

(1926) 02 BOM CK 0017
In the Bombay High Court
Case No : O.C.J. Suit No. 1521 of 1925

Abdulla Shariff

APPELLANT

Vs

Mahomed Aba

RESPONDENT

Date of Decision : 26-02-1926

Acts Referred:

Citation : (1926) 28 BOMLR 500

Hon'ble Judges : Marten, J

Bench : Single Bench

Judgement

Marten, J.—This is a suit by a master to recover moneys entrusted to his servant and subsequently lost, The claim is baaed on an alleged agreement to refund the moneys and an entry in the plaintiffs" books made by the defendant admitting his liability. The defence is that the moneys were stolen from the defendant and were lost without any negligence on his part, that the above entry was made under coercion and undue influence and a threat of criminal proceedings, and that the defendant is under no liability to pay, and that the plaintiffs had abandoned their claim.

2. The case comes on as a contested short cause but was better fitted for the long cause list, Unfortunately, the defendant is not now represented by counsel, and accordingly I am without the assistance I should ordinarily get and which I should particularly welcome in the present case for it seems to me to be one of considerable difficulty. I am accordingly in very much the same unfortunate position as I was in the case of Kishenprasad and Co. Ltd. Vs. Rajaram Ramharakh, Nor has the investigation by plaintiffs" counsel of the law on the subject produced any authority on the exact point.

3. Shortly stated, the admitted facts are that the defendant was a cashier of the plaintiffs on Rs. 160 a month under an agreement for about eleven months expiring in September 1923 On April 18, 1923, he was entrusted with eight currency notes of a thousand rupees each, He was thereout to pay Rs. 2,500 at the Central Bank in discharge of a hundi, and was to pay Rs. 5,000 at the

Imperial Bank. He came back to his masters with the discharged hundi for Rs. 2,500 and the sum of Rs. 500 in cash, but said he had lost the Rs. 5,000. His story at the trial was that he had all the money at the Central Bank, and that he had to go afterwards to Messrs. Bruel and Co., and missed the Rs. 5,000 when he got to the Imperial Bank.

4. The plaintiffs disbelieved this story and told him he had misappropriated the money. They, however, did not at first call in the police or apparently make any inquiries at the Bank, In the evening they obtained the above entry from the defendant (Exhibit A) debiting his account with the Rs. 5,000 That entry ran :-

Rs. 5,000 to the account of Bhai Mahomed Aba; currency notes of the value of Rupees five thousand out of Rs. 8,000 were lost by us in the Central Bank within the Fort. The date the 18-4-,23

5. Some five days later, viz,, on April 23, 1924, the loss was reported to the police and a copy of the report (Exhibit D) states that the notes were lost somewhere between the Central Bank and Messrs. Bruel and Co. at about 2 p.m. on the 18th. Notwithstanding the above loss the plaintiffs retained the defendant in their service for the remainder of the period of his agreement, and in the ordinary course of business large sums passed through his hands during those months. Shortly after he Had left the plaintiffs" service, a letter was written on his behalf by his cousin Ibrahim Gani interceding on his behalf and asking the plaintiff"s what could be done, It appears from Ibrahim"s evidence that he had advised the defendant to go back into the service of the plaintiffs and to allow the amount of the loss to be deducted from his pay. The defendant in his evidence states that the plaintiffs did offer to take him back but that he refused because the salary offered was too low. The plaintiffs, however, deny this. It is a question of oath against oath and on the present materials I am unable to find that it has been proved.

6. Turning to the pleadings it is most material to observe how this action is framed. In the first place there is no charge of theft. And, though plaintiffs" counsel made certain insinuations during the course of the case, the matter was cleared up by his statement in his final speech that he did not charge the defendant with theft. I think it only fair to add that in my opinion on the evidence before me no charge of theft could be substantiated against the defendant.

7. It is also material to observe that the plaint does not charge the defendant with negligence, The material part of the plaint is paragraph 3 which states :-

The plaintiffs refused to believe the defendant"s story and required him to make good the said sum to the plaintiffs. The defendant admitted his liability and agreed to do so. On that same day the defendant debited to himself the said sum of Rs. 5,000 in his own handwriting in the plaintiffs" cash book.

8. I read that as pleading that this suit is brought on an alleged agreement between the plaintiffs and the defendant that the defendant would pay this sum,

9. But a difficulty in the way of the plaintiffs is this, What was the consideration for this alleged agreement if in fact the defendant was under no liability to pay the plaintiffs ? A pro-misory note without consideration imports no legal obligation to pay, And if in the present case the defendant was under legal obligation to pay, a mere agreement to do so would not be binding in law without some consideration. In this respect there is nothing to show that the agreement was a compromise of a claim or in consideration of the plaintiffs forbearing to sue the defendant for the money. On the contrary, according to the plaintiffs' story, this entry by the defendant was a voluntary act on his part. On the other hand the written statement clearly raises the point of negligence, viz., that the moneys were lost without any negligence on the part of the defendant. Accordingly the defendant has made that an issue in the case. I, therefore, think that the issue of negligence is one which may fairly be determined between the parties.

10. On certain points the evidence is in direct conflict. The plaintiffs' manager, Ahmed Noor Mahomed, and his best witness, Nur Mahomed, both state positively that the defendant's first story was that in taking out the Rs. 8,000 at the Central Bank, he paid over Rs. 3,000 to the Bank clerk, put the remaining Rs. 5,000 on the counter and that he afterwards forgot to take up the notes. Nur Mahomed adds that the defendant said he put his hand on the Rs. 5,000 when on the counter. That story is in direct conflict with what the defendant has deposed to at the trial, viz., that he was wearing an open waistcoat with two pockets, and that in effect he kept the moneys he had to pay in one pocket and the moneys or documents which he had to receive in another pocket. Consequently, at the Central Bank he handed over Rs. 3,000 to the Bank clerk and put the remaining Rs, 5,000 back in one of his pockets. Then when he received the discharged hundi and the Rs. 500 he put those into a different pocket because he had to take them back to his master, Similarly when he went to Messrs. Bruel & Co., he put the Rs. 2,000 he received into the same pocket as the hundi and the Rs. 500. It was not till he was at the Imperial Bank that he had occasion to look at the other pocket and it was then that he found that he had lost the Rs. 5,000.

11. [The learned Jndge then dealt with the evidence of certain witnesses and proceeded.-] As regards the evidence of the plaintiffs' manager, Ahmed Noor Mahomed, he is in this difficulty, that he admits in cross-examination that he told the defendant that he had misappropriated the money, and yet he never called in the police and on the contrary took this entry in satisfaction of the loss. On his own showing, therefore, what happened sounds very like compounding a felony. Accordingly, he was particularly careful to say that he used no threats of any sort or kind to the defendant to induce him to sign the entry in question. But as to the main details of the story, I cannot see that there is any particular reason to disbelieve what he has stated.

12. The defendant was not seriously shaken in cross-examination and undoubtedly he gave his answers very readily when asked to explain exactly

what took place at the theft I recognise the difficulty the Court is now placed in nearly two years after the event in question in endeavouring to ascertain what really happened and what was really said. If the plaintiffs had adopted the common-sense course of having the defendant's story taken down in writing, or on the other hand of calling in the police in an endeavour to trace the loss of the notes, or even if the plaintiffs had previously observed the business precaution of taking the numbers of the notes of such a large denomination as this, much trouble might have been saved. But I have to take the case as I find it and to do the best I can on the somewhat unsatisfactory materials before me.

13. Now on the conflict of evidence between the plaintiffs and the defendant, I think I should accept the story of the plaintiffs' manager Ahmed Noor Mahomed and the witness Nur Mahomed that the defendant first stated that the notes were left on the counter. In saying this I recognise the difficulty in which a person is who is endeavouring to explain how he has lost certain articles. He may first of all think he lost them here, and then he may think he lost them there. Whereas, if the true explanation is that the articles were stolen by a skilful pickpocket, his surmises or guesses may be all quite fruitless. It may be therefore that his first story that he left the notes on the counter, was his impression at the time and was right.

14. Then as regards the charge of coercion, I recognise that it is quite possible that the plaintiffs did hold out some threat to the defendant, Ahmed admitted that he accused the defendant of having misappropriated the money. But on the whole I do not think the defendant has satisfied the onus of proof which lies on him to show that this particular entry was made under a threat of criminal proceedings or of handing him over to the police, Indeed that story is rather inconsistent with his other story that he begged his masters to call in the police and that they refused to do so. Similarly, I do not accept the defendant's story that the plaintiffs agreed to abandon their claim. It is possible that the plaintiffs were prepared to take back the defendant into their service, and it is possible that something may be decided in *Kishenprasad and Co. Ltd. Vs. Rajaram Ramharakh*, already referred to. The English case was one where a servant had been dismissed for an act of carelessness with a printing machine. The servant had done damage to the extent of ₹30 to a valuable printing machine by forgetting to place one end of a certain part called the "toprider" in the forks of the machine before he started it, The manager dismissed him on the spot The question was whether he was entitled to do so and whether this omission on the part of the servant constituted such a neglect of duty as justified the master in dismissing the servant without notice. The case, under the particular English statute in force came before the Metropolitan Magistrate who found in favour of the master. The matter was then taken to the Divisional Court which upheld the decision of the Magistrate on the ground that there was evidence before him on which he could come to the conclusion that the servant had been guilty of negligence justifying his immediate dismissal. Mr. Justice Darling said (p. 903):-

Neglect as often arises from forgetfulness as from anything else; and, if the forgetfulness is with respect to an important thing it may well, in my view, be good ground for dismissal of the servant without notice. I do not say that it would be good ground for dismissal in every case. Some trivial acts of forgetfulness might not even justify a complaint or remark (to forget) to do a thing, which, if not done, may cause considerable damage to the master, or to his property, or to fellow-servants, may be a serious neglect of duty. Take the case of a signalman on a railway who does not put the signal at danger when he ought to do so.

15. On the other hand Mr. Justice Channell stated (p. 904):-

It is quite impossible, and I shall not attempt, to give an exhaustive definition what is misconduct which justifies dismissal without notice. As to whether a single act would justify dismissal, that depends upon the character of the act and the duties of the man who does it. I cannot say that the magistrate was wrong in the conclusion he came to. I do not say that I should have come to the same conclusion it is sufficient for us to say that there was ample evidence upon which he might arrive at it. The question is one of fact and degree in all cases.

16. In the case of Kishenprasad v. Rajaram a servant had been entrusted With two cheques for an aggregate sum of Rs. 40,000. He cashed them and his story was that he was taken ill on the way back and became unconscious and was robbed. The real facts were that he had a brother as confederate, that the proceeds went to the joint family of which they were members in Central India, and some time afterwards the joint family waxed prosperous, and paid off old mortgages and bought new property. Finally a dispute arose between them as to the division have been said about giving up this claim in that event. But this is all, in my opinion, guess-work, and on the conflict of evidence before me I am unable to hold that the defendant has made out his case in this respect,

17. Similarly, as regards the smaller point as to whether he received the notice of demand. Exh. B, the registered letter is marked "Refused," and I find it difficult to accept his explanation that he knew nothing whatever about it and that no such letter was ever refused by him.

18. Accordingly, as far as issues Nos. (3) and (4) are concerned, viz , whether the defendant signed the entry in the plaintiffs' books under the circumstances mentioned in paragraph 3 of the written statement and whether the plaintiffs agreed to abandon their claim, my answer to each is "no

19. Then as regards issue No. (I) whether Rs. 5,000 was stolen from the defendant, my answer to that is "not proved." I agree that no charge of theft has been made against the defendant himself and it is quite possible that in the crowd at the counter at the Central Bank this money was stolen from the defendant. But there are no circumstances here, apart from the loss of the money, which would enable me to infer that a theft had taken place There is no question of the defendant having felt any pull at his pocket or having seen any

man running away or anything of that sort.

20. Then as regards issue No. (2), whether the defendant took all care and caution and was guilty of no negligence, on the whole I think that issue should be answered "No." I have already held that I have accepted the plaintiffs' story that the defendant first said that the money was left on the counter and that he forgot to pick it up. If so, I think that was an act of negligence, and that he could not maintain that he took all care and caution. Even on his own story that the money was in his open waistcoat which he did not keep buttoned, I am not satisfied that he can be said to have been guilty of no negligence. He went into a crowded spot with pockets particularly open to attack and with the possibility of small papers being easily abstracted and yet he had these valuable notes in his pockets,

21. It remains to be seen, what is the legal position on these findings; and whether even then the plaintiffs can succeed. The only two cases cited to me by counsel for the plaintiffs are, *Baster v. London and County Printing Works* (1899) 1 Q.B. 901 and my own decision of the spoils, in the course of which the actual thief claimed that he was entitled to a larger share because it was he who had actually stolen the money. Strange to say this domestic dispute was decided by the village elders in the presence of the village. It was these facts which enabled a Bombay jury to convict the two brothers, and which enabled me on a subsequent date to find that both of them and also the other members of the joint Hindu family were liable in a civil Court to replace the money. But I did so on the ground that there was a criminal breach of trust of which the thieves had been convicted, and that the other members of the family had notice of the embezzlement and that accordingly they were liable for participation in the subsequent breach of trust which took place when the family divided the stolen proceeds amongst themselves. But I there pointed out the difficulty which I then experienced, inasmuch as counsel were unable to refer me to any section in the Indian Code or to any decided case in the English law under which the thieves or their family could be made liable. At p. 116 I did suggest that an action might lie at any rate against the original thieves for money had and received. But that case is a long way from the present. It was a case where the actual thieves had been convicted and it was a case of theft, not a case of loss, as I have here.

22. But since the argument was concluded, I have found in the English reports a case which is nearer to the present than either of the above, viz., *Parry v. Roberts* (1835) 3 A. & E. 118. It came before four judges of the King's Bench and the head-note runs as follows:-

Plaintiff employed defendant, without reward, to carry 45 l. for him to a person at Liverpool. Defendant did not deliver it, and afterwards told plaintiff that he had lost it in a brothel, but would repay it to him. There was no other evidence how the loss had happened. Plaintiff sued defendant for 45 l. had and received to his use. Held, that the action lay, independently of the promise, defendant not having paid over the money or returned it to plaintiff! that if a loss, in the

manner alleged, had been proved, the action should have been for gross negligence, and not for money had and received; but that the defendant's assertion was not satisfactory proof of his own gross negligence.

23. Lord Denman C.J. there said (p, 120) :-

The defendant had money to pay for the plaintiff, and has not paid it. The prima facie case, therefore, against him is that he has it still to pay, He is to extricate himself from that. He endeavours to do so by saying that it is true he received the money, but he has lost it in such and such a manner. Is that sufficient f The case is something like one which was before us yester-day Philpott v. Kelley (1835) 3 A. & E. 103. The party is clearly responsible for the money, but seeks to excuse himself by saying that he has lost it, and under such circumstances that he is only chargeable in an action for gross negligence. If he is to avail himself of his own wrong to defeat an action which otherwise would lie, he must give clear proof of it. His own admissions are not such proof. The promise made by him to reimburse the plaintiff was not wanted to render this action maintainable.

24. Mr. Justice Littledale thought that on the facts they were not obliged to believe the excuse and the rest of the case raised so much suspicion that the jury might infer a misapplication of the money. Mr. Justice Patterson said (p. 122):-

Here the defendant says that he has not the money, and the only account he gives of it is, that he has lost it in a very negligent manner. I think that it did not lie in his mouth to say that he no longer had the money because he had lost it in a brothel.

25. Mr. Justice Coleridge said (p. 122):-

I agree that if the ground of this action had been a negligent loss, money had and received was not the proper form. But the fallacy of the defendant's case is, that he seeks to throw an issue on the plaintiff where he has no right to do so. He admits that he has not delivered the money, but says ha has loan it in the manner described. The plaintiff is entitled to say that the money was received to his use, find that the defendant is bound to account for ib, The answer attempted by him does not disturb the plaintiff's case.

26. Reading this authority it must be borne in mind that those were the days of technical pleadings. They distinctly had their use, because counsel had to define exactly what it was they were claiming and on what grounds. But if the action had really been one founded on negligence, then under the old rules an action for money had and received could not have been sustained. In our Court here we are not now bound by those technical rules. We can accordingly treat the present case as one for money had and received or alternatively for damages having regard to the defence raised and the issue at the trial.

27. My conclusion on the facts and circumstances of this particular case is that prima facie an action for money had and received does lie against the defendant.

He was entrusted with these moneys-not without reward as in the case just cited but for reward-and he failed to hand over the proceeds to the plaintiffs. Further, I think his reasons for not doing so are not sufficient to excuse him in an action of this nature. But I wish to guard myself against it being thought that in no event in an action of this nature could the defendant justify his non-payment. For instance, supposing it had been clearly shown here that the money had been stolen by a thief without any negligence on the part of the defendant, then in my judgment the case would be entirely different, and it may well be that the defendant could not be successfully sued. After all, as pointed out in Halabury's Laws of England, Vol. XXI, at pp. 362 and 363:-

This standard (of care ordinarily required) is founded upon a consideration of the care which would be observed by a prudent and reasonable man,. No liability for negligence attaches to a party when in the prosecution of a lawful not injury to another is caused by a pure accident), nor can anyone be said to be negligent merely because he fails to make provision against an accident which he could not be reasonably expected to foresee." And at p. 364 it is stated :-

In ordinary circumstances, or where simple operations are being performed, persons are not as a rule required to guard against every conceivable result of their actions, nor are they bound to exercise scientific care or to take extravagant precautions...A fair test of what is reasonable care is often the consideration of what) is habitually done in the same or similar circumstances; for the omission to take precautions which are usually taken is some evidence of negligence.

28. I think then the onus in the present case was on the defendant to show that he had taken all care and caution and was guilty of no negligence and that having regard to my finding on issue No. (2) he fails in this defence to this section treated as one for money had and received. This conclusion, as in Parry v. Roberta already cited, is quite irrespective of the alleged promise to pay. Accordingly in my judgment there will be a decree for the plaintiffs for Rs. 5,000 less a sum of Rs. 284-11-6 admitted by paragraph 4 of the plaint to be due to him in respect of his salary. I do not propose to grant any interest against the defendant. But as the plaintiffs insist on their strict legal rights, I cannot withhold an award of costs. Therefore the defendant must pay the plaintiffs' costs and there will be interest on judgment at six per cent.