

ALLAHABAD HIGH COURT

Singar Kunwar

Vs.

Basdeo Prasad

(Kendall, J.)

11.02.1930

JUDGMENT

Kendall, J.

1. This is a defendant's appeal arising out of a suit for sale on the basis of a mortgage deed dated 9th September 1913 executed by Kunwar Sheopal Singh, the deceased husband of defendant 1, in favor of Shekher Prasad, the father of the plaintiffs. The mortgage deed was for L 15,000 and carried interest at 0-7-6 per cent per mensem with six-monthly rests. The plaintiffs have given credit for L 150, and have claimed the balance together with interest amounting to nearly L 27,000. The main defense raised on behalf of the defendants was want of consideration, although even the execution of the document was not admitted. The learned Subordinate Judge has found the mortgage deed to have been duly executed, but has held that part of the consideration has not been established, and has accordingly decreed the claim in part. The defendant has appealed and the plaintiffs have filed a cross objection.

2. The mortgage deed is printed at p. 55 and the details of consideration are to be found on p. 56. In appeal before us only two of the items are now challenged on behalf of the defendant-appellant. The bulk of the amount is L 3,424-10-3 stated to have been due on four hundis of 1912 in favor of the mortgagee himself, and L 3,490 left in deposit with the mortgagee in order to pay off a hundi in favor of one Panna Lal. The cross-objections relate to the amount due on the promissory note of 1912 which was included in the sum of L 3,424-10-3. There can be no doubt that the execution of the document has been fully established, and indeed that plea is not now pressed before us. When the execution was proved there was the acknowledgment of Sheopal Singh admitting the receipt of the entire consideration, as well as the fact that there were hundis and promissory notes executed by him which had been set off, or for the payment of which money had been left in the hands of the mortgagee. There was therefore the initial presumption in favor of the plaintiffs that the full consideration had passed, and the burden was upon the defendants to rebut that presumption. Nevertheless the plaintiffs did lead evidence in the first instance, not only on the question of execution but also of consideration, though the evidence only related to the amount due under the hundi in favor of Panna Lal. On the other hand there was no direct evidence on behalf of the defendants to show that the amount did not actually pass, the reason being that the borrower Sheopal Singh was dead, and there was no one who could categorically deny the receipt of the consideration.

3. The learned advocate for the respondents has contended before us that under Section 118, Negotiable Instruments Act, there is a strong presumption in favor of the passing of consideration on the hundis and the promissory note, and that in the absence of any direct and positive evidence to rebut it the plaintiffs' claim must be decreed. We are not prepared to go to this length for, in our opinion, the presumption arising under Section 118 or that from the acknowledgment of the mortgagor can be rebutted even by circumstantial evidence. The plaintiffs in the Court below relied mainly on the acknowledgments of Sheopal Singh and his various admissions. There was no direct evidence to prove the payment of consideration on the four hundis or the promissory note, though there was the oral statement of Panna Lal to prove the payment of the amount on his hundi. Similarly there was no positive and direct evidence of the non-receipt of consideration on behalf of the defendants. But both the parties have led evidence and certain circumstances have been duly established, and therefore the main point for consideration is whether the circumstantial evidence is sufficient to rebut the ordinary presumption.

4. The learned Subordinate Judge has himself come to the conclusion that the ordinary presumption is so weak that the plaintiffs' claim in respect of the hundis and the promissory note cannot be decreed in this case on merely formal proof of their execution (p, 22). He has, however, thought that there was some corroborative evidence as regards the hundis.

5. It cannot be disputed that the deceased Sheopal Singh was a young man of very extravagant habits. He attained majority about 1909, and his estate was managed for some time by one manager, and was then in charge of a receiver. The estate appears to have come directly into his own hands about 1913. The net income according to the plaintiffs was from L 7,000 to L 8,000, while according to the defendants it was about L 12,000 a year. The only debt which has been proved to have been left outstanding on the death of Sheopal Singh's father amounted to L 30,000, which could have been easily paid off by a prudent and careful manager with the income at his disposal. As observed by the learned Subordinate Judge, instead of there being any reduction in these debts within a period of five years, they had swelled at least on paper to a lakh of rupees at the time of the execution of the bond in suit. Sheopal Singh executed bonds, hundis and promissory notes in quick succession, and died at the age of 24 leaving behind him a widow and no children. He had not any big family to support, and his relations with his mother also had been much strained. She did not live with him. The learned Subordinate Judge has recorded a finding that even if he had not been a drunkard or a debauchee he could very well be taken to be a profligate. On behalf of the plaintiffs an attempt was made to minimise the profligate habits of Sheopal Singh, while the oral evidence on behalf of the defendants went to show that he was in fact much worse than the evidence justified. But even the plaintiffs' own witness Ashrafi Lal, on whose evidence great reliance was placed by the Court below and also before us, had to admit in cross-examination that Sheopal Singh was a weak-minded man, and that he was incapable of managing his estate.

6. Shekher Prasad, the mortgagee, was a resident of the same place, and undoubtedly knew all about the habits of this young man. On his own showing Shekher Prasad advanced to him largo sum of money aggregating to L 88,700 principal between the 27th February 1912 and the 1st April 1915. These deeds together with the amounts borrowed are set forth in detail in a judgment on p.78.

7. This judgment was inter partes, and was delivered in a suit brought by the present plaintiffs against the defendants on the basis of one of these bonds, viz., the one dated 14th July 1915, which was ostensibly for L 9,700. In the course of the judgment the learned Subordinate Judge in the case observed at pp. 78 and 79 that Kunwar Sheopal Singh was a profligate and drunkard of the first water, and he contracted the bad habit of prostitution and drinking, and used to hold dancing parties and drink heavily; he further held that Shekher Prasad himself pampered his evil habits by bringing prostitutes and wine to him, which fact was established by the old servants of the family, who showed that Shekher Prasad was indeed his evil genius. In view of the circumstances disclosed he held that the burden lay on the plaintiffs to prove that Shekher Prasad had paid the full consideration. At pp. 86 and 87 he found that Shekher Prasad was not in a position to advance a large sum like L 88,000. His words were: "He had no means to lend one-hundredth part of the fabulous sum of L 88,000." He accordingly dismissed the suit holding that the bond was entirely without consideration.

8. As it was fair to both the parties that we should look at the final judgment which was pronounced in that case we admitted in evidence the judgment of the High Court dated 9th December 1926, to which no objection was raised on behalf of the respondents. The High Court upheld the decree of the Court below substantially, but increased the amount of the principal sum by L 864. There was a finding that in the deeds were included a fictitious item, as also sums which were not really due. Towards the close of the judgment the learned Judges remarked that Sheopal Singh was a drunkard and profligate, and it will be safe so hold that Shekher Prasad was in a position to dominate his will and exercise undue influence over him, and thereby to obtain from him terms of contract which would be inequitable.

9. In this connexion we may also refer to another judgment in a suit inter partes brought by the present plaintiffs against the defendants to recover the amount due on a hypothecation bond dated 10th April 1915. This judgment is dated 12th November 1927 and has become final. The Court found that more than half of the amount of L 40,000 had not passed and decreed the claim for the balance only. There are similar remarks in the judgment as regards the extravagant and profligate habits of Sheopal Singh.

10. The other circumstances which have been strongly relied upon by the learned counsel for the defendants are as follows:

Neither Basdeo Prasad nor any of the other plaintiffs has gone into the witness-box and submitted himself to cross-examination. It cannot be suggested that; Basdeo Prasad was unacquainted with the circumstances under which this hypothecation bond was executed, for in his deposition dated 10th April 1923, taken down in a previous case he admitted his presence at the time when the hypothecation bond in suit was executed. His previous deposition is admissible as an admission. The cross-examination on p. 72 discloses that besides Sheopal Singh's document there was no document executed by anybody in favor of Shekher Prasad for an amount up to L 1,000 or L 500. The highest amount for which a registered document existed was L 200 only, of which also he was unable to give any details. He alleged that he did not keep an account book but only kept a memorandum and

stated that about L 200 used to be paid as Income Tax on his business. He had to admit that the so-called memorandum book contained only 12 or 13 written pages and was not in the form of a regular account book. He held no receipts showing the payment of any Income Tax as he stated that he did not keep any such record. It is inconceivable that a money lender, Vaish by caste, who professes to have advanced about L 88,000 to only one borrower in the course of three years, would not keep any regular account books. The only inference that can be drawn is that such account books as existed have been withheld. He admittedly carries on a shop at which gold and silver are sold, and it is impossible to believe that he has got no regular account books.

11. It is a noticeable circumstance that so far as the amounts due on the four hundis and the promissory note which went to make up the total of Rupees 3,424-10-3 are concerned, there is absolutely no legal evidence on the record to prove the actual passing of consideration oral or documentary. The respondents rely solely on the presumption arising from the acknowledgments. Even as regards the acknowledgments it is curious, though it may not be of any very great importance, that even before the Sub-Registrar there was an omission on the part of Sheopal Singh to expressly acknowledge the receipt of consideration for these hundis and this promissory note. At p. 57 the endorsement only shows an acknowledgment of the receipt of L 100 and Rupees 6,985-5-9 which were paid before the Sub-Registrar. There is no reference to any other acknowledgment. This might have been due to a mere slip, but the fact remains that apart from the fact that Sheopal Singh signed the deed he did not in express language acknowledge the receipt of consideration of L 3,424-10-3 even before the Sub-Registrar.

12. We have already pointed out that it does not appear that the plaintiffs' father was in a position to advance such a large sum of money. It also appears that in the ordinary course there would have been no need for Sheopal Singh to borrow such large sums in quick succession. 'On 27th February 1912 he had executed a bond for L 14,000 in favor of Shekher Prasad, and according to the oral evidence about L 7,000 had been paid in cash under it, and yet L 1,000 are said to have been borrowed in March, Rupees 400 in April, L 500 in May, L 500 in June and L 550 again in July 1912. In April 1912, L 3,490 are said to have been borrowed from Panna Lal under a hundi. These were followed by three more documents of the value of L 60,000.

13. In view of all these circumstances we have no doubt in our minds that the initial presumption arising from the mere acknowledgments or the execution of the hundis and the promissory note has been sufficiently rebutted by the circumstantial evidence. That such a presumption can be rebutted in this way is quite clear from the opinion expressed in the Madras High Court in *Sundarammal v. Subramania, Chettiar*¹ and *Sami Sah v. J. Parthasarathy Chetty*²

14. The defendants having led prima facie circumstantial evidence to rebut the presumption, the burden of proof shifted on to the plaintiffs to satisfy the Court that the

¹[1915] 29 M.L.J. 236

²[1915] 31 I.C. 739

consideration did actually pass. As remarked above the learned Subordinate Judge himself has held in this case the mere proof of the execution of the hundis and the promissory note will not be sufficient to decree the claim.

15. As regards the four hundis and the promissory note which went to make up the total of L 3,424-10-3 there is, absolutely no legal evidence on the record to prove the passing of consideration. The learned Subordinate Judge has accordingly disallowed the claim as regards the promissory note. But as regards the hundis he is of opinion that there is corroborative evidence furnished by a slip which is printed at p. 53. This purports to have been written by Sheopal Singh to Mr. Asharfi Lal, a pleader, in August 1913 shortly before execution of 'the mortgage deed. Sheopal Singh appears to have made enquiries from this pleader whether there was any harm if the hundis of Shekher Prasad were received and the amount due under them included in the amount of the mortgage deed. One would think that the point was so simple that no legal opinion was required for the purpose. It is also a curious circumstance that this slip of 1913 addressed to the pleader has been preserved by him for 12 years. There was oral evidence led on behalf of the defendants which was directed to show that this letter was a forgery and was antedated, and that it was procured after the registration of the mortgage deed because Sheopal Singh had not acknowledged the receipt of the consideration of these hundis and the promissory note. It is not necessary for us to go to this length, but we are certainly of opinion that this letter is not of such great importance as to outweigh the other circumstantial evidence. The letter does not refer to the dates of the hundis, nor does it state the amounts under those hundis. As a matter of fact taking it strictly literally it refers to one hundi and not hundis in the plural. In any case it would not show that all the amounts due under the four hundis and the promissory note were actually due on that date. At best they would show the existence of such hundis. According to Mr. Asharfi Lal this letter was written in connexion with the transaction in dispute. If Shekher Prasad was in a position to dominate the will of Sheopal Singh, even this letter can have no greater weight than the other acknowledgments.

16. The learned counsel for the respondents has relied strongly on the evidence of Mr. Asharfi Lal, and has urged that the defendants have not rebutted his evidence. On the other hand the learned advocate for the appellant has very severely criticised his evidence, and has referred to the fact that in a former suit the High Court was not prepared to hold on his bare statement that a certain purchase in the name of the wife of Sheopal Singh was not for her benefit (pp. 63 and 67). On behalf of the appellant a copy of the judgment of the Full Bench of this Court dated 23rd January 1928, which was affirmed in part by their Lordships of the Privy Council in the case reported in *Asharfi Lal v. The Judges of the High Court of Judicature, Allahabad*³ was tendered as additional evidence in order to show that their Lordships have found that the pleader concerned had been guilty of professional misconduct. We have refused to accept this fresh evidence in appeal, the sole object of which was to shake the credit of this witness. We have read the evidence of Asharfi Lal very carefully, and, apart from showing that the deceased admitted his liability to Shekher Prasad, that the mortgage deed in question was drafted by him, that the parties were staying at his place at the time, that he identified the mortgagor before the Sub-Registrar and the mortgagor acknowledged the receipt of consideration, and that in connexion with this transaction the letter of 31st August 1913 was written, his evidence

³ A.I.R. 1930 P.C. 60

does not go to prove the actual passing of the consideration on these hundis and promissory note. It follows that the burden of evidence having shifted to the plaintiffs, and there being no legal evidence on the record on their behalf to prove the actual payment of the consideration of these hundis and promissory note, the claim as regards them must fail.

17. As to the hundis in favor of Panna Lal there is the oral statement of Panna Lal himself at p.

13. He has sworn that he advanced the amount on his hundi of April 1912 and Shekhar Prasad did pay him L 3,490 in respect of that debt. No doubt there are many circumstances against Panna Lal. We need not refer to the fact that in the suit in which the judgment dated 12th November 1927 was delivered, another hundi in his favor executed by Sheopal Singh was held to be bogus. There is the fact that Panna Lal is himself a man of small means, and has no zamindari, and at the time of his deposition was actually indebted to the extent of L 500. He has not produced any account books to show that he had advanced the money to Sheopal Singh, or that he had received the amount from Shekhar Prasad. He asserts that he does not keep any bahi khata of the money-lending business, but he admits that he has bahi khatas in his shop in which the loan and its payment are not entered. His evidence was certainly very weak, but it was legal evidence. The learned Subordinate Judge who heard him has believed his evidence, and has considered that the points referred to above can be easily explained away. After having considered them he has come to the conclusion that this hundi was a genuine one and not a bogus one, and that the payment of it had been fully established by his, evidence (p. 21). After considerable hesitation we have come to the conclusion that in appeal we should not differ from the view taken by the learned Subordinate Judge of this oral evidence. We would accordingly hold that the plaintiffs have established the passing of this item of consideration. As regards the cross-objections, they relate to the promissory note which stands on the same footing as the four hundis. The cross-objections must accordingly be dismissed. We accordingly allow this appeal in part, and modifying the decree of the Court below dismiss the plaintiffs' claim with regard to L 3,424-10-3 principal and corresponding interest, but uphold the decree as regards the other items. The parties will receive and pay costs of this appeal in proportion to success and failure in both Courts and the defendant-appellant will have her costs from the plaintiffs in the cross objections.

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