IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1324 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

LALLUBHAI RADHESHYAM DUBE

Versus

GYANCHAND VEVARIMAL RAJAI

Appearance:

MR SK JHAVERI for Petitioner

MR RN SHAH for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 29/11/96

ORAL JUDGEMENT

1. The appellant - defendant has filed this Appeal challenging the judgment and decree passed in Civil Suit No. 38 of 1975 by the learned Civil Judge (S.D.), Godhra partly allowing the suit and ordering the appellant to pay Rs. 15,930/- to the respondent plaintiff with costs of the suit and with interest at the rate of 6% per annum from the date of filing of the suit till the date of the payment.

2. The respondent has filed the suit to recover Rs. 19,275/- contending inter alia that the appellant often used to take loan on interest from the respondent on giving cheques. The appellant had accordingly given a cheque dated 14.12.1975 for Rs. 19,275/- with cost for settling the account. However, when the same was presented by the respondent in the bank, it was dishonoured by the bank with the endorsement, "refer to drawer". The appellant in his written statement Exhibit 25 while denying the averments has, inter alia, contended that respondent used to advance loan to him for his business and for security of such loan, he used to take signature of the appellant on blank cheques. According to the appellant, he has paid all the amounts of loan and no amount is due from him. He further stated that the suit cheque is without consideration and the respondent has misused blank cheque bearing his signature and has filed a false suit. According to the appellant, the plaintiff does not possess licence of lending money and therefore the suit itself is not tenable.

3. The learned trial Judge, after appreciating the evidence on record, was of the view that the case of cash consideration put forward by the respondent in his cross-examination is inconsistent with his pleadings and in fact the subsequent say of the respondent that he has paid Rs. 19,000/- in cash at a time does not inspire any confidence. The learned trial judge has however decreed the suit in favour of the respondent on the ground that the original burden which is on the appellant - defendant to prove want of consideration is not discharged and it does not prove contrary to the statutory presumption. According to the learned trial Judge whether the burden is on the defendant or the evidence of the respondent plaintiff is believable or not is not material on the point of consideration. In substance, the learned trial Judge, in view of contradictory evidence of the respondent, on the basis of statutory presumption, was of the view that the burden will be there on the appellant defendant to prove want of consideration. The learned trial Judge, it appears, has taken the same view on the basis of the judgement of the Bombay High Court in the case of TARAMAHOMED HAJI ABDUL REHMAN v. TYEB EBRAHIM BHARAMCHARI reported in AIR 1949 Bom. 257. The Bombay High Court in the said judgement while explaining the extent of presumption under "Section 118 (a) of the Negotiable Instruments Act, 1881 held as under Sec. 118(a) of the Negotiable Instruments Act raises a statutory presumption in favour of there being consideration for every negotiable instrument. The

presumption continues until it is rebutted and the only way it can be rebutted is by proving the contrary, viz., that the negotiable instrument was without consideration. The presumption that is raised under the section is not in respect of the consideration mentioned in the negotiable instrument but the presumption is in favour of there being a consideration for the negotiable instrument, any consideration which is a valid consideration in law. It is perfectly true that if a particular consideration is mentioned in a negotiable instrument and that consideration is set up, that is a factor which the Court would take into consideration in deciding whether the defendant had discharged the burden cast upon him by Sec. 118. But the mere fact that the consideration mentioned in the negotiable instrument turns out to be wrongly described does not rebut the presumption under Sec. 118 and the burden still lies on the defendant to satisfy the court that there was no consideration for the instrument. In order to determine whether the contrary is proved or not as required by Sec. 118, the whole volume of evidence led before the Court including admissions of the plaintiff made in his cross-examination, must be considered. But in considering the volume of evidence the court must always bear in mind the statutory presumption and also the fact that the burden of proof lies upon the defendant and that burden has got to be discharged by the defendant. Where the plaintiff attempts to prove a particular consideration, the mere fact that he failed to prove such consideration does not, in any way, relieve the defendant from his obligation in law to establish the contrary of the presumption".

3. Mr. S.K. Jhaveri, learned Counsel appearing for the appellant has submitted that presumption under Section 118 of the Negotiable Instruments Act can be rebutted from the circumstances and the case put forward by the plaintiff apart from the oral as well as documentary evidence put forward by the defendant. To substantiate his submission Mr. Jhaveri has relied upon the decision of the Full Bench of the Rajasthan High Court in the case of HEERACHAND v. JEEVRAJ AND ANOTHER, reported in AIR 1959 Rajasthan 1. The Full Bench of the Rajasthan High Court in the said judgment, it appears, has not approved the judgment of the Bombay High Court rendered in Tarmahomed (supra). The learned Judge speaking on behalf of the Full Bench has observed as under :

"I know that the question as put is based on the decision of the Bombay High Court in Taramahomed

Haji Abdul Rehman's case (G), but I find it difficult to understand how a Court could deal with the evidence in two water-tight compartments - first saying that the evidence of the maker of the negotiable instrument as to failure of consideration is untrustworthy and then saying that the evidence of the plaintiff fails to establish the consideration that is alleged or relied upon by him and stopping short there.

Even insuch a case the Court has, in my opinion, to go further and come to the conclusion where there is presumption of consideration in the sense explained above whether the consideration has been disproved. If it comes to the conclusion that the consideration has been disproved, the presumption is rebutted and the plaintiff must fail.

If, on the other hand, it comes to the conclusion that the consideration has not been disproved, the defendant would fail and the plaintiff would get a decree on the negotiable instrument. whether the consideration has been disproved or not in a particular case has to be decided by the Court after considering all the matters before it and then deciding whether it believes that the consideration does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

That seems to be the only way in which the Court has to arrive at the conclusion whether the presumption of consideration, which it is bound to make in favour of the plaintiff in a case based on a negotiable instrument, has been displaced and the consideration has been disproved. The question, as put, seems to presume that the Court is not prepared to take the third step after it has taken two steps, namely that it has come to the conclusion that the evidence of the maker of the negotiable instrument as to failure of consideration is untrustworthy and also to the conclusion that the evidence of the plaintiff fails to establish the consideration that is alleged or relied upon by him.

I am of opinion that in such a case the Court

must take the third step also namely whether on a consideration of all the matters before it, it is of opinion that consideration has been disproved and there is no question of the Court not taking this third step and decreeing the suit after taking only these two steps on the basis of the presumption of consideration. It must, as the Evidence Act stands and as the words "shall presume" and "disproved" are defined in it, take this final step. I would, therefore, say in answer to the second question that the correct position in a case of this kind is that where both parties have led their entire evidence, the matter certainly rests on such evidence.

It would, however, not be correct to say that it does not rest upon presumption at all, for the Court cannot forget the presumption. It will always remember the presumption and judge the evidence in the light of the presumption, that is, it must come to the conclusion that the consideration has been disproved. In order to arrive at that conclusion, it will have to consider all the matters before it and then decide whether it believes that consideration does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

If, however, I must answer the second question as it is put, my answer to the first part of it would be that if the Court is only prepared to take the two steps mentioned therein and is not prepared to take the further step indicated by me, the presumption will not be of help to the plaintiff. My answer to the second part of the question is that the correct position in such cases where both parties have led their entire evidence is that the matter rests upon such evidence, but the Court must not forget the presumption in favour of consideration and must come to the conclusion of the entire evidence whether the consideration has been disproved."

4. In view of this judgment Mr. Jhaveri submitted that the learned trial Judge has committed an error in decreeing the suit even though it has recorded a finding that the evidence of the respondent plaintiff regarding the past consideration of the cheques is not believable. As the original burden which is on the defendant to

prove, want of consideration is not discharged and it does not prove contrary to the statutory presumption. Mr. Jhaveri submitted that in view of the judgement rendered by the Full Bench of the Rajasthan High Court both the parties have to prove the entire evidence and the court is required to decide the dispute as to whether the consideration has been disproved or not after appreciating the evidence before it.

5. At this stage it is necessary to refer the decision of the Supreme Court in the case of KUNDAN LAL RALLARAM v. CUSTODIAN, EVACUEE PROPERTY, reported in AIR 1961 SC 1816. The Supreme Court in the said judgement by interpreting Section 118 of the Act has observed that Section 118 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 phrase "burden of proof" has two meanings - 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. A plaintiff who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration of the relevant 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. If such a relevant evidence is withheld by the plaintiff, S.114, Evidence Act 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.

In substance, the Supreme Court in the said judgment has laid down that apart from very statutory presumption, the burden shifts from defendant to plaintiff if defendant rebuts the presumption by

evidence.

6. In view of this judgment the law is developed from time to time in given cases that under Sec. 118 of the Negotiable Instruments Act, the court shall presume that the negotiable instrument or the endorsement was made or endorsed for consideration. Now this presumption being legal, which remains unchanged during the entire trial. However, if a party, in the instant case, the appellant - defendant, by adducing sufficient evidence, i.e. oral or documentary or admissions made by opposite party or by placing substantial evidence, rebuts the presumption, in that case, it is for the plaintiff to establish his case. In other words, if the defendant adduces direct evidence to prove that the negotiable instrument was not supported by consideration, and if, he adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. With this settled principles, let us examine the case on hand.

7. It is the specific case of the respondent in the plaint as well as in the evidence that the appellant often to take loan on interest on giving cheques and ultimately Rs. 19,000/- was found due from the appellant and the appellant had given a cheque dated 14.12.75 of Rs. 19,000/- to him. The respondent has in his evidence clearly come out a case that the appellant often used to take loan on giving cheques and he used to take back the cheques and that he has never given blank cheques. There is some discrepancy regarding the amount of Rs. 19,000/received by the respondent from his brother and regarding in depositing the same in the bank for the purpose of advancing the loan of Rs. 19,000/- to the appellant but the case that there was an amount of Rs. 19,000/- was due from the appellant to the respondent after the accounts has remained consistent. The appellant in Para - 10 of his evidence has clearly admitted that cheques Exhibits 77 to 82 are written and signed by him. He further admitted that he used to pay amount of cheques on due date to the plaintiff. Prior to this also, the appellant used to take amounts on cheque and he used to get back the cheques on payment of amount. He has denied that he has not paid amount for cheques Exhibits 77 to 82. He has also denied that he took cash amount from plaintiff without cheque. He has further denied that Exhibits 78 to 82 are written by him after receiving their amount from the plaintiff. He has stated that subsequently he has paid up their amount and that he has no document to show their payment. He has also admitted that he cannot say from whom the plaintiff took the amount of the cheques Exhibits 78 to 82 and paid to

him. He has not given any notice to the plaintiff to return the cheques Exhibits 78 to 82. In view of this admission by the appellant, there is no manner of doubt that the appellant used to borrow amount from the respondent and used to pay back the same by cheques. The fact that the appellant has admitted his signature on cheques Exhibits 78 to 82 raised presumption of consideration. In view of the admission of the appellant in his evidence that he used to take back his cheques on payment of loan amounts, I failed to understand as to how the cheques have remained with the respondents. This would, on the contrary, go to show that no payment as alleged by the appellant is made to the respondent. Except the allegation that the respondent used to keep the blank cheques signed by the appellant, there is no evidence led by the appellant to substantiate the allegation. One more factor is required to be mentioned here that the appellant has made part payment by installments to the tune of Rs. 3,070/- as shown in the note book Exhibit-49 and also deposed by the respondent. The appellant has not denied to have made payment as shown in the note book Exhibit 49. The learned Judge has also believed the same. This would, on the contrary, go to suggest that the amounts of the respondent were due from the appellant and therefore there is no merits in the contention of the appellant that the suit cheque was without consideration. Since the appellant has failed to rebut the statutory presumption, the burden of proof does not shift to the respondent and consequently it is not for the respondent to establish his case.

8. Mr. Jhaveri has submitted that the respondent is doing money lending business without licence and, therefore, the suit itself is not tenable. The learned trial Judge has gone in detail in considering the said contention in paragraphs 51 to 60. Since I agree with the findings reached by the trial court, there is no reason to interfere with the reasons given by the learned trial Judge. Suffice to say that nothing new is pointed out before this Court to take a different view from the view taken by the learned trial Judge. In view of the aforesaid, I see no merit in the Appeal and the same is dismissed with costs.
