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plaint should be returned to them for presentation to the proper court. The plaintiffs came to court on the allegation that this was a grove in the possession of defendants Nos. 1 and 2, who were zamindars. There was no suggestion in the plaint that at the present moment the grove retains the character of a tenant's grove and is not a zamindar's grove. The defendants were pleading adverse possession over this property. Without going into the question of fact, it would be impossible to say that the suit was not cognizable by the civil court. As the plaintiffs chose the forum, it must be assumed against them that they treated the property as if it was not a land within the meaning of the Agra Tenancy Act. We, therefore, see no reason to entertain this plea for the first time in the Letters Patent appeal, particularly as it was not urged before the learned Judge who heard the appeal.

The appeal is dismissed with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice and Mr. Justice Bennet

LAL GIRWAR LAL (PLAINTIFF) *v.* DAU DAYAL (DEFENDANT)*

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Promissory note—Consideration—Burden of proof—Evidence led on either side inconclusive—Negotiable Instruments Act (XXVI of 1881), section 118—Evidence Act (I of 1872), section 102—Civil Procedure Code, order XVIII, rule 3.

If a suit is brought on a promissory note, and execution is admitted but consideration is denied, the burden of proving want of consideration is on the defendant, according to section 118 of the Negotiable Instruments Act as well as section 102 of the Evidence Act. If in such a case the plaintiff leads evidence in the first instance to prove consideration, it is an exercise of the option given to him by order XVIII, rule 3 of the Civil Procedure Code, which does not in any way involve an admission on his part that he is undertaking the burden of

*Second Appeal No. 1057 of 1931, from a decree of J. N. Dikshit, Additional Subordinate Judge of Agra, dated the 23rd of April, 1931, reversing a decree of Manzoor Ahmad Khan, Munsif of Fatehabad, dated the 30th of July, 1930.

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proving that issue, the burden of which lies on the defendant; and if the plaintiff's evidence, as well as the defendant's evidence as to want of consideration, are both found to be inconclusive so that the court does not arrive at a clear finding on the question, the initial presumption in the plaintiff's favour is still available to him and he ought to succeed. But if the court has, after a consideration of the entire evidence, recorded a clear finding one way or the other, then that finding is based not on a mere presumption but on the evidence, and the question of burden of proof is no longer material.

In the present case, however, the suit was really based on the original loan and not on the document which was executed afterwards, and which, again, was a bond and not a promissory note, and the admission of the signature was qualified by an allegation of fraud; in these circumstances the weakness of the defendant's evidence could not avail the plaintiff and his failure to establish consideration was fatal to his suit.

Messrs. *G. Agarwala* and *B. Malik*, for the appellant.

Mr. *S. B. L. Gaur*, for the respondent.

SULAIMAN, C. J., and BENNET, J.:—This is a plaintiff's appeal arising out of a suit for recovery of Rs.700 with interest and costs, stated to have been borrowed by the defendant from the plaintiff and to be payable on demand. The plaint asserted that "After taking the loan, the defendant made over two writings to the plaintiff for his satisfaction which are hereto annexed." The plaintiff filed a document purporting to be a promissory note attested by witnesses and a receipt of the same date. The defendant denied that he had executed any promissory note in favour of the plaintiff and pleaded that the document filed by the plaintiff had been obtained from him by practising fraud, and also denied the passing of any consideration. The plaintiff led evidence in the first instance and the defendant produced rebutting evidence. The lower appellate court has disbelieved the plaintiff's evidence and has also considered that the defendant's witnesses are not worthy of belief. As the plaintiff failed to prove that the money had been lent to the defendant, the lower appellate court has dismissed the suit.

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The appeal was referred to a Division Bench because of an apparent conflict of opinion on the question whether, where the plaintiff has led evidence in the first instance to prove the consideration for a promissory note and has failed to establish the passing of consideration, he can fall back on the initial presumption in his favour. On this point the latest ruling of this Court in the case of *Ram Nath* v. *Ram Chandra Mal* (1) is in favour of the plaintiff. In that case the execution of the promissory note having been admitted by the defendant and the passing of consideration denied, the plaintiff could still avail himself of the presumption under section 118(*a*) of the Negotiable Instruments Act, even though the evidence produced by both the parties had not been believed by the courts. This view is in accord with the previous rulings of this Court in *Muhammad Tahir* v. *Raghubar Dayal* (2), *Babbu* v. *Sita Ram* (3) and *Jagmohan Misir* v. *Mendhai Dube* (4). The learned counsel for the respondent, however, relies on the case of *Kishen Ballabh* v. *Ghure Mal* (5), in which there are certain remarks which may be construed to amount to an expression of the view that where the plaintiff has chosen to open the case and lead evidence as to the passing of consideration and the courts have disbelieved that evidence, the presumption arising in favour of a negotiable instrument with regard to the passing of consideration would not hold good. It is not clear whether the learned single Judge meant to express that opinion clearly; if so, we would not be prepared to agree with that view. Possibly in that case the courts were satisfied on the entire evidence that some consideration had passed. In the case of *Muhammad Shafi Khan* v. *Muhammad Moazzam Ali* (6) it was laid down that in a case where consideration is denied and the plaintiff goes into the witness-box, and the result of his cross-examina-

(1) A.I.R., 1935 All., 154.
(2) (1911) 8 A.L.J., 736.
(3) (1914) I.L.R., 56 All., 478.
(4) (1931) I.L.R., 54 All., 375.
(5) (1915) 13 A.L.J., 322.
(6) (1922) 67 Indian Cases, 684.

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tion is such that he fails to establish the point which he set out to make, namely that he gave the consideration, and the court is satisfied that he did not give the consideration, the defendant can avail himself of that. We are not satisfied that it was meant to be laid down in that case that where the plaintiff merely fails to prove that consideration passed and the defendant also fails to prove that he did not get consideration, there is no presumption in favour of the plaintiff. Very probably in that case the court had come to the conclusion that some consideration had passed, because the learned Judge observed: "and the court is thus satisfied that he did not give the consideration which he alleges." The court is certainly entitled to record a categorical finding on the question of the passing of consideration on a consideration of the entire evidence produced by both the parties. The case of *Shambhu Dayal* v. *Lallu Mal* (1) may be distinguishable because there the plaintiff had gone back on the recital in the negotiable instrument and had admitted that at least part of the consideration had not been paid in cash. The learned Judges especially emphasised this fact and remarked: "As the case now stands the plaintiff himself has gone back on the recital in the promissory note to the effect that Rs.8,000 were paid over in cash." As in the present case there is no such going back, we are not called upon to consider the bearing of this ruling on this case, although it may be pointed out that section 118 of the Negotiable Instruments Act does not speak of any cash consideration.

The case of *Singar Kunwar* v. *Basdeo Prasad* (2) has no application because there the presumption under section 118 of the Negotiable Instruments Act was applied but it was held that that presumption had been rebutted by the evidence in the case.

It seems to us that under order XVIII, rule 3 of the Civil Procedure Code, where there are several issues the

(1) A.I.R., 1924 All., 256. (2) A.I.R., 1930 All., 568.

burden of proving some of which lies on the defendant, the plaintiff can "at his option" either produce his evidence on those issues in the first instance or reserve it by way of answer to the evidence produced by the other party. The exercise of the first of these options does not in any way involve an admission on the part of the plaintiff that he is undertaking the burden of proving that issue although that burden lies on the defendant. Section 118 of the Negotiable Instruments Act is imperative and the court is bound to draw the initial presumption that every negotiable instrument was made for consideration, when its execution is admitted. Similarly section 102 of the Indian 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 was admitted, the plaintiff's claim would be decreed.

But where the court has after a consideration of the entire evidence recorded a clear finding one way or the other, then that finding is based not on a mere presumption but on the evidence, and has to be accepted.

In the present case the main difficulty in the way of the plaintiff is that he was conscious of the fact that the ostensible promissory note which had been attested by witnesses either before or after the execution was a bond and not a promissory note, or that it had been tampered with. Again, the receipt was under-stamped and could not be accepted without being impounded. In the face of these difficulties the plaintiff chose to bring a suit for the recovery of the amount advanced as a loan and admitted that the documents were handed over to him "after the taking of the loan." Furthermore it is not at all clear that the defendant had clearly admitted the execution of the promissory note or the bond in question in the strict sense of the word. He had admitted his signature on the document but had qualified his admission by saying that the signature had

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been obtained by means of fraud. We, therefore, do not think that in this particular case the plaintiff should now be given a decree for the amount when the court below has recorded a clear finding that he has failed to prove that the money was lent to the defendant. He cannot be allowed to take advantage of the weakness in the defendant's evidence, namely that the want of consideration had not been satisfactorily established, when his suit is professedly not based on the bond.

The appeal is accordingly dismissed with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice and Mr. Justice Bennet

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AMIR AHMAD (PLAINTIFF) *v.* SAIYID HASAN (DEFENDANT)*

Provincial Insolvency Act (*V of* 1920), *section* 53—*Annulment of transfer within two years before insolvency—Burden of proof—Transfer by transferee of insolvent—Parties to annulment proceedings—Annulment order obtained against the first transferee whether binding on the second transferee—Provincial Insolvency Act, sections* 4(2), 28(7)—*Judgment* in rem.

Although section 53 of the Provincial Insolvency Act does not in terms apply to a transferee from a transferee of the person adjudged an insolvent, it does not follow therefrom that a subsequent transferee, who is a legal representative of the original transferee, cannot be bound at all by an order of annulment under that section. At the same time it must be remembered that except where the transfer by the insolvent was wholly fictitious and it was not intended that the property should in fact pass to the transferee, the transfer for the time being is valid, though voidable at the option of the receiver, and the subsequent annulment can not be equivalent to a declaration that the transfer was void *ab initio* with the necessary consequence that all subsequent transfers must as a matter of course fall through.

If a transfer made by the debtor is wholly fictitious and bogus and no interest in the property passes to the transferee, then the transfer is void *ab initio* and subsequent transferees

*Second Appeal No. 924 of 1931, from a decree of Ratan Lal, First Subordinate Judge of Saharanpur, dated the 14th of September, 1931, confirming a decree of R. S. Agarwal, City Munsif of Saharanpur, dated the 19th of December, 1930.