

LAHORE HIGH COURT

Bishambar Das

Vs

Ismail

(Agha Haidar, J.)

14.11.1932

JUDGMENT

Agha Haidar, J.

1. This appeal arises out of a suit instituted on the 24th August 1926, by the plaintiff against defendant 1, major, and defendants 2 and 3, minors, for the recovery of ₹ 6,500/- on the basis of a promissory note alleged to have been executed by Muhammad Bakhsh, father of the three aforesaid defendants, on the 25th August 1923, in his favor. The trial Judge had dismissed the plaintiff's suit. The plaintiff has come up to this Court in appeal.

2. Muhammad Bakhsh Gujar was an illiterate agriculturist who died some nine or ten months before the institution of the present suit on the 24th August 1926, leaving him surviving his three sons, namely, Ismail, defendant 1, and Nazir and Sharif, defendants 2 and 3. Ismail refused to act as guardian ad item of his two minor brothers so the trial Judge, by his order dated the 9th December 1926, appointed an official of his Court to act as their guardian ad litem. Ismail filed a written statement and Nazir and Sharif also filed a separate written statement through their guardian. The purport, however, of these two documents is the same. The defendants in both these written statements plead that they have no knowledge of the debt and that the previous account may be examined. They raised certain other pleas in defense with which we are not concerned in the present appeal.

3. The plaintiff relies upon the promissory note, Exh. P. A, which is printed at p. 24 of the paper book and also upon his bahi account, Exh. P-2, where there is an entry in respect of this promissory note of ₹ 6,000/-. Against this entry are to be found two other entries which are intended to show the items which, together with interest, go to make up the main consideration of the promissory note. The first entry relating to ₹ 1,360, is dated the 10th March 1920, and mentions that the amount was taken by Muhammad Bakhsh for ornaments, clothes and other

marriage, expenses of one Munshi. The second entry of ₹ 1,800/-, is dated the 22nd March 1920, and recites that the money had been advanced to Muhammad Bakhsh for the purchase of land. The sum of ₹ 6,000/-, has been arrived at by adding these two items of ₹ 1,360/- and ₹ 1,800/- and ₹ 2,765/-, interest calculated on them up to the date of the promissory note in suit and a sum of ₹ 100/-, made up of the principal and interest of some other minor items. The total sum in fact comes to ₹ 6,025/-, but, after remitting a sum of ₹ 25/-, the amount claimed by the plaintiff comes to ₹ 6,000/- plus interest ₹ 500/- total ₹ 6,500/-.

4. The plaintiff produced Rura Mal, P.W. 1, who is the scribe of the promissory note in suit. He says that he personally knew Muhammad Bakhsh who put his thumb impression on the promissory note in his presence, and that the document was read over to him before obtaining his thumb mark. He further says that the transaction had been entered in his own register also at No. 164 and that Muhammad Bakhsh's thumb mark had been taken on it. The witness has not produced this register because, according to him, it was deposited in the Record Room of Gurdaspur. Rura Mal has further given evidence as to the entry dated the 22nd March 1920, for Rupees 1,800, in the bahi of the plaintiff. He says that this sum was advanced to Muhammad Bakhsh for buying some land. The first item of ₹ 1,360/- has been sought to be proved by the evidence of Ghulam Muhammad, P.W. 3. This witness did not sign the document and he frankly admits that he is a robkari witness to the entry, and that, on two or three occasions he has acted as "robkari gwah" on behalf of the plaintiff. In the course of his cross examination this witness has admitted that the uncle of Ismail, defendant 1, had taken proceedings against him under Section 110 of the Criminal P.C., though the matter was dropped by the police later on.

5. The plaintiff, Bishamber Das, has given evidence in the case on his behalf and has tried to prove the thumb impression on the promissory note in dispute and also the items of ₹ 1,360/- and ₹ 1,800/-. He has also given details as to how ₹ 6,000/- was made up. There are no admitted thumb-impressions of Muhammad Bakhsh on the record. In rebuttal the defendants produced Munshi, D. W. 1. He is also a Gujar like the defendants and has stated on oath that Muhammad Bakhsh had no full nephew of the name of Munshi, and that he never paid for the marriage of anyone bearing that name. In answer to a question put to him by the Court the witness stated that Muhammad Bakhsh never purchased any land.

6. In cross-examination he stated that Muhammad Bakhsh had received a square of land from the Government ten or eleven years ago and that the sum of ₹ 2,500/-, which he had to pay to Government, remains unpaid. Nur Bakhsh, D.W. 2, has stated that Muhammad Bakhsh never purchased any land, that he got a square from the Government the price of which had not yet

been paid, and that Muhammad Bakhsh never paid for the marriage expenses of anyone called Munshi.

7. Hussaina, D.W. 3, has stated that he had known Muhammad Bakhsh for 10 or 15 years and that his village was at a distance of about a mile from that of Muhammad Bakhsh. He is quite definite that Muhammad Bakhsh never purchased any land nor spent any money on the marriage, of one Munshi. To the same effect is the evidence of Ghulam Qadir, D.W. 4.

8. In rebuttal the plaintiff produced Mahcsh Das, P.W. 5, who belongs to the same caste and got as the plaintiff. He says that he had been invited by Muhammad Bakhsh and a number of other villagers to open a shop in the Montgomery District where they had been granted squares of land, and that, result of this invitation, he shifted to Chak No. 12 in order to carry on his business. He says that Muhammad Bakhsh and Munshi used to live together and to cultivate the land jointly and that his shop was in the same house in which Muhammad Bakhsh and Munshi lived He finishes off by saying that he returned to his original home and stopped the business in the Montgomery district. This is all the evidence in the case. Having regard to the pleas raised in defence, there cannot be any doubt that the defendants did not in any way admit the execution of the promissory note in suit by their father Muhammad Bakhsh. In fact they distinctly put the plaintiff on proof that the promissory note was thumb marked by Muhammad Bakhsh. In a Case of this kind when the alleged executant of a document is dead and his minor sons are being sued subsequent to his death, it is necessary that the plaintiff should prove by clear, cogent and reliable evidence that the thumb impression on the document is early that of the deceased executant. In other words, a high standard of proof would be exacted from the plaintiff before the execution of the document, which is sued upon under the circumstances indicated above, can be held to have been duly proved. In my judgment the evidence, which has been produced on behalf of the plaintiff to establish that the thumb impression on the promissory note is really that of Muhammad Bakhsh, falls considerably short of that high standard of proof which is required by law. The best evidence in the case which was available to the plaintiff has not been produced. He could have easily summoned some of the records of the Colonization Office at Montgomery where undoubtedly Muhammad Bakhsh's genuine thumb impressions are sure to have been preserved. The plaintiff himself is an interested party and his evidence has to be read with a great deal of caution and certainly, standing by itself, it is not sufficient to prove the genuineness of the thumb impression on the promissory note and other entries on which he relies. Rura Mal, P.W. 1, is a man who purports to be the scribe of the document and it is significant that he has tried to keep himself out of the affair as much as possible by stating that his own register, which bore the thumb impression of Muhammad Bakhsh, was not with him and was in fact in the Record Room of Gurdaspur. Furthermore, the transaction of ₹ 1,360/-, has been sought to be proved by Ghulam Muhammad, P.W. 3. It need hardly be said that the evidence of this witness is not calculated to inspire confidence in a Court of justice. I attach great importance to the observations made by the learned trial Judge in his judgment at p. 20 of the paper book where he says that if the plaintiff

had produced account books which showed that on the dates when he says that he advanced ₹ 1,360/- and ₹ 1,800/- in cash he had really paid out such sums, I would regard his case more favorably.

9. These account books are not forthcoming and we have got only entries of these amounts purporting to have been made on the debit side while the entry about the promissory note in suit is on the credit side. It would have greatly strengthened the case for the plaintiff if he had produced the account book dealing with the period when these two items of ₹ 1,360/- and ₹ 1,800/-, had, according to him, been advanced to Muhammad Bakhsh. I may also note here that the entries about ₹ 1,360/- and ₹ 1,800/- are silent about interest.

10. Having regard, therefore, to the evidence on the record it is extremely doubtful whether a Court of Justice can hold that the plaintiff has proved satisfactorily that the thumb impression on the promissory note in suit was a genuine thumb impression of Muhammad Bakhsh and, even assuming for the sake of argument that the learned trial Judge was right in holding that Muhammad Bakhsh had been somehow tricked to put his thumb impression on the promissory note in question, the burden of proving want of consideration has been amply discharged by the defendants. In discharging the burden of proof, it is not always necessary for the defendants to prove want of consideration by producing definite evidence on their own behalf. It is open to them to rely upon the facts and circumstances of the case and also to refer to the flaws in the evidence of the plaintiff himself and then to argue that on the record of the case as it stands, the burden has been discharged by them. There are a number of authorities on this point and it is not necessary to consider them for the purposes of this appeal. Whether a party had discharged the burden of proof laid upon him is a question for the Court to decide and each case depends upon its own peculiar facts and circumstances.

11. In my judgment, the defendants, on the record before us, have been able to prove that no consideration had passed. The conclusion arrived at by the learned trial Judge seems to me to be correct and I do not think that anything has been brought to my notice which would justify me in reversing his finding on a question of evidence. I would, therefore, affirm the judgment and decree of the trial Judge and dismiss this appeal with costs to defendants 1 only, the minor defendants not being represented in this Court.

Addison, J.

12. I agree.