

Kalyan Singh Vs. Ranjot Singh

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Court : Himachal Pradesh

Decided On : Mar-22-2002

Reported in : 2003(1)ARBLR425(HP)

Judge : R.L. Khurana, J.

Acts : [Negotiable Instruments Act, 1881](#) - Section 118; ;[Evidence Act, 1872](#) - Sections 73 and 114; ;[Contract Act, 1872](#) - Section 29; ;[Sale of Goods Act, 1930](#) - Section 55

Appeal No. : Second Appeal No. 382 of 1998

Appellant : Kalyan Singh

Respondent : Ranjot Singh

Advocate for Def. : G.D. Verma, Sr. Adv. and; Romesh Verma, Adv.

Advocate for Pet/Ap. : Kuldeep Singh, Sr. Adv. and; Jyotiba, Adv.

Judgement :

R.L. Khurana, J.

1. The plaintiff has directed the present appeal against the judgment and decree dated 29-6-1998 of the learned District Judge, Nahan, reversing the judgment and decree dated 7-2-1998 of the learned Sub-Judge Ist Class (1). Paonta Sahib, and

thereby dismissing the suit of the plaintiff for the recovery of Rs. 50,000/- from the defendant.

2. The plaintiff on 25-10-1993 had sold barberry roots to the defendant for a sum of Rs. 37,000/-. The defendant issued a cheque for the said amount in favour of the plaintiff. Such cheque on presentation to the Bank for encashment was returned as dishonoured for want of sufficient funds in the account of defendant. The plaintiff, accordingly, on 16-8-1995 filed the suit for the recovery of Rs. 50,000/- (Rs. 37,000/- being the principal amount and Rs. 13,000/- as interest on such principal amount at the rate of 18% per annum from 25-10-1993 till 31-7-1995).

3. The defendant while resisting the suit, denied having purchased barberry roots from the plaintiff. It was pleaded that the parties were dealing in the sale and purchase of barberry roots and have been supplying the same in Lucknow (UP). The defendant was possessed of the requisite licence for sale/supply of roots in U.P. whereas the plaintiff was not possessing such a licence. The plaintiff, therefore, had approached the defendant for the sale of his barberry roots in U.P. area. The plaintiff had agreed to receive the payment of cost of such roots as and when the same would be received by the defendant. Issuance of cheque for Rs. 37,000/- was admitted by the defendant. It was pleaded that such cheque was issued on the instance of the plaintiff, who had given an undertaking not to encash the cheque till payment was received from Lucknow by the defendant. An agreement in writing to this effect was executed between the parties. It was further pleaded that since the defendant had not received the payment from Lucknow, he was not liable to make the payment to the plaintiff. Objections as to maintainability of the suit, absence of cause of action, the suit being premature and also that the suit is bad for non-joinder of necessary parties.

4. On the pleadings of the parties, following issues were framed by the learned trial Court :--

1. Whether defendant purchased 'Herbs' to the tune of Rs. 37,000/- from plaintiff as alleged OPP

2. Whether the cheque qua the payment of this amount having been issued by defendant in favour of plaintiff was dishonoured due to insufficiency of funds as alleged OPP

3. Whether defendant is liable to pay rate of interest at Rs. 18% per annum on the aforesaid amount as alleged OPP

4. Whether suit of the plaintiff is not maintainable as alleged OPD

5. Whether plaintiff has no cause of action to file the suit OPD

6. Whether suit is bad for non-joinder of necessary parties OPD

7. Whether defendant is liable to pay Rs. 37,000/- with interest to the plaintiff as prayed OPP

8. Relief.

5. The learned trial Court decided issues No. 1 to 3 in favour of the plaintiff and issues No. 4 to 6 against the defendant. Consequently, the suit of the plaintiff for recovery of Rs. 50,000/- was decreed with costs in his favour and against the defendant.

6. In appeal preferred by the defendant, the learned District Judge, set aside the Judgement and decree of the Court below. The learned District Judge on the basis of the writing Ex. DW1/A came to the conclusion that the plaintiff had no cause of action to recover the amount in suit. Aggrieved by the impugned judgment and decree of the learned District Judge, the plaintiff is before this Court by way of present appeal, which stands admitted on the following substantial questions of law :--

1, Whether learned District Judge has erred in holding that the plaintiff has no cause of action for filing, the suit in view of Ex. DW 1/A which has been misconstrued, misinterpreted and misapplied

2. Whether under Section 118 of the Negotiable Instruments Act, 1881, presumption as to consideration, date etc. of cheque Ex. PD has not been

rebutted by the defendant?

3. Whether the learned District Judge has erred in drawing adverse inference against plaintiff on the point of his specimen writing and signatures when the admitted signatures of plaintiff on the plaint and Vakalatnama were already on record for purpose of comparison

4. Whether the learned District Judge on the basis of cheque Ex. PD dated 25-10-1993 has erred in not upholding the judgment, decree dated 7-2-1998 of the learned trial Court even in the presence of writing. Ex. DW1/A dated 4-10-1993

5. Whether the learned District Judge has misconstrued, misinterpreted writing Ex. DW1/A and cheque Ex. PD and the view taken by the learned District Judge is not possible on the basis of material on record

7. I have heard the learned counsel for the parties and have also gone through the record of the case.

Question No. 2

8. Issuance of cheque Ex. PD dated 25-10-1993 for a sum of Rs. 37,000/- is admitted by the defendant. Section 118, [Negotiable Instruments Act, 1881](#), which deals with presumptions as to negotiable instruments, provides :--

'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, indorsed, negotiated or transferred, was accepted, indorsed, 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 negotiable instrument was made before its maturity;

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

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

(g) that holder is holder in due course : that the holder of a 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.'

9. Dealing with the above provision, it has been held by a Division Bench of the Bombay High Court in Tarmahomed Haji Abdul Rehman v. Tyeb Ebrahim Bharamchari, AIR 1943 Bombay 257. that Section 118 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. In order to determine whether contrary is proved or not as required by the Section, the whole volume of evidence led before the Court including admissions made by the plaintiff 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 burden of proof lies on the defendant and that burden has got to be discharged by the defendant.

10. In Beni Madhab Nath v. Juyandra Nath Barman, AIR 1979 Gauhati 46, dealing with the presumption under Section 118, [Negotiable Instruments Act, 1881](#), it was held :--

'Mr. B.K. Das, the learned counsel for the appellants has submitted before me that the first appellate Court has misconceived the provisions of Section 118(a) of the [Negotiable Instruments Act, 1881](#). According to the learned counsel, the findings that no cash consideration had actually passed in respect of the hand-note are questions of law and can be agitated before this Court in a second appeal. Secondly, the learned counsel submits that even if a particular consideration is mentioned in a negotiable instrument and that consideration is found to be false and some other consideration is set up, it is the duty of the Court to take into consideration the other consideration in deciding whether the defendant has discharged the burden cast upon him by Section 118 of the said Act.'

11. In *Rama Raja Ram v. Dhruba Charan Jena*, AIR 1982 Orissa 264, the plaintiff therein had brought an action on the basis of promissory note. The defendant while admitting the execution of the note pleaded that the same was forcibly obtained from him under threat and coercion. No evidence was led by the plaintiff as to passing of consideration. It was held :

'Section 118 of the Negotiable Instruments Act is imperative and the Court is bound to draw the initial presumption that the negotiable instrument was made for consideration when its execution is proved. It throws the burden of proof of want of consideration on the defendant. Similarly Section 102 of the Evidence Act throws the burden of proving want of consideration on the defendant, for if no evidence was produced by either side and the execution of the document being admitted, the plaintiff's claim would be decreed. When the Court below decided that the defendant had failed to prove that the promissory note was obtained from him under threat and coercion, it was unnecessary to consider whether the plaintiff had proved passing of consideration or not. The execution of the hand-note having been admitted, it was not necessary for the plaintiff to prove passing of consideration. The presumption under Section 118 of the Negotiable Instruments Act, continued in all its rigour until the contrary was proved. The mere fact that the plaintiff did not adduce sufficient evidence to prove passing of consideration did not in any way relieve the defendant from the burden of establishing the contrary of the presumption arising under Section 118 of the Negotiable Instruments Act.'

12. It may be stated that it is not the case of the defendant that the cheque Ex. PD was without consideration. The case set up by vide para 2 of his written statement is as under :--

'That para No. 2 of the plaint is wrong and hence denied. The defendant along with his barbering roots sold the barbering roots of the Plaintiff also at Lucknow and the payment was to be made later on to the Defendant by his purchaser/Arti. The Plaintiff on 4-10-93 insisted for giving a cheque for the price of barbering roots given by the Plaintiff to the Defendant for selling the same at Lucknow and undertake not to cash it till the payment of the same is not received by the Defendant from Lucknow nor he will institute any suit till the payment by the Arti to the Defendant for the same. The Plaintiff give this undertaking through an agreement reduce in writing in presence of witnesses, the copy of which is attached with the written statement.'

13. The defendant while appearing as his own witness also has not stated that the cheque was without consideration. Rather it is admitted case of the defendant that the cheque was given by him towards the price of barberry roots delivered to him by the plaintiff for sale at Lucknow. Therefore, on the evidence coming on record as well as the pleadings put forth by the defendant himself the presumption as to consideration attached to Ex.PD has not been rebutted. The question is answered in favour of the plaintiff.

Question No. 3

14. Ex. DW 1/A is the writing dated 4-10-1993 alleged to have been executed by the plaintiff undertaking not to encash the cheque till the payment was received from Lucknow. The plaintiff has denied such document. During the course of trial of the case after the defendant had closed his evidence and when the case was fixed for rebuttal evidence of the plaintiff, an application was made by the defendant was obtaining the specimen handwriting/signatures of the plaintiff for the purpose of getting the same compared with the disputed handwriting/signatures on Ex. DW 1/A by a handwriting expert. Since the plaintiff vide his statement dated 29-5-1997 declined to give his specimen handwriting/signatures, the learned trial Court on the same day dismissed the

application of the defendant.

15. No specific finding was recorded by the learned trial Court on the question whether the writing Ex. DW 1/A was executed by the plaintiff or not. The learned trial Court merely observed that Ex. DW 1/A had no effect on the merits of the case and that the same was not in respect of the cheque Ex. PD.

16. The learned first appellate Court on the basis of the evidence coming on record as well as by drawing an adverse inference against the plaintiff on his refusal to give specimen handwriting/signatures for the purpose of comparison, came to the conclusion that the writing Ex. DW 1/A was executed by the plaintiff.

17. There is no denying that under Section 73, Evidence Act, the Court has the power to call any party to give his specimen handwriting/signatures for the purpose of comparison and on the refusal of such party to give his specimen handwriting/signatures, an inference under Section 114, Evidence Act, may be drawn against him. However, in the present case an error has been committed by the learned first appellate Court in drawing an adverse inference against the plaintiff.

18. It is pertinent to note that the defendant had closed his evidence on 7-10-1996. The application for taking specimen handwriting/signatures of the plaintiff was made on 19-10-1996 when the case was fixed for rebuttal evidence of the plaintiff. While making the application, no prayer was made by the defendant for production of additional evidence. In the absence of permission to lead additional evidence, the application for taking specimen handwriting/signatures and for sending the same to handwriting expert for comparison with the disputed signatures on Ex. DW 1/A could not have been otherwise allowed. Besides, admitted signatures of the plaintiff were available on the plaint of the suit, replication as well as power of attorney in favour of the counsel for the plaintiff. The defendant could have asked for sending such admitted signatures for comparison with the disputed signatures on Ex. DW 1/A. No such course was adopted by the defendant. Therefore, no adverse inference could have been drawn against the plaintiff on his refusal to give specimen handwriting/signatures.

19. The writing Ex. DW 1/A is shown to have been recorded on 4-10-1993 while cheque Ex. PD is dated 25-10-1993. It is not the case of the defendant either in his pleading or in his evidence that he had issued a post dated cheque in favour of the plaintiff on 4-10-1993. In the absence of pleadings and evidence, the learned first appellate Court has wrongly drawn the inference that the cheque might have been post dated by the defendant.

20. Even if it be assumed that the writing Ex. DW 1/A was executed by the plaintiff as alleged by the defendant, such agreement is void and cannot be enforced in view of uncertainty of the meaning thereof void Section 29. [Contract Act, 1872](#). Under the said writing, the plaintiff is alleged to have undertaken not to enforce the payment of the cheque, till payment of barberry roots was received from Lucknow. There is as such uncertainty as to the period when the amount was to be received. Besides, admittedly, the barberry roots were sold by the defendant at Lucknow. He was to enforce payment thereof from the party to whom he had sold barberry roots at Lucknow. If no action is taken by the defendant to recover the price of the roots, the claim of the plaintiff as against the defendant cannot be defeated simply on the ground that the defendant has not received such amount from Lucknow.

21. Admittedly, the barberry roots were sold at Lucknow by the defendant. Such sale was not made by him as agent of the plaintiff. Therefore, the plaintiff has no locus against such purchaser. Only the defendant can recover the price from the purchaser at Lucknow. The case of the defendant that since the plaintiff was not having requisite licence/permit to sell the barberry roots outside the State of H.P. he had approached him (the defendant) to sell the roots on his behalf stands fulfilled by his own statement as DW 1 wherein he has admitted that the plaintiff did possess a licence/permit in this regard.

22. Nothing has come on the record by the defendant as to whom he had sold the barberry roots and for how much at Lucknow. It is the admitted case of the defendant that he received barberry roots from the plaintiff worth Rs. 37000/-. Therefore, he is liable to pay such amount to the plaintiff.

Questions Nos. 1, 4 and 5

23. In view of the findings recorded under questions Nos. 2 and 3 above, the findings of the learned District Judge that in view of writing Ex. DW 1/A the plaintiff has no cause of action against the defendant are wrong and cannot be sustained. The defendant is liable to pay the amount of cheque Ex. PD in spite of the writing Ex. DW 1/A. There has been complete misconstruction and mis-application of the evidence coming on record by the learned first appellate Court.

24. As a result, the appeal is allowed. The judgment and decree dated 29-6-1998 of the learned District Judge are set aside and that of the learned trial Court dated 7-2-1998 restored. The plaintiff shall be entitled to costs throughout.

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