APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

BANNU MAL (PLAINTIFF) Appellant

versus

MUNSHI RAM (DEFENDANT) Respondent.

1935

March 20.

Civil Appeal No. 331 of 1934.

Negotiable Instruments Act, XXVI of 1881, section 118 — Presumption that consideration passed — whether affected by the facts : that there was no necessity for raising the loan — that the creditor is a money-lender and the debtor a dissolute young man — or by the Indian Evidence Act, I of 1872, section 114, explanation to illustration (c).

Held, that a creditor is not bound to see how the loan is spent, nor is he compelled to inquire whether it is wanted for the dire necessities of life; on the other hand, a debtor is bound to repay the money actually borrowed by him, whether he squanders it in debauchery or expends it on charity

Held also, that by virtue of section 118 of the Negotiable Instruments Act, the Court is bound to presume that the consideration had passed, until the contrary is proved, and the *onus* lies on the person who makes an allegation to the contrary to prove that it is so.

Held further, that in such cases the explanation attached to illustration (*c*) of section 114, Indian Evidence Act, 1872, does not apply, as that explanation must be held to have been replaced by the rule contained in section 118 of the Negotiable Instruments Act, 1881, a later enactment. Moreover, the said explanation does not *in terms* refer to the *making* and *drawing* of negotiable instruments.

Moti Gulabchand v. *Mahomed Mehdi Tharia Topan* (1), explained and distinguished.

Held lastly, that the defendant had failed to prove that consideration had not passed.

(1) (1896) I. L. R. 20 Bom. 367.

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v.
MUNSHI RAM.

First appeal from the decree of Sardar *Sewa Singh, Senior Subordinate Judge, Delhi, dated the 22nd December, 1933, dismissing the plaintiff's suit.*

RAM KISHORE and NAWAL KISHORE, for Appellant.

KISHAN DAYAL and BISHAN NARAIN, for Respondent.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—This judgment will dispose of Civil Appeals Nos.331 and 332 of 1934, which have arisen out of two suits brought by Bannu Mal, plaintiff-appellant, against Munshi Ram, defendant-respondent, on the 14th December, 1931. One of the suits was for recovery of Rs.5,046-8-0 and the other for Rs.5,072-4-0. They were instituted under Order 37, Civil Procedure Code, as they were based on negotiable instruments, but in both cases the Court upon application by the defendant, gave leave to appear and defend them. The allegations in the plaint and the pleas with which they were met were common to both the suits and they were consequently decided by one judgment. Both were dismissed and as the appeals proceed on identical grounds, we have also chosen to dispose of them by one judgment.

The plaintiff's case was that the defendant and his father were conducting an expensive litigation in Bombay in 1931, that the case was actually proceeding from day to day in the High Court of Bombay in the month of July, 1931, that the defendant approached him for a loan a few days before it was actually advanced, that he represented to him that his father was badly in need of money, that being a neighbour he agreed to meet their need and that on being satisfied of the defendant's majority, he asked

the defendant to execute the two *hundis* in suit in his favour for Rs.5,000 each and paid Rs.10,000 to him in Rs.100 currency notes on the 27th of July, 1931. Of the two *hundis*, one was made payable in 61 days and the other in 90 days.

The defendant denied these allegations and pleaded want of consideration. His story was that his grandfather, Salig Ram, left a considerable amount of property which in a dispute with his father fell to his share, that he attained majority on the 5th May, 1930 only, that he fell into evil ways and grew a reckless debauchee while he was still in his teens, that in July, 1931, he became enamoured of the charms of an infamous woman named *Mussammat* Bibbo, that he took the plaintiff into his confidence, who informed him that he would not be able to gain access to her unless he engaged her regularly and that to achieve that object it would be necessary for him to maintain a house for her and pay her Rs.400 per mensem in addition. The defendant had no money of his own and as he was bent upon gratifying his lust at any cost, he readily agreed to the plaintiff's suggestion to sign two documents described as *hundis* each for Rs.5,000 in his favour, in lieu of which the plaintiff undertook to bear all expenses to be incurred in connection with *Mussammat* Bibbo and to pay her the fixed monthly allowance. The plaintiff, however, did not fulfil his part of the contract and the whole scheme fell through. In December, 1931, the defendant's parents became aware of these transactions and compelled him to make a settlement with the plaintiff with a view to end further disputes and to save the family honour, and consequently on the 7th December, 1931, the defendant paid the plaintiff Rs.3,500 in full satisfaction of his claim. Thereupon, the

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plaintiff destroyed the two documents which the defendant had executed in his favour and consequently the two *hundis* in suit were fictitious and forged and the defendant was not at all liable on them.

The Senior Subordinate Judge came to the conclusion that the defendant had failed to establish that the *hundis* in suit were executed by him for the purpose of retaining *Mussammat* Bibbo and for securing her monthly allowance, but dismissed the suits on the ground that no consideration had passed. The plaintiff has appealed.

We may say at the outset that neither the Subordinate Judge has disposed of the issue dealing with the alleged settlement, nor has the respondent's counsel touched the matter before us. It has also not been disputed that the *hundis* in question were executed by the defendant. The only question, therefore, that requires determination in these appeals is whether the defendant had discharged the *onus* that lay heavily on him to prove want of consideration.

It may be remarked here that in the Court below the case was fought not on the basis of want of consideration, but on the basis of immorality of consideration and its subsequent failure and although the Senior Subordinate Judge had come to a definite finding that the defendant had failed to substantiate his allegations on that score, he yet appears to have allowed his mind to be influenced by the alleged immorality of the defendant and to conclude that no consideration had passed. Counsel for the respondent has also taken the same line of argument before us, but we have no hesitation in remarking that that is an erroneous way of dealing with this matter. Whether the defendant was a scoundrel or a saint will not matter. Nor will

it matter whether the plaintiff was a disreputable cocaine smuggler or an honest business man. In cases of simple loans where the power of the debtor is not subject to any limitations, these considerations are quite foreign to the issue involved. A creditor is not bound to see how the loan is spent, nor is he compelled to inquire whether it is wanted for the dire necessities of life. Similarly, a debtor is bound to repay the money actually borrowed by him, whether he squanders it in debauchery or expends it on charity. The only simple issue involved in such cases is whether, when execution is admitted or proved, there is any material on the record to show that no consideration had passed. By virtue of section 118 of the Negotiable Instruments Act, the Court is bound to presume that the consideration had passed until the contrary is proved and the *onus* lies on the person who makes an allegation to the " contrary " to prove that it is so. Moreover, a casual or a professional money-lender is as much entitled to the benefit of legal presumptions as any innocent business man in the world and no degree of sentiment, that one may cherish against him or his profession, can legally deprive him of that benefit

Counsel for the respondent has strenuously contended that in such cases the explanation attached to illustration (*c*) of section 114, Indian Evidence Act, applies, and that in the case of a dissolute young man dealing with a professional money-lender, the *onus* contemplated by section 118 of the Negotiable Instruments Act is so weakened that his bare denial is sufficient to make it obligatory on the money-lender to prove that the document was made for consideration, even if its execution was admitted or proved. In support of his contention, he has mainly

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relied on *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan* (1) and some cognate authorities like *Sundarammal V.* v. *Subramania Chettiar* (2) and *The Official Assignee of Madras* v. *G. Sambanda Mudaliar* (3) which are based on that decision. It is no doubt true that the learned Judges who decided *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan* (1) remarked as follows :—

" These facts being admitted (apart from the technical rule laid down in section 118 of the Negotiable Instruments Act) the ordinary presumption that a negotiable instrument has been executed for value is so much weakened, that the allegation of the young man that he has not received full consideration is sufficient to shift the burden of proof and to throw upon the money-lender the obligation of satisfying the Court that he has paid the consideration in full. This is, we think, the practical effect of illustration (*c*) to section 114 of the Evidence Act, and its explanation."

But it also appears from the same judgment that the learned Judges observed that the question between the parties was one of pure fact and further added that they did not lay down the above propositions as rules of law, but had stated them as guides which they had placed before themselves in examining the evidence which had been recorded. It is significant that they decreed the money-lender's suit against a young profligate in spite of these observations. Those decisions that proceed on the broad propositions stated in that judgment and treat them as absolute rules of law, rather than as mere rules of caution, undoubtedly go beyond its scope.

(1) (1896) I. L. R. 20 Bom. 567. (2) (1916) 30 I. C. 971.
(3) (1920) I. L. R. 43 Mad. 739.

Illustration (*c*) to section 114 of the Evidence Act reads as follows :—

" that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;"

To this is attached an explanation in the following terms :—

" But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it :—as to illustration (*c*)—A, the drawer of a bill of exchange, was a man of business, B, the acceptor, was a young and ignorant person, completely under A's influence."

In the first place it must be remembered that section 114 of the Evidence Act was enacted in 1872 and then came the Negotiable Instruments Act nine years later. What was merely permissible in 1872 was converted into a statutory obligation in 1881. It cannot be reasonably urged that when it was enacted in section 118 of the Negotiable Instruments Act that until the contrary was proved, it should be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it had been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration, it did not in any way affect the provisions of illustration (*c*) to section 114, Evidence Act. If this argument were accepted, the result would be that in one and the same matter one provision of law would merely permit a presumption to be made and the other would impose a statutory obligation to make it. This surely could not be the intention of the legislature and in these circumstances we must infer from the later modification of the rule

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laid down in illustration (*c*) to section 114 of the Evidence Act that the subsequent alteration was intended to replace the previous enactment. Moreover, it may be noted that while illustration (*c*) to section 114 is confined to the acceptance or endorsement of a bill of exchange, section 118 of the Negotiable Instruments Act applies to the making or drawing of it also.

Secondly, all that the explanation to illustration (*c*) lays down is that while applying the maxim enacted in illustration (*c*), the Court shall duly consider the fact that the acceptor of a bill of exchange was completely under the money-lender's influence. In other words, the explanation merely sounds a warning that the rule laid down in illustration (*c*) was not intended in any way to override the general provisions of law, that a contract entered into under undue influence was bad.

Thirdly, the rule laid down in *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan* (1) is not of universal application and cannot serve as a conclusive reply to all suits brought by money-lenders against dissolute young men, and in spite of what is laid down there, it is still open to a Court to determine in every case whether the person who denies consideration has succeeded in supporting his denial by such direct or circumstantial evidence which may be sufficient in itself to rebut the presumption laid down in section 118 of the Negotiable Instruments Act.

[*Their Lordships then proceeded to discuss the evidence and finished their judgment as follows.*]

In the result, we are satisfied that the *hundis* in both the suits were executed for consideration and

(1) (1896) I. L. R. 20 Bom. 367.

accepting both appeals, set aside the decrees of the Court below and decree both suits with costs throughout.

P. S.

Appeals accepted.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

AZIZ-UL-RAHMAN (PLAINTIFF) Appellant

versus

FAZAL-UL-RAHMAN AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No.902 of 1932.

Execution of Decree — One of the joint decree-holders purchasing in his own name property put up to sale — other decree-holder — whether entitled to a share in the purchase — Civil Procedure Code, Act V of 1908, section 66 — whether applicable.

Held, that where one of two joint decree-holders purchases a property of the judgment-debtor at a Court sale held in execution of the decree, the purchase money being payable out of the decretal amount, he must be held to have made the purchase for the benefit of both decree-holders, though made in his own name, and the other decree-holder is entitled to recover a share of the purchased property; section 66 of the Civil Procedure Code has no application to such a case.

Lal Singh v. *Mst. Chotey Beti* (1), *Ganga Sahai* v. *Kesri* (2), and *Khub Chand* v. *Todar Mal* (3), followed.

First Appeal from the decree of Lala *Chiranjiv Lal, Subordinate Judge, 1st Class, Delhi, dated 8th March, 1932, dismissing the plaintiff's suit.*

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(1) 1933 A. I. R. (All.) 855. (2) (1915) I. L. R. 37 All. 545 (P. C.).
(3) 1924 A. I. R. (All.) 813.