SUPREME COURT OF INDIA

Kundan Lal Rallaram

Vs.

Custodian, Evacuee Property, Bombay

C.A.No.433 of 1959

(K. Subba Rao, Raghubar Dayal and J. R. Mudholkar, JJ.)

16.03.1961

JUDGEMENT

SUBBA RAO, J.:

1. This is an appeal by special leave from the order dated July 13, 1957, of the Custodian-General of Evacuee Property, New Delhi.

2. One Abdul Satar Ahmedbhoy owned a factory known as Empire Tin Factory at Hathi Baug, Love Lane, Mazagaon, Bombay. On partition of the country he migrated to Pakistan. One Nathuram Ramaldas, a resident of Karachi, owned a shop there named Inidan Electric and Trading Company. Abdul Satar Ahmedbhoy and Nathuram Ramaldasagreed to enter into a transaction of exchange in respect of the said properties. For the purpose of exchange the Empire Tin Factory at Bombay was valued at a sum of Rs. 1,48,000/- and the Indian Electric and Trading Company at Karachi was valued at Rs. 1,00,000/- In respect of the balance of Rs. 48,000/- payable by Nathuram Ramaldas to Abdul Satar Ahmedbhoy, the former paid to the latter a sum of Rs. 11,000/- in cash and executed a promissory note dated December 24, 1947, in his favour for the balance of Rs. 37,000/- On or about march 22, 1948, Abdul Satar Ahmedbhoy endorsed the said promissory note in favour of the appellant Kundan lal Rallaram. It is said that the said endorsement was made in consideration of the transfer of the stock-in-trade of the appellant's business in radios and gramophones in Karachi. On November 13, 1948, the appellant made a demand on Nathuram Ramaldas for the payment of the amount due under the promissory note, but Nathuram Ramaldas denied his liability Thereupon, having made a demand for payment on Abdul Satar Ahmedbhoy and having received his reply repudiating his liability. Nathuram Ramaldas filed a suit (No. 411 of 1950) in the High Court at Bombay against Abdul Satar Ahmedbhoy and the executant of the promissory note for the recovery of the amount due thereunder. Subsequent to the filing of the suit, the Deputy Custodian of Evacuee Property, Bombay, issued a notice dated September 23, 1950, to Abdul Satar Ahmedbhoy to show cause why he should not be declared an evacuee under the Administration of Evacuee Property Act. 1950 (Act XXXI of 1950) (hereinafter called the Act) The Deputy Custodian, by his order dated Oct 25, 1950, declared the said Abdul Satar Ahmedbhoy an evacuee under S. 2 (d)(I) and (ii) of the Act and the said promissory note as an evacuee property. The appellant filed a petition under S. 40 of the Act before the Custodian of Evacuee Property, Bombay for confirmation of the transaction of exchange whereunder he became the endorsee of the promissory note. The Deputy Custodian, by his order dated July 10, 1951, held that the endorsement of the promissory note was not bona fide or for valuable consideration and, on that finding, rejected the petition. The appellant filed an appeal against that order to the Custodian of Evacuee Property, Bombay, on August 10, 1951, and the same

was dismissed on September 10, 1951. But the Custodian-General by his order dated December 7, 1955, in revision remanded the case to the custodian for further enquiry after giving the parties an opportunity to produce fresh evidence with regard to the genuineness or otherwise of the signature of Abdul Satar Ahmedbhoy to the endorsement. On remand, the Custodian, after considering the entire evidence placed before him, found that the transaction of exchange between Abdul Satar Ahmedbhoy and Nathuram Ramaldas was without consideration, though the endorsement on the reverse of the promissory note by Abdul Satar Ahmedbhoy in favour of the appellant was proved. On revision the Custodian General agreed with the Custodian that the endorsement was not supported by consideration and, on that finding dismissed the petition. Hence this appeal.

3. Learned counsel for the appellant contended that the finding of the Custodian-General was vitiated by the fact that he had held erroneously that the presumption under S. 118 of the Negotiable Instruments Act in favour of the appellant that the consideration had passed for the endorsement of the promissory note was rebutted by evidence and circumstances in the case, when as a matter of fact the respondent did not produce any evidence in rebuttal.

4. To appreciate this argument it would be necessary to notice at the outset the scope of the presumption under S. 118 of the Negotiable Instruments Act and also the different methods available to a person against whom such a presumption is drawn to rebut the same. The relevant part of S. 118 of the Negotiable Instruments Act reads:

"Until the contrary is proved, the following presumptions shall be made:-

(a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."

5. This section lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a court shall presume, inter alia, that the negotiable instrument or the endorsement was made or endorsed for Consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. The question is, how the burden can be discharged? The rules of evidence pertaining to burden of proof are embodied in Chapter VII of the Evidence Act. The phrase "burden of proof" has two meaning - one the burden of proof as a matter of law and pleading and the other the burden of establishing a case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e. oral or documentary evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact. To illustrate how this doctrine works in practice, we may take a suit on a promissory note. Under S. 101 of the Evidence Act, "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist." Therefore, the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the execution of the promissory note is proved the rule of presumption laid down in S. 118 of the Negotiable Instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff; but as soon as the execution is proved, S. 118 of the Negotiable Instruments Act imposes a duty on the court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of establishing a case

shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and if he adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff. He may also rely upon presumptions of fact, for instance those mentioned in S. 114 and other sections of the Evidence Act. Under S. 114 of the Evidence Act, "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." Illustration (g) to that section shows that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. A plaintiff, who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration , should produce the said account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff, S. 114 enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court, can under certain circumstances rebut the presumption of law raised under S. 118 of the Negotiable Instruments Act. Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law.

6. We shall now notice some relevant decisions. The Privy Council in Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, AIR 1917 PC 6 observed :

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties this may be right enough - they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is in their Lordships' opinion, as inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

7. The same rule was reaffirmed in Rameshwar Singh v. Bajit Lal, AIR 1929 PC 95 and was approved by this Court in Hiralal v. Badkulal, AIR 1953 SC 225. These three decisions lay down that it is the duty of a party to a suit in possession of important documents to produce them in court, and if that duty is not discharged the court may as well draw the presumption which it is entitled to do under S. 114 of the Evidence Act. A division bench of the Madras High Court in Narayana Rao v. Venkatapayya, ILR (1937) Mad 299 : (AIR 1937 Mad 182) considered the interaction of the provisions of S. 118 of the Negotiable Instruments Act and S. 114 of the Evidence Act in the matter of rebuttal of the presumption under the former section. After considering the earlier decisions, including those of the Privy Council, Varadachariar, J., summarized the law at p. 311 (of ILR Mad) : (at p. 187of AIR) thus:

"It has to be borne in mind that, when evidence has been adduced on both sides, the question of onus is a material or deciding factor only in exceptional circumstamces, cl. Yellappa Ramappa Naik v. Tippanna, 56 Mad LJ 287 : (AIR 1929 Mad 8) and that even the onus under S. 118 of the Negotiable Instrument Act need not always be discharged by direct evidence adduced by the

defendant; Muhammad Shafi Khan v. Muhammad Moazzam Ali Khan, 79 Ind Cas 464: (AIR 1923 All 214), Singar Kunwar v. Basdeo Prasad, 124 Ind Cas 717: (AIR 1930 All 568) and Bishambar Das v. Ismail, AIR 1933 Lah 1029. Not merely can the Court base its conclusion on the effect of the evidence taken as a whole but it may also draw adverse inferences against a party who being in a position to adduce better evidence deliberately abstains from doing so; AIR 1917 PC 6, Guruswami Nadan v. Goplaswami Odayar, ILR 42 Mad 629 : (AIR 1919 Mad 444) and Raghavendra Rao v. Venkataswami Naicken, 30 Mad LW 966 at p. 971 : (AIR 1930 Mad 251 at p. 254).

We respectifully accept the correctness of the said observations.

8. Now let us apply this legal position to the facts of this case. In this case the appellant gave evidence before the Deputy Custodian. His evidence discloses the following facts : the appellant was doing business in radios and gramophones in Karachi in partnership with one Sarup Singh; he transferred his shop to his friend Iqbal Hussain with the consent of the landlord without consideration and the stock-in-trade for consideration to Abdul Satar Ahmedbhoy; he did not remember the name of the landlord whose permission he took before transferring the shop to Iqbal Hussain; he sold all his goods to Abdul Satar Ahmedbhoy who was a stranger to him and took from him a sum of Rs. 96-1-0 in cash and took from him an endorsement in his favour of the promissory note for Rs. 37,000/- executed by another who was also a stranger to him; he prepared a list of articles in the shop at the time of valuation, but the list was not produced; he admitted that he had accounts and that they might be in Delhi, but did not produce them; he stated that the whole business was managed by his partner, Sarup Singh, and though the partner is alive and in India, he did not examine him as a witness. The aforesaid evidence discloses the circumstances under which the stock-in-trade of the appellant was transferred to Abdul Satar Ahmedbhoy and the promissory note was endorsed in his favour. It also establishes that the appellant had documentary evidence as well as oral evidence to prove that consiederation passed but he wilfully withheld them. The said circumstantial evidence and the wilful withholding of the material evidence in the case would be legal evidence on the basis of which the custodian-General held that the presumption raised under s. 118 of the Negotiable Instruments Act was rebutted. The Custodian-General stated in his order as follows:

"It cannot be denied that prima facie a negotiable instrument which had been endorsed shall be taken to have been drawn for consideration. But if there is evidence to prove that there was no consideration for the endorsement then there can be no presumption to that effect. As I have set out above the evidence and the circumstances of the case negative the fact that the promissory note was endorsed for consideration."

9. The proposition of law enunciated by the Custodian-General is correct and on the basis of the relevant legal evidence he held that the presumption was rebutted. The order of the Custodian-General is, therefore, correct both in law and in fact.

10. In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

</html