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PARBHU DAYAL v. DWARKA PRASAD.

Several other cases were cited before us, but we do not think that there is any case which bears directly on the point before us. Some of the cases have drawn the distinction to which we have already alluded and which undoubtedly exists between the cases of torts of different kinds.

In this particular case there is nothing in favour of the plaintiff which could induce us to grant him any relief. In the result, we dismiss the application with costs.

Before Mr. Justice Kendall.

JAGMOHAN MISIR (PLAINTIFF) *v.* MENDHAI DUBE AND ANOTHER (DEFENDANTS).*

1931 *November,* 17.

Promissory note—Consideration—Burden of proof—Negotiable Instruments Act (XXVI of 1881), section 118—Provincial Small Cause Courts Act (IX of 1887), section 25—Revision—Misdirection and misplacing of burden of proof.

The defendants to a suit on a promissory note in a court of small causes admitted their signatures but alleged that they had signed a blank paper, without any consideration in cash, in order to induce the plaintiff to give evidence for them in a certain case. Thereupon an issue was framed in such a form as in fact to throw the burden of proof regarding consideration on the plaintiff. Evidence was led on both sides and in the result the suit was dismissed on the ground that consideration was not proved. It was *held*, in revision, that the Judge had lost sight of section 118 of the Negotiable Instruments Act, under which every negotiable instrument must be presumed to be for consideration, and so the issue was wrongly struck so as to throw the burden on the plaintiff; that the Judge had misdirected himself, with the result that even without any discussion of the defence evidence or even a definite statement that this evidence had been considered on its merits he had come to the conclusion that the defence had been made good; and that the case was one fit for interference under section 25 of the Provincial Small Cause Courts Act.

Mr. *Kedar Nath Sinha*, for the applicant.

*Civil Revision No. 186 of 1931.

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JAGMOHAN MISIR v. MENDHAI DUBE.

Mr. *Gopalji Mehrotra*, for the opposite parties.

KENDALL, J. :—This is an application for the revision of an order and decree of the Judge of the small cause court, Jaunpur, dismissing the plaintiff's suit. The plaintiff's suit was based on a promissory note for Rs. 300. The contesting defendants, although they admitted that they had signed the promissory note and receipt, claimed that they had affixed their signatures to a blank paper and that there was no consideration in cash. They alleged that they had induced the plaintiff to give evidence for them in a mutation case by affixing their signatures to the promissory note and receipt. On these pleadings the Judge framed an issue in the following form: "Did the defendants execute the promissory note in suit for consideration?" The burden of proof was in fact thrown on the plaintiff, and he produced himself and two witnesses, namely the witness to the promissory note and receipt and a mukhtar, to prove that the note had been duly executed for a cash consideration. The first defendant produced himself and one witness who alleged that he was present when the note was executed and that there was no consideration. It is argued in revision that this decision was contrary to law.

In the case of *Muhammad Bakar* v. *Bahal Singh* (1) a Full Bench of this Court defined the limitations of section 25 of the Provincial Small Cause Courts Act, 1887. They held that the High Court should not interfere under that section "unless it clearly appeared to us that some substantial injustice to a party to the litigation had directly resulted from a material misapplication or misapprehension of law or material error in procedure in the court of small causes."

In the present case, after hearing counsel on both sides and examining the pleadings and the record, I am clearly of opinion that the learned Judge misdirected

(1) (1890) I.L.R., 13 All., 277.

himself and that his conclusion is largely a result of that misdirection. Under section 118 of the Negotiable Instruments Act, 1881, it is laid down that the presumption shall be made that every negotiable instrument was made or drawn for consideration until the contrary is proved. The issue should therefore not have been struck in the form in which it was struck so as to throw the burden of proof on the plaintiff. It is true that both sides produced evidence. The court, however, did not find that the defendants had made good their somewhat elaborate defence. It found in the first place that "the promissory note is not free from suspicion". No reason however is given for this statement, with which the judgment starts. The promissory note is as a matter of fact drawn on a printed form and there is nothing on the face of it that throws any doubt on its genuineness. The judgment proceeds, however, to show that in another litigation the plaintiff made a damaging admission, viz., that on a certain date subsequent to the date of the promissory note the defendants did not owe him any debt. This is not quite accurate, as what the plaintiff said was that the defendants had not executed any "*dastawez*", and it is explained in argument that "*dastawez*" is not ordinarily the term used for a promissory note, so that it is by no means certain that the plaintiff was referring to a promissory note when he mentioned the word *dastawez*. Nevertheless from this statement the court has concluded that the promissory note was a bogus note, and it proceeds from this to the conclusion that the defence is correct, without any discussion of the defence evidence or even a definite statement that this evidence had been considered on its merits.

As a matter of fact the defence evidence is worth very little. The first defendant came into the witness box and repeated what had been said in the written statement. One witness supported him so far as to say that the promissory note was "*bila muwaeza*". This

sounds suspiciously like the repetition of a pleading. There was no evidence beyond the statement of the one defendant to support the story that the plaintiff had agreed to give evidence in a mutation case on condition that the defendants executed a promissory note for Rs. 300. If the court had had section 118 of the Negotiable Instruments Act in mind, and if the issue had been properly struck and the burden of proof thrown on the defendants, it is scarcely conceivable that the decision would have been that the defence had been made good.

But apart from the weakness of the defendants' case there was clear evidence to support the story told by the plaintiff and the promissory note. Not only the plaintiff, but the man who had been a witness to the promissory note itself and the receipt and a mukhtar both said that Rs. 300 in cash had been paid to the defendants when those documents were written.

It has been argued that as both sides produced evidence the question of the burden of proof was not of great importance, for in such cases the burden of proof is constantly shifting. The learned counsel for the applicant has referred to the case of *Moti Gulabchand* v. *Mahomed Mehdi* (1) in which a somewhat similar question as to the burden of proof was raised. There, however, were certain circumstances, which do not exist in the present case, but which were held to weaken the ordinary presumption that a negotiable instrument had been executed for value received, and in spite of those circumstances when the plaintiff produced evidence that was worthy of credit it was held that "A heavy onus is thrown upon the defendant which can only be met by a perfectly truthful and harmonious statement which the court feels able to rely upon with confidence." In my opinion the evidence in this case produced for the defendants falls very far short of a perfectly truthful and harmonious statement, and if the court had not misdirected

(1) (1895) I.L.R., 20 Bom., 367.

itself throughout I do not believe that it would have been able to rely upon it with confidence.

In these circumstances I must allow the application for revision, set aside the order of the Judge of the small cause court and direct that the plaintiff's suit be decreed with costs in both courts.

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

GOPI SHANKAR (PLAINTIFF) *v.* LILAWATI AND OTHERS (DEFENDANTS).*

1931 *November* 17.

Abadi—House of agricultural tenant—Whether appurtenance to his holding—Presumption—Ejectment from house on ceasing of tenancy—Landlord and tenant—Evidence Act (I of 1872), section 110.

There is no presumption of law that the house occupied by a cultivator in a village is an appurtenance to his holding so that the house or at least the site must be given up simply because the tenancy has either been lost or has lapsed by death in favour of the zamindar.

While the circumstances of a particular case may give rise to an inference that a tenant is entitled to occupy part of the village site so long as he is a cultivator in the village, or so long as he cultivates a particular holding, it is not permissible to presume generally that the right to occupy the site of a house in the village abadi ceases when he ceases to cultivate land in the village or is ejected from a particular holding. The landlord must establish by direct evidence, or by proof of circumstances which justify the inference, that the defendant's right to the site is dependent on his right to retain the holding.

Mr. *U. S. Bajpai*, for the appellant.

Mr. *K. C. Mital*, for the respondents.

MUKERJI, J. :—This appeal has been referred to a Bench of two Judges because the learned Judge before whom it came thought that the matter under

*Second Appeal No. 73 of 1929, from a decree of Ratan Lal, Additional Subordinate Judge of Farrukhabad, dated the 22nd of November, 1928, reversing a decree of Sheobaran Singh, Munsif of Kanauj, dated the 17th of December, 1927.