he had acknowledged that at the least he was morally bound to pay the balance and his promise to do so as found by the Judge is evidence to support the plaintiff's claim.

I would dismiss the appeal with costs.

Appeal dismissed.

