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BOISOGOMOFF v. NAHAPIET JUTE COMPANY.

BANERJEE J.

samples are all of inferior quality, the probability that the bulk is of the same quality is so great that every prudent man would act upon the supposition that it is of such quality, and, if that is so, the Court ought to hold that the fact that the goods are of inferior quality is proved in such a case.

HILL J. I agree with the learned Chief Justice, and, I think, speaking for myself, that, if regard be had to the manner in which the case of the defendant company was put in the written statement, the plaintiff might well have supposed that the issue which it was intended to raise for trial was, whether upon the results of the survey, and judging from it alone, the jute supplied was of the quality contracted for. So far as my experience goes, it would be unusual and contrary to the practice of the trade to require a more exhaustive test than that which was applied in the present case, and there is nothing in the written statement that I can perceive to suggest to the plaintiff that, an adequate survey having been made, he would be called upon to adduce evidence bearing directly upon the quality of the consignment as a whole. That the plaintiff's survey was sufficient according to the understanding of mercantile men, for the purpose of determining the quality of the bulk, is apparent from the evidence on both sides.

Appeal allowed.

Attorneys for the appellant: *Leslie and Hinds.*

Attorneys for the respondents: *Morgan & Co.*

S.C.B.

PRIVY COUNCIL.

P. C.*
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Feb. 13.

BHOG HONG KONG
v.
RAMANATHEN CHETTY.

[On appeal from the Court of the Recorder of Rangoon.]

Promissory note—Presumption of payment arising from possession of note by debtor—Evidence rebutting presumption—Books of account kept in course of business—Act I of 1872 (Evidence Act) s. 34.

In a suit on a promissory note where the note and the security for its payment were in the possession of the defendant:

* *Present:* LORD DAVEY, LORD ROBERTSON, and SIR ANDREW SCOBLE.

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Held, that, under the circumstances of this case, as shown by the evidence, the *primâ facie* presumption that the note had been paid was rebutted.

Books regularly kept in the course of business can, under the Evidence Act, be used not only for the purpose of refreshing the memory of a witness, but also as corroborative evidence of the story he tells.

APPEAL from a decree (16th March 1900) of the Court of the Recorder of Rangoon decreeing with costs the suit of the respondents.

The defendants Bhog Hong Kong and another appealed to His Majesty in Council.

The suit was instituted by Ramanathen Chetty and others for the principal and interest due on a promissory note executed by the defendants in favour of the plaintiffs on 18th March 1897. The plaintiffs, who were carrying on business as bankers in Rangoon, had for some years previous to 1897 been making advances to the defendants' firm, which carried on business as dealers in rice. On 18th March 1897 the defendants, who were husband and wife, executed in favour of the plaintiffs two promissory notes, each for Rs. 10,000, payable on demand and bearing interest at Re. 1-8 per cent. per month. One of these notes had, the plaintiffs' admitted, been paid off and had been given up to the defendants. On being called upon for payment of the other note, the defendants alleged that they had paid it off on 17th July 1897.

Hence the suit for Rs. 12,745, the amount due on the latter note.

The plaint stated that this note was a renewal of an earlier promissory note, dated 20th June 1896, for the same amount, and that in respect of that note the defendants had deposited with the plaintiffs certain title-deeds, but that, as the defendants afterwards contended that the title-deeds were deposited in respect of two hundis for Rs. 5,000 each, which were paid off on 1st June and 15th June 1897, respectively, the plaintiffs had returned the title-deeds to the defendants on the latter date, and the promissory note in suit had by some mistake been returned amongst those papers.

The main defence was that the note had been paid off and returned to the defendants. The defendants filed separate

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written statements. The defendant, Bhog Hong Kong, stated that he gave the plaintiff, Mosthea Chetty, the title-deeds as security as well for the promissory note sued upon as for the two hundis of Rs. 5,000 each, and that the title-deeds were returned to him by the plaintiffs not when the hundis were paid off, but on 17th July 1897, when he alleged that the promissory note, now sued upon, was discharged.

The second defendant alleged that she had given Bhog Hong Kong a sum of Rs. 10,000 for the purpose of paying off the note, and that a day or two afterwards he had brought her the note saying that he had discharged it.

Nothing was said as to the payment of any interest on the note.

On the 16th March 1900 the Recorder (SIR W. F. AGNEW) held that the note in suit had not been discharged, and gave the plaintiffs a decree for the amount claimed with costs.

Phillips for the appellants. The evidence adduced by the appellants satisfactorily proves payment of the promissory note. From the fact that the note was in the possession of the appellants there was a presumption that it had been paid, and the evidence on behalf of the respondents is not sufficient to rebut that presumption or the evidence of payment given by the appellants. Under the circumstances the onus is on the respondents to show that the note had not been paid, and this they have not done. The judgment appealed from erred in ignoring the presumption arising from the note having been returned to the appellants. It was, moreover, against the weight of the evidence and should be set aside.

Haldane K.C. and *J. H. A. Branson* for the respondents. It is admitted that it is for us to overcome the presumption arising from the possession by the appellants of the note, but that presumption is rebutted by the evidence adduced on our behalf. We would not have returned the note as having been discharged, unless the interest on it as well as the principal had been paid. The appellants say the interest was not paid until the 26th July; it is therefore improbable that the note was returned on 17th as having been discharged. The appellants

say the note and the title-deeds were returned together about that date. As to the title-deeds, the respondents absolutely disprove that statement. We say the title-deeds were returned on 15th June, and the books, regularly kept in the course of the business, and which can therefore be used, under s. 34 of the Evidence Act, to corroborate this story, prove that the 15th June was the actual date of the return of the deeds. The appellants' story being untrue as to this, the explanation given by us of how the note comes to be with the appellants, namely, that it was kept in the same bundle with the title-deeds and was inadvertently returned with them on 15th June, is by no means improbable. As to the actual payment alleged by the appellants, the great improbability that a sum like Rs. 10,000 was paid in coins without there being any evidence to show how they were transported to the respondents' place of business is strongly against the story that the note has been discharged. It is submitted the judgment is right and should be upheld.

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Phillips in reply.

The judgment of their Lordships was delivered by

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LORD DAVEY. This is an appeal from a decree of the late Court of the Recorder of Rangoon. The learned Recorder gave judgment for the plaintiffs, who are the present respondents, in an action on a promissory note. The peculiarity of the case is this—that both the promissory note, which was sued on, and the security, which was given for its payment, being some title-deeds of land at a place called Bassein, are at present in the hands of the defendants, that is, the present appellants. *Primâ facie*, therefore, the presumption is, where you find the instrument of a debt and the security for that debt in the hands of the debtor, that the debt has been discharged; but Mr. Haldane, for the respondents, while admitting that that presumption is a strong one, and that the burden of proof is upon him to rebut that presumption, contends that the evidence is such as to rebut the presumption.

Now, the learned Judge was also of that opinion; and their Lordships, having very carefully considered the evidence in the course of the argument, have come to the conclusion that the

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learned Judge took a correct view. In the first place, it must be observed that, according to the appellants' own view, the promissory note did not come into their possession in the ordinary course, because they admit that there was interest owing on the promissory note on the day on which they say it was handed to them, namely, the 17th July 1897 or a day or two afterwards. Interest was then due upon it, and that interest was not paid until the 26th July, and therefore it appears that the promissory note, even according to their own view, was handed to them not in the ordinary course, but before the principal and interest, which was due upon it, had been discharged.

In the next place, there are discrepancies and difficulties in the story of the appellants which do not exist in the story of the respondents, the plaintiffs; and the story of the respondents is, moreover, supported by their books, which have been regularly kept, and, according to the Evidence Act, may be appealed to not only for the purpose of refreshing the memory of a witness, but also as corroborative evidence of the story which he tells.

It is unnecessary to go into the complicated financial relations between the appellants and respondents. Suffice it to say that the appellants, who are husband and wife, carry on business in Rangoon, and the respondents are bankers or money-lenders carrying on business in the same place, and that financial transactions had been going on between them for some time. On the 18th March two promissory notes were made by the appellants to the respondents, one of which is the one sued on. It was made payable on demand and carried interest in the meantime, and was secured, together with two hundis for Rs. 5,000 each, which were executed the day before the promissory note, by the title-deeds of the land at Bassein. It is admitted on both sides that the two hundis were paid off on the 1st June and the 15th June 1897 respectively. According to the story of the respondents, the title-deeds were handed to the appellants at, or soon after, the time when the second of these hundis was paid off. They say that the first hundi was not paid on the day when it became due. The manager of the respondents' business warned the appellants that they would have to pay the other hundi on the day it was due, and that they asked that the title-deeds of the land might be

given up to them on payment of the two hundis, notwithstanding that they stood as security for the promissory note, and Moothia, the manager of the respondents, says that he acceded to that view.

Now, that at first sight looks a little extraordinary, that a banker should give up a security which he held for a promissory note without payment of the promissory note, but, on the other hand, it is apparent that the respondents had confidence in the solvency and honesty of the appellants, and that they were prepared, as appears from the subsequent proceedings, to lend them a very large sum of money without any other security than their personal security. On the other hand, the appellants say the title-deeds were retained by the respondents until some day after the 17th July, on which day the husband, the principal appellant, paid the sum of Rs. 10,000 in three or more bags of silver to the clerk of the respondents, and that on that payment the title-deeds and the promissory note in question were handed to him on the footing of the promissory note having been discharged. Reference has already been made to the fact that the promissory note, according to any view, was not then discharged, because interest remained due on it, which was not paid until a subsequent date.

Passing that over for the present, several questions have been raised. In the first place, a sum of Rs. 10,000 cannot be carried in your pocket. It is said to weigh 320 lbs., or something of that kind, and no attempt has been made to show how or by whom the money was transported to the office of the respondents, or what became of it when it got there. There was a faint suggestion, but, to do Mr. Phillips justice, it was not pressed, that the clerk of the respondents embezzled the money, but it would be difficult to see how so large a sum of silver could be embezzled by a clerk, having regard to the means of carrying on business at the shop, as it is called, of the respondents which was of a very modest character, and consisted of a wooden box, a safe, and a mat, and it would be difficult to see how the clerk who was in charge of a shop of that kind could embezzle and make away with so large a sum of silver without the knowledge of the respondents in the course of their business.

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It is essential to the view of the appellants, and indeed they insist upon it, that the promissory note and the deeds were not returned until a day or two after the 17th July. There is a discrepancy between the view taken by the principal appellant and his wife, the other appellant, as to whether the deeds were returned to the principal appellant himself, or whether they were brought by Moothia's clerk to the house, but nothing very much appears to turn upon that beyond noting that there is that discrepancy.

But a more serious question is, which is right?—were the deeds returned on the 15th June or on the 17th July? It is vital to the story of either party that they should be right upon that point. Now, in favour of their being returned on the 15th June we have an entry in the books of the respondents, the bankers, and according to the entries made in those books under the heading "15th June," we find this, "Credit received on return of the above hundi"—that is one of the hundis which were secured by the deeds,—"and the grant of the lands at Bassein deposited in connection with the transaction of the 18th March, Rs. 5,000." Now the learned Judge saw these books. It may be that he laid too much stress upon the books alone, but their Lordships will deal with them merely as corroborative evidence of the respondents' oral story. They do show this that in books which have been regularly kept, and which have been seen by the learned Judge in the Court below, and appeared to him to be kept in the regular course of business, there is a distinct statement that the deeds were returned on the 15th June. Indeed, it is fair to observe that, unless credit were given to this extent to the books as corroborating the evidence of the respondents, it would involve this, that a separate set of books (the entry occurring in its ordinary place and its right order) would have had to be written up for the purpose of being put in evidence in this case. Therefore their Lordships are disposed to agree with the learned Recorder that the evidence is in favour of the respondents that these deeds were in fact given up on the 15th June. Now, if that be so, it is not conclusive that the promissory note was given up on that date; but it goes a long way to shake the story given by the appellants, because, according to their view, the promissory

note and the deeds were both given up together on the same date, that is, a day or two after the 17th July.

The suggestion on behalf of the respondents is this: That the clerk, being directed by his employers to give up the title-deeds of the land according to the arrangement which had been made with the appellants, accidentally and by an oversight, or perhaps not understanding whether he had to give up all the papers which were naturally tied up together or not—accidentally or intentionally gave up the promissory note, which was tied up with the title-deeds, as well as the title-deeds themselves. But, however that may be, their Lordships are disposed to think that the balance of evidence is in favour of the deeds having been given up on the 15th June.

Now, what have the appellants got to corroborate the story which they tell? They produce a book which purports to be an interest account with these particular people only. No explanation is given why the book contains entries only with this particular firm, and it seems difficult to understand why people doing business, and apparently a large business from the amount of capital they employed, in Rangoon should keep a book confined to entries with one particular firm. This book contains in an entry written in the margin: "17th July 1897. Repaid to Moothia Rs. 10,000;" and in another book, which purports to be a statement of the interest account with Moothia Chetty on this promissory note, there is a note written at the bottom: "Principal returned, 17th July 1897." The learned Judge did not think that those books were entitled to the same credit as the books which were produced by the respondents, and their Lordships, without having seen the books, and therefore not being in the same advantageous position as the learned Recorder was for judging of the comparative weight attributable to the books of the appellants and respondents respectively, can quite appreciate the reasons why the learned Recorder did not think fit to give credit to those entries, and indeed, in their opinion, it would be impossible to give the same credit to books, or rather sheets of books, of that kind referring only to this particular transaction, as to books recording this transaction in common with other transactions in

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the ordinary course of business, and at the appropriate dates such as those put in on behalf of the respondents.

There are other difficulties in the way of the appellants, which their Lordships will mention without commenting at length upon them, arising from the absence of persons who might have been called as witnesses. For example, there is a person named Palaniappa. The story of the appellants is that they borrowed Rs. 5,000 from Palaniappa for the purpose of paying this Rs. 10,000 to the respondents on the 17th July. Now, if Palaniappa had been called, and had confirmed the statement which is also made that he received the deeds of this land in Bassein as security for that Rs. 5,000 which he lent to the appellants, it would corroborate, so far as it went, the appellants' statement, but Palaniappa was not called. Indeed, on the day on which the case was on the file for hearing, an application was made to take his evidence by commission, but the learned Judge rejected that application, treating it evidently as not being genuine, and being made too late, and he points out that a commission had already been granted for the taking of other evidence by commission, and the name of Palaniappa had not been included in that commission. Palaniappa, at any rate, was not called.

The same observation occurs in respect of one Soliappa, who might have given evidence on behalf of the defendants, corroborating their story, and with regard to a man with a Burmese name, Ko Shive Dike, who, it is suggested, was present, or may have been present, when the money was paid, and paid to the clerk of the respondents, but who is not called to give evidence.

On the whole, their Lordships do not see their way to differ from the judgment of the learned Recorder, and they will therefore humbly advise His Majesty that this appeal be dismissed. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the appellants: *Sanderson, Adkin, Lee and Eddis.*

Solicitors for the respondents: *A. H. Arnould and Son.*

J. V. W.