

APPELLATE CIVIL.

Before Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

MADHO RAM (Plaintiff)—Appellant,

versus

NANDU MAL (Defendant)—Respondent.

Civil Appeal No. 995 of 1916.

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March 18.

Negotiable Instruments Act, XXVI of 1881, Section 118—Shah Jog hundi—consideration—onus probandi—Second appeal—where lower Appellate Court has placed onus on the wrong party.

The respondent N. M. drew upon himself two *Shah Jog hundis* in favour of the appellant M. R., one on 5th November 1914, payable after 31 days, and the other on 9th November 1914, payable after 61 days. On 15th December 1914 N. M. brought an action for cancellation of the *hundis* on the ground that they were without consideration. A week later M. R. brought a counter-action claiming principal and interest on the earlier *hundi*; the period for payment on the second *hundi* had not then expired. Both actions were tried together and the first Court held that the *onus* of want of consideration was on N. M., the drawer, and that he had failed to discharge this *onus*. On appeal the Additional District Judge, placing apparently the *onus* of proving consideration on M. R., the drawee, held that he had proved consideration on the second *hundi* but not on the first. M. R. then presented a second appeal to this Court.

Held, that the *hundi* in dispute is what is called *Shah Jog hundi*, *i.e.*, a bill payable to a *Shah* or banker, which is similar to some extent to a cheque crossed generally, which is payable only to, or through, some banker, and that such a *hundi* satisfies the requirements of a negotiable instrument.

Held also, that under section 118 of the Negotiable Instruments Act there is a statutory presumption in favour of the passing of consideration and that the *onus* of proving want of consideration was therefore upon the drawer.

Held further, that in cases of this character in which the question of allocation of *onus* is the most vital question between the parties, it is the duty of the Court in Second appeal to rectify a mistake made by the lower Appellate Court in this respect.

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The facts of the case are sufficiently stated in the judgment of this Court.

Second appeal from the decree of S. Clifford, Esquire, Additional District Judge, Delhi, dated the 6th January 1916, reversing that of Lala Murari Lal Khosla, Subordinate Judge, 1st class, Delhi, dated the 27th July 1915, decreeing plaintiff's claim with costs.

MOTI SAGAR, for Appellant.

ABDUL RAZAK (for B. N. KAPUR), for Respondent.

The judgment of the Court was delivered by—

SHADI LAL, J.—The respondent Nandu Mal drew upon himself two *hundis* for Rs. 2,500 each in favour of the appellant Madho Ram, one on *Mangsir Badi* 3rd, *Sambat* 1971 (5th November, 1914), payable after 31 days, and the other on *Mangsir Badi* 7th, *Sambat* 1971 (9th November 1914) payable after 61 days. On the 15th December 1914 Nandu Mal brought an action for the cancellation of the *hundis* on the ground that they were without consideration. A week afterwards Madho Ram brought a counter-action claiming principal and interest on the earlier *hundi* which had fallen due. The period for payment on the second *hundi* had not then expired, so no action was brought on the strength of that *hundi*.

Both the actions have been tried together, and the crucial question for determination in both the cases is whether the *onus* as to consideration lay upon the drawer or the holder of the *hundis*. The Subordinate Judge held that the *hundis* were negotiable instruments, and consequently there was a statutory presumption in favour of the passing of the consideration as laid down by section 118 of the Negotiable Instruments Act. In view of this finding the trial Judge, upon a survey of the entire evidence, reached the conclusion that Nandu Mal had failed to prove that consideration did not pass, and he consequently decided both the suits against Nandu Mal. The Additional Judge, to whom Nandu Mal went up on appeal, has not expressly dealt with the question of *onus*; but his judgment contains clear indications that he was under the impression that it was for Madho Ram to prove the passing of the

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consideration for the instruments. After reciting the respective versions of the parties and the finding of the trial Court, the learned Judge sets out the point for determination in the following terms:—"The main question for decision is what transaction was entered into between the parties, and what consideration passed thereon. He then states that "the question set out above is a very difficult one to decide, as upon the evidence it is difficult to say which side is really telling the whole truth" and proceeds to enumerate the circumstances which tell in favour of the version of one party or of that of the other. The learned Judge concludes his examination of the evidence in these words:—

"Upon a review of the evidence and the peculiar circumstances of the case I am not satisfied that consideration passed on the first *hundi* of *Mangsir Badi* 3rd, *Sambat* 1917, but as regards the *hundi* of *Mangsir Badi* 7th I think that consideration did pass and find accordingly."

The above extracts from the judgment of the appellate Court and more especially the last one make it clear that the Court thought that it was the duty of Madho Ram to establish consideration for the *hundis*, and that it was for this reason that the Court reached the conclusion that while successful in proving consideration as regards the latter *undi* he had failed to satisfy the Court "that consideration passed on the first *hundi*."

The learned counsel for the respondent contends that when both the parties have adduced all the evidence in support of their respective versions and the Court has considered all the material thus placed before it, the question of the allocation of *onus* is immaterial. He accordingly urges that the finding of fact arrived at by the lower appellate Court should not be disturbed in Second appeal, even though that Court may have taken an erroneous view of the burden of proof. To this contention we cannot possibly accede. It seems to us perfectly clear that in cases of this character *onus probandi* is the most vital question between the parties, and that it is the determination of this question which

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settles the fate of the case. We have perused with considerable care the judgment of the Additional Judge, and we find that the learned Judge felt some difficulty in deciding which of the parties was telling the truth as regards the payment or otherwise of the money in respect of the *hundis*. It seems to us that if the learned Judge had been distinctly asked to answer the question whether the respondent had satisfied him that the consideration did not pass his reply would have been in the negative. We are accordingly of opinion that if the lower appellate Court has placed the *onus* on the wrong party it is the duty of the Court of Second appeal to rectify the mistake.

Whether the *onus* was on the drawer to prove want of consideration does not require any elaborate discussion, because it is admitted by the learned counsel for the respondent that the *hundis* in question must be regarded as negotiable instruments; and that the conclusion of the trial Judge on this point is not open to any objection. The instrument in respect of which the Additional Judge has given his verdict against the appellant, is what is called a *Shah Jog hundi*, which is a bill payable to a *Shah* or banker. A *hundi* of this kind is similar, to some extent, to a cheque crossed generally which is payable only to, or through, some banker. The object in both cases is that the payment should be made to a respectable person and not to a person who has got hold of the instrument in a surreptitious manner. In the case of a *Shah jog hundi* it is the duty of the payer to make inquiry before payment that the payee is a respectable person so that if the *hundi* turns out to be a stolen or a lost one or to contain a forged endorsement, the payer may be able to demand a refund from the *Shah* to whom the money has been paid by mistake.

The terms of the instrument make it clear that not only Madho Ram could demand payment on the strength thereof, but also his endorsee provided that the latter was a respectable holder, that is, a man of worth and substance known in the bazar. The bill could be transferred by endorsement, the only restriction being that the payment could be made only to a person of the above description. We consider that it satisfies the requirements of a negotiable instrument, and that the

presumption in favour of the passing of consideration attaches to it.

The learned Subordinate Judge has expressed his opinion that the evidence produced by the drawer is unsatisfactory and does not relieve him of the *onus* cast upon him. It seems to us that the Additional Judge would have reached the same conclusion, had he not made a mistake in placing the *onus* upon the wrong party. We are accordingly of opinion that his judgment must be set aside; and we therefore allow the appeal and setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs throughout.

Appeal accepted.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Broadway.

Mussammat JIWI (PLAINTIFF)—Appellant,

versus

SANDHI AND OTHERS (DEFENDANTS)—Respondents.

Civil Appeal No. 1962 of 1916.

Custom—Succession—self-acquired property—sister or collateral's in 6th degree—Mussalman Rajputs—Jullundur District—Rhwaj-4-am.

Held, that among Mussalman Rajput agriculturists of the Jullundur District the *onus probandi* was on the plaintiff, the sister of the deceased, to prove that she is entitled to succeed to her brother's land in preference to the defendants, collaterals in the 6th degree, the entry in the *Rhwaj-4-am* being against her, although the land was non-ancestral *qua* the defendants.

Ranjha v. Mussammat Jindwaddi (1) and *Bholi v. Kahna* (2), distinguished.

First appeal from the decree of Lala Sri Ram Poplai, Senior Subordinate Judge, Jullundur, dated the 21st March 1916, dismissing plaintiff's suit.

DURGA DAS (for MOTI SAGAR), for Appellant.

N. C. MEHRA and DEVI DAYAL, for Respondents.

The judgment of the Court was delivered by—

LEROSSIGNOL, J.—The suit out of which this appeal arises related to 1,345 *kanals* 16 *marlas* of land

(1) 104 P. R. 1914.

(2) 85 P. R. 1909.

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