

# RAJASTHAN HIGH COURT

Jeewan Singh

Vs.

Shiv Singh Galudia

Civil First Appeal No. 143 of 1994

(A.C. Goyal, J.)

05.11.2003

## JUDGEMENT

**A.C. Goyal, J.**

1. The appellant-defendant has filed this first appeal under Section 96 of the Civil Procedure Code against the judgment and decree dated 5-9-1994, whereby learned Additional District Judge No. 2, *Jaipur City, Jaipur* decreed the suit for Rs. 60,967.50 along with costs of the suit and interest at the rate of 6% p.a. from the date of filing the suit till realization.
2. The facts in brief giving rise to the present appeal are that the plaintiff-respondent filed a civil suit for recovery of the suit amount on 14-11-1983, with the averments that the defendant was in need of money, hence the plaintiff advanced a sum of Rs. 55,000/- on 21-3-1983. The defendant agreed to pay interest at the rate of Rs. 1.50 p.m. and executed promissory note and a receipt on that very day. Thereafter the plaintiff asked the defendant to repay and also served a notice on 12-9-1983 but with no result.
3. The defendant filed written statement on (sic) 1984 denying the averments with regard to advancing loan and execution of documents on 21-3-1983, although on demand promissory note and a receipt were executed by him without mentioning any date. It was pleaded that the defendant and some other persons entered into an agreement with the plaintiff on 10th February 1982, for sale of certain land. An agreement was executed on that day and the plaintiff paid a sum of Rs. 50,000/- vide Cheque No. 992010, dated 15-2-1982. That agreement failed, hence the plaintiff raised a demand of the amount of the cheque and thus under pressure of the plaintiff, the defendant signed these documents without mentioning the dates.

4. Amended written statements were filed on 4-12-1986 and 30-6-1987 pleading that the defendant and his two sons agreed to sell their agricultural land for a total consideration of Rs. 5.75 lacs and an agreement was executed on 10-2-1982. The plaintiff paid in cash a sum of Rs. 1100/- and Rs. 50,000/- vide cheque. The plaintiff had to pay the remaining amount of Rs. 5,23,900/- within three months. Thereafter on 21-3-1983, he was summoned by the plaintiff in the Court premises at *Jaipur*. On that day, three agreements to sell along with power of attorney were got executed by the plaintiff but his two sons Ashwamegh Kumar and Ashwin Kumar did not sign the agreements of the agricultural land belonging to them. Thereupon, he executed both these documents without mentioning any date only to ensure repayment of the amount received by him from the plaintiff. It was also pleaded that the interest rate had been subsequently inserted in these documents along with signatures of attesting witnesses.

5. Rejoinders were submitted by the plaintiff on 27-5-1987 and 30-6-1987 with a plea that the transaction of advancing loan of Rs. 55,000/- has no concern with agreements of sale of agricultural land.

6. On the basis of the pleadings of the parties, following issues were framed :-

(Vernacular matter omitted.....Ed.)

After recording the evidence of the parties the learned trial Judge vide judgment dated 5-9-1994 decreed the suit as stated herein-above.

7. I have heard learned counsel for the parties. Following points arise in this appeal.

(i) Whether Ex. 2 pronote was executed by the defendant-appellant without any consideration.

(ii) Whether Ex. 2 pronote was materially altered subsequent to its execution.

8. Learned trial Judge having considered the evidence available on the record came to this conclusion that the defendant failed to prove that this pronote was without consideration. It was also held on the basis of the statement of handwriting expert D. W. 5 Krishna Charan that dates "21-3-1983" marked A to B in promissory note Ex. 2 and marked E to F in receipt Ex. 1 are not found to be written by the defendant, but only on this count no material alteration was found to be proved.

9. Before advertng to the submissions and the evidence, it would be proper to reproduce the provisions of Sections 87 and 118 of the Negotiable Instruments Act, 1881 (in short the Act, 1881).

87. Effect of material alteration :- Any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;

Alteration by endorsee :

and any such alteration, if made by an endorsee, discharges his endorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of Sections 20, 49, 86 and 125.

118. Presumptions as to negotiable instruments of consideration - Until the contrary is proved, the following presumptions shall be made :-

(a) of consideration that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

(b) as to date - that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer - that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of endorsements that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course-that the holder of negotiable instrument is a holder in due course; provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

10. With regard to material alteration, learned counsel for the appellant- defendant submitted that since the trial Judge himself came to this finding that the dates are not in the handwriting of the defendant, the statement of the defendant is found proved that these dates were subsequently inserted in Ex. 1 and Ex. 2, hence in view of Section 87 of the Act, 1881 this pronote is void. He placed reliance upon *Jayantilal Goel v. Smt. Zubeda Khanum*,<sup>1</sup> *Sesharal Bajna v. C. Subramanian*,<sup>2</sup> *Allampati Subba Reddy v. Neelapareddi Ramanareddi*,<sup>3</sup> *Suresh Chandra v. Satish Chandra*,<sup>4</sup> *Loonkaran Sethia v. Mr. Ivan E. John*,<sup>5</sup> *M. S. Anirudhan v. Thomco's Bank, Ltd.*,<sup>6</sup> and *Bhanwarlal v. Gulabchand*,<sup>7</sup>. Learned counsel for the plaintiff- respondent submitted that merely on this count that the dates are not in the hand of the appellant-defendant, case of material alteration is not made out. I have considered the said submissions. In all the judgments relied upon by learned counsel for the appellant-defendant, it has been held that in case material alteration is done in a negotiable instrument the same is rendered as void. In the instant case, the trial Court on the basis of the evidence of D. W. 5 Sh. Krishna Charan arrived at this finding that the dates A to B and E to F respectively in Ex. 2 and Ex. 1 are not in the handwriting of the defendant. Only on this finding, material alteration in the said documents cannot be said to be proved. There is no evidence that these dates were inserted later on. It is not the legal requirement that dates of these documents must have been written by the defendant himself. It is significant to say here that by way of amended pleadings the defendant pleaded that dates, rate of interest and signatures of attesting witnesses were inserted subsequent to execution of these documents. But the expert opinion was obtained only with regard to the dates and thus no expert opinion was sought with regard to remaining two objections regarding rate of interest as well as signatures of the attesting witnesses. The defendant himself admitted in his statement that this pronote Ex. 2 and receipt Ex. 1 were written and signed by him. Out of two attesting witnesses P.W. 3 Surendra Singh Shekhawat, an advocate, was examined on behalf of the plaintiff-respondent. He categorically stated before the trial Court that these two documents Ex. 1 and Ex. 2 were signed by him as well as by one other witness Atma Ram on 21-3-1983 at the time when these documents were written by the defendant himself. Learned counsel for the appellant-defendant raised two objections with regard to his statement. First objection was that P. W. 3 is an interested witness and second is that another witness Atma Ram was not examined. But both these objections are of no importance. P.W. 3 Surendra Singh admitted in his cross-examination that his father-an advocate was appearing for the plaintiff in some cases, but only on this count this objection cannot be accepted that P. W. 3 Surendra Singh is an interested witness.

Likewise, non-examination of other witness Atma Ram is no ground to disbelieve the other evidence available on the record as it was not necessary for the plaintiff to examine all the attesting witnesses. Thus, in view of the entire discussion made hereinabove, this contention cannot be accepted that Ex. 1 and Ex. 2 were materially altered subsequent to its execution.

11. With regard to consideration, Section 118 of the Act, 1881 makes it clear that until contrary is proved, the presumption of consideration and as to dates shall be made. According to learned counsel Mr. Bhandari, the defendant proved that this pronote was without consideration and once *prima facie* evidence to this effect was produced, the burden shifted to the plaintiff- respondent to prove that consideration as contained in the pronote passed on to the borrower, but the plaintiff did not produce even his account books to prove the payment of this loan amount and in absence of account books, Ex. 10 and Ex. 11 certificates of P.W. 2 M. L. Agarwal were not reliable. While referring the evidence with regard to previous transactions of agricultural land between the parties, it was contended that the defendant had already received a total amount of Rs. 66,100/- from the plaintiff and since the transactions to sell agricultural land failed, these documents Ex. 1 and Ex. 2 were signed by the defendant only to ensure repayment of this amount to the plaintiff. Otherwise also, as per Mr. Bhandari, there was no need of loan as the defendant had a right to recover balance amount of sale-consideration; that there is no evidence as to why the plaintiff went to the court premises on 21-3-1983 with this amount of Rs. 55,000/-. He placed reliance upon *G. Vasu v. Syed Yaseen Saifuddin Quadri*,<sup>8</sup> wherein it was held that once the defendant shows either by direct evidence or circumstantial evidence or by use of other presumptions of law or fact that the pronote is not supported by consideration in the manner stated in the pronote or in the manner stated in the suit notice or in the pleadings the evidential burden shifts to the plaintiff to prove that the promissory note is supported by consideration and at that stage, the presumption of law covered by Section 118 disappears. Similar view was taken in *Heerachand v. Jeevraj*, AIR 1959 Rajasthan 1. In *Ganga Ram v. Het Ram and others*,<sup>9</sup> it was held where the defendant admits execution of thumb mark on the khata wahi of the plaintiff indicating the liability to pay a certain amount with interest but denies in his written statement that the mark was obtained by exercise of undue influence and that he was minor when it was executed, it is not possible to spell admission of liability on the part of the defendant from the bare execution of the document. Per contra, learned counsel for the respondent submitted that since the execution of the pronote was admitted by the defendant, the presumption of consideration shall be drawn until the contrary is proved

and the defendant completely failed to prove that this pronote was without consideration. It was next submitted that previous transactions with regard to sale of land had no concern with the transaction in question and in view of the admission of the defendant regarding execution of these documents, it was not necessary for the plaintiff to produce his account books. He placed reliance upon *K. P. O. Moideenkutty Hajee v. Pappu Manjooran*, <sup>10</sup> wherein it was held that presumption would not arise when plaintiff pleads a consideration different from one found in the promissory note. According to learned counsel Mr. Ranjan, such is not the situation in the instant case. In *Dal Chand v. Satish Chandra*, <sup>11</sup> it was held by this Court that defendant cannot raise plea of Benami transaction in respect of pronote in the name of the plaintiff. In *Bharat Barrel & Drum Manufacturing Company v. Amin chand Payrelal*, <sup>12</sup> it was held that presumption under Section 118 (a) of the Act, 1881 is rebuttable.

12. I have considered the rival submissions in the light of the evidence available on the record and the judgments referred to hereinabove. The parties to the present litigation had been having previous transactions with regard to agreements of sale of lands belonging to the defendant-appellant and his two sons. Ex. 5 agreement of sale was executed by the defendant and his two sons in favor of the plaintiff and his brother as H. U. F. on 10-2-1982. The total sale price agreed was Rs. 5,75,000/-. It is not disputed between the parties that a sum of Rs. 1100/- in cash was paid as advance and a sum of Rs. 50,000/- was paid vide cheque and the balance amount was to be paid/adjusted within three months at the time of registration of the sale deed subject to the terms and conditions contained in this agreement. A perusal of page 5 of this agreement goes to show that the State Bank of India's loan outstanding against the vendors was to be settled by the vendors mutually out of the aforesaid period of three months with the Bank authorities and in case the Bank would agree, the balance amount of loan would got be transferred by the vendors in the name of the purchasers, of course to the liability of the purchasers in accordance with this agreement of sale. These three months were to expire approximately on 10-5-1982. Ex.3 is on a small piece of paper. According to the defendant, he vide this Ex. 3 asked the plaintiff to pay the balance price under the said agreement of sale while according to the plaintiff the defendant asked him to advance a sum of Rs. 55,000/- as loan. But this document Ex. 3 is silent on these points. As per plaintiff, he informed defendant on telephone and came to Court premises and got three agreements of sale prepared on behalf of the defendant and his two sons as mutually agreed between them on 21-3-1983. But the defendant's both sons did not turn up. According to the plaintiff, he advanced a sum of Rs. 55,000/- to the defendant as loan and the defendant executed Ex. 1 and Ex. 2, as

the defendant was in need of this money for repair and extension of his house and for his other family requirement. According to the statement of the defendant-appellant, he did not receive any consideration against this pronote and it was signed under pressure of the plaintiff. It was further stated by him that under the agreements for sale their agricultural land, the plaintiff paid a sum of Rs. 1100/-, Rs. 10,000/-, Rs. 5,000/- and Rs. 50,000/- vide cheque and thus total sum of Rs. 66,100/- was paid by the plaintiff to him. He further stated that a sum of Rs. 11,100/- was taken by him as advance under the agreement of sale dated 21-3-1983 and for the remaining amount of Rs. 55,000/-, he executed this pronote in favor of the plaintiff. In cross-examination he stated that a sum of Rs. 10,000/- and Rs. 5000/- taken by him as stated in his earlier statement were received by him in the year 1982, although he does not remember the date as well as the month of the year 1982. Thus, this part of his statement that he received this amount of Rs. 15,000/- in the year 1982 is contrary to his earlier statement that this amount of Rs. 15,000/- was received in the year 1983. Again, he gave contradictory statement by saying that this amount of Rs. 15,000/- was received by him after the agreement dated 10-2-1982 in the year 1983. Statement of D. W. 2 Nathu singh is not relevant with regard to execution of these pronotes and the consideration contained therein. D.W. 3 Ashwamegh Kumar and D.W. 4 Ashwani Kumar are sons of the defendant. According to the statement of Ashwamegh Kumar, his father received a sum of Rs. 1100/- in cash and a cheque of Rs. 50,000/- under the agreement dated 10-2-1982 and thereafter his father received a sum of Rs. 15,000/- from the plaintiff. In cross-examination he pleaded ignorance as to when the amount of Rs. 15,000/- was paid by the plaintiff to his father. D.W. 4 Ashwani Kumar stated that it was the plaintiff who told him that he has got one pronote of Rs. 55,000/- and one agreement of Rupees 11,100/- executed in favor of his father. Thus, the statement of D. W. 4 Ashwani Kumar is of no help with regard to point in question that as to whether the said pronote was with or without consideration. Thus, according to the statement of the defendant himself and his son Ashwamegh Kumar a total sum of Rs. 66,100/- was paid by the plaintiff to the defendant. But this oral testimony does not find corroboration from the documents. As per agreement Ex. 5 a total sum of Rs. 51,100/- was paid by the plaintiff to the defendant on 10-2-1982. Second agreement dated 21-3-1983 is Ex. 7. No payment was made under this agreement by the plaintiff to the defendant. Condition No. 2 (a) at page 3 of this agreement goes to show that a sum of Rs. 1100/- paid as advance in cash and Rs. 10,000/- out of the said cheque of Rs. 50,000/- was adjusted against the total consideration contained in this agreement Ex. 7. Third agreement dated 21-3-1983 is Ex. 9. According to this agreement D. W. 3

Ashwamegh Kumar agreed to sell his land although he did not sign this agreement. According to condition No. 2 at page 3 of this document the plaintiff paid a sum of Rs. 5,000/- in cash as advance money on 21-3-1983 and this money was received by the defendant himself on behalf of his son Ashwamegh Kumar. Fourth agreement said to be executed on behalf of D.W. 4 Ashwani Kumar on 21-3-1983 is Ex. A1. According to the condition No. 2 at page 3 of this agreement a sum of Rs. 40,000/- out of the cheque amount of Rs. 50,000/- already paid vide agreement dated 10-2-1982 was adjusted as consideration under this agreement. Thus, according to these agreements a total sum of Rs. 56,100/- including the cheque amount of Rs. 50,000/- was paid by the plaintiff to the defendant. Thus the explanation given by the defendant that the plaintiff paid a total sum of Rs. 66,100/- to him and out of that amount a sum of Rs. 11,100/- was retained by him under the agreements executed on 21-3-1983 and for the remaining amount of Rs. 55,000/- he executed the pronote in favor of the plaintiff completely fails. In other words, the explanation given by the defendant is wholly unreliable. It is significant to say here that in para 10 of the written statement submitted on 7-1-1984 it was pleaded by the defendant that on account of pressure put by the plaintiff he executed the pronote. But contrary to these pleadings the defendant at page 16 of his statement admitted this fact that the plaintiff asked him to execute the pronote and since he had no objection, he executed the same. This statement shows that this pronote was executed without any pressure. Keeping in view the entire evidence adduced by the defendant, the learned trial Judge rightly relied upon the evidence of the plaintiff. The plaintiff Shiv Singh categorically stated before the trial Court that as the defendant was in need of money as stated in the plaint he advanced a sum of Rs. 55,000/- on 21-3- 1983 and the defendant himself executed both the documents i.e. Ex. 1 receipt and Ex. 2 pronote. He has also given evidence in detail with regard to transactions of sale of agricultural land and the circumstances under which the defendant did not comply with those agreements of sale. Merely on account of non-submission of account books of the plaintiff, no such inference can be drawn that this pronote was executed without any consideration and further it is also important to say here that there was no prayer made on behalf of the defendant asking the plaintiff to produce his account books. The statement of the plaintiff finds corroboration not only from the statement of the attesting witness P. W. 3 Surendra Singh but also from the statement of Sh. M. L. Agarwal, Chartered Accountant who issued two certificates Ex. 10 and Ex. 11. Thus, in view of entire discussion made hereinabove, this appeal is liable to be dismissed. Hence, dismissed with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1986 AP 120
2. AIR 1983 Mad 368
3. AIR 1966 AP 267
4. AIR 1983 All 81
5. AIR 1977 SC 336
6. AIR 1963 SC 746
7. AIR 1959 Raj 96
8. AIR 1987 AP 139
9. AIR 1965 Raj 47
10. 1996) 8 SCC 586: (AIR 1996 SC 3356)
11. 1982 WLN 54: (AIR 1983 Raj 23)
12. (1999) 3 SCC 35: (AIR 1999 SC 1008)