

(1951) 11 MP CK 0004

In the Madhya Pradesh High Court

Case No : Small Cause Revision No. 77 of 1950

Nathu Kalu

APPELLANT

Vs

Anandilal Bhikaji

RESPONDENT

Date of Decision : 08-11-1951

Acts Referred:

Evidence Act, 1872 — Section 114

Citation : (1951) 11 MP CK 0004

Hon'ble Judges : Chaturvedi, J

Bench : Single Bench

Advocate : Datta, for the Appellant; Gandhe, for the Respondent

Final Decision : Allowed

Judgement

Chaturvedi, J.—This is a revision petition by the Defendant against a decree passed by the Small Cause Court, Indore.

2. After hearing the learned Counsel for both the parties I have come to the conclusion that the decree made by the Court of Small Cause in this case is not according to law and must be set aside.

3. The Defendant Petitioner executed on 4-9-1946 a promissory note (Ex. P-2) for Rs. 300/- with interest at the rate of 1 1/2 Rs. per cent per month in favour of the Plaintiff who has a shop of milk in Indore. On the same date he executed an agreement (Ex. P-1) in favour of the Plaintiff by which he promised to give milk to the Plaintiff, daily, without fail, at 4.30 A.M. in the morning and at 5 P.M. in the evening at the rate of 3 1/2 seers per rupee and further stipulated to give 17 Chhataks per seer. The milk to be given to the Plaintiff was agreed to be pure and without water and of such a quality that one seer of milk should provide 20 tolas of Mawa. If the milk was not of this quality and would not provide the requisite weight of Mawa, it was further stipulated that the Plaintiff would be entitled to deduct 2 annas per tola. The Defendant agreed that from Bhadwa Badi 1 of Samwat 2003 to Shrawan Sudi Poonam of Sam vat 2004 he would not

sell his milk to anybody else and that if he failed to do so or if he failed to give milk to the Plaintiff even once, the Plaintiff would be entitled to deduct, at the rate of 2 1/2 annas per seer, a sum, from the price of milk, to be paid to him for the milk given to the Plaintiff during the past month. Then in para 3 of the agreement there is a reference to Rs. 300/- borrowed by the Defendant and the para runs as follows:

Apse jo peshagi rupaye teen so liye hain un pete Bhois nag ek ka dudh deunga, aur rupaye pete khandi 30 mahwar jama karta jaunga. Agar khandi jama" nahi karau wa mah das ke under jo bhi apne rupaye liye ada nahi karun to apko bakaya rupaye ka byaj jis tarikh se rupaye liye waha se ap ko rupaye deu. Wada tak rupaye ka byaj deunga.

4. The Defendant is illiterate and has affixed his thumb impression on the agreement as well as on the pro-note. The Plaintiff, in his plaint, alleged that the Defendant only paid Rs. 104/- and did not pay the whole amount of Rs. 300/- within a period of ten months as stipulated in the agreement and therefore he filed a suit for Rs. 185/- (i.e., Rs. 300/- principal plus Rs. 49 interest minus Rs. 165/- is equal to 185). The Court decreed the suit for Rs. 169/- only, rate of interest having been reduced to 1/- Rs. only.

5. The Defendant resisted the suit on the ground that he had been regularly supplying milk to the Plaintiff and the agreement was to supply milk worth Rs. 30/- per month and thus pay back Rs. 300/- within 10 months. He never promised to pay Rs. 30 in cash per month. In my opinion, the execution of pro-note and the agreement, on the same day and the contents of the agreement, as stated above, definitely support the contention of the Defendant.

6. Mrs. Gandhe, on behalf of the non-applicant, contended that there were two transactions, one for milk; and another for Rs. 300/-; and that the agreement (Ex. P-1) should be read as referring to both. I do not think this contention can succeed. It is clear from para No. 3 of the agreement that the Defendant wanted to pay Rs. 300/- by supplying milk worth Rs. 30/- per month. The words are clear.

Ap se jo peshgi rupaye teen so (300 Rs.) liye hain un pete bhais nag ek ka dudh deunga aur rupaye pete kandi 30 Ru. mahawar jama karta jaunga.

7. It is clear that Rs. 300/- were advanced by the Plaintiff to the Defendant only for the supply of milk regularly; otherwise the terms of the agreement would not have been so strict. Every term of the agreement is definitely in favour of the Plaintiff and against the Defendant, and prima facie, the whole bargain appears to be an unconscionable one. The Defendant would never have agreed to the terms if he had not taken Rs. 300/- in advance for the supply of milk.

8. Next thing that supports the Defendant's contention is the Khata of the Plaintiff. The Defendant is never shown to have paid Rs. 30/- in cash in any month. On the other hand, milk had been supplied to the Plaintiff for Rs. 30/- as.

4 pies 6 in September; for Rs. 31-4-6 in October; for Rs. 37-1-0 in November for Rs. 39-4-6 in December; and Rs. 29-2-3 in January; for Rs. 23-14-9 in February and for Rs. 22/9/- in March. The average comes to about Rs. 30/- per month. I do not understand how the Court has overlooked the contents of the agreement and the figures in the Khata which speak for themselves.

9. The Court has also, in its judgment, stated that in Ex. P-4 the account of milk supplied by the Defendant is recorded and that every item bears the thumb impression of the Defendant. The judgment seems to have been written in some hurry. The three items mentioned in the Khata (1) Rs. 21-10-3 for June 1947; (2) Rs. 26-8-0 for July 1947; (3) Rs. 48-2-3 for June and July do not bear the thumb impression in the original document, though in the copy it is mentioned underneath the item, "Ni. a. Khud Natnual". The Plaintiff has admitted this.

10. Then the Khata was written by the brother of the Plaintiff Ramchandra, who is alive and is in Indore. He has not been produced in this case and I do not understand how the Khata can be taken to have been proved.

11. It will be apparent from the Khata that in one lump sum Rs. 76-5-6 have been deducted from the price of milk, presumably because the milk supplied was not of the quality, one seer of which would have supplied 20 tolas of Mawa and the Plaintiff resorted to his right of deducting 2 annas per tola from the price of milk. But on what particular dates the milk was not of requisite quality and for what dates the deductions have been made has not been mentioned in the Khata. The Khata only mentions that the deductions have been made for the milk of past two months. The Plaintiff in his testimony also, cannot mention the specific dates. The Khata is in the hand-writing of Ramchandra who could have said that everything was explained to the illiterate Defendant when his thumb impression was taken, but in the absence of Ramchandra's testimony the items cannot be taken to have been legally proved.

12. In cases of documents executed by ignorant and illiterate person, it is difficult to draw the usual presumption arising u/s 114, Evidence Act, "Udebhan v. Vithoba" AIR 1939 Nag. 78 . In AIR 1937 274 (Privy Council) , in an appeal from West Africa, their Lordships of the Privy Council held that where a person not knowing English has affixed his mark to a document written in English language, the onus to prove that the document was properly explained and interpreted to the person affixing his mark so as to make him understand its true importance is on the party relying on the document ("Omanhence Kwanum Bassayin v. Omanhene Ben Dentu).

13. In "Hoe Moh v. I.M. Seedat" AIR 1927 Rang. 319: 5 Rang. 527, the Defendant to an action based on a promissory note for Rs. 3000/- had admitted his signature on the paper but stated that he had signed a blank note with only the figure of Rs. 300/- written on the top of the paper. Division Bench of the Rangoon High Court dealing with the question of onus of proof observed:

The admission by the Defendant did not establish the Plaintiff's claim and if

there had been nothing on the pleadings besides the plaint and the Defendant's denial, the suit must have failed. It is quite true that the fact that the Defendant's signature is on the pro-note is of great evidentiary value and in many cases of this nature it might be sufficient corroboration of evidence given by the Plaintiff himself to establish the Plaintiff's case. That would depend on the circumstances of the particular case. But the Defendant did not and never has admitted the material propositions of fact, which would give the Plaintiff a right to sue, and the burden of proving the loan, in our opinion, rested upon the Plaintiff.

14. In "Ebadut Ali v. Mohammad Fareed" 35 Ind. Cas. 56 (Pat.) it was pointed out that execution consists in signing a document read out and understood and does not consist of mere signing the name upon a blank sheet of paper. To be executed, a document must be in existence. Where there is no document in existence there cannot be execution. So where an executant clearly says that he signed a blank paper, the statement is a denial and not an admission of execution.

15. In an Allahabad case, Pirbhu Dayal Vs. Tula Ram, , a Division Bench of the Allahabad High Court held that an admission by a Defendant regarding the putting of a signature or a thumb mark on a document while he mentions that the paper when he signed it was blank is not such an admission of the execution of the document as to thrust the burden of proving his case upon him and it is for the Plaintiff in such a case to prove primarily the due execution of the document relied upon by him.

16. In "Maung Bya v. Maung Po" 11 Ind. Cas. 916 (Rang.) an illiterate person had put her mark and thumb impression on a document for Rs. 3000/- but had denied execution of such a document; though she admitted executing a document which the Plaintiff told her was only for Rs. 400/-. It was held that the burden of proof in such a case lies upon the Plaintiff to prove consideration and genuineness of the transaction.

17. Two rulings, one of Lahore "Ramji Lal v. Debi Sahai" AIR 1934 Lah 542 , and another of Sahdeo Mauar Vs. Pulesar Nonia, , had held a contrary view to the effect that the burden is on the Defendant to explain how the document having Defendant's thumb impression came into existence and the Lahore High Court held that in such a case the onus about non-payment lies upon the Defendant. In view of the decision of the Privy Council in 1937, these two rulings cannot be held to be good law.

18. In Ramlakhan Singh Vs. Gog Singh, , a Division Bench followed with approval the two rulings of "Hoe Moh v. I.M. Seedat" AIR 1927 Rang 319 and Pirbhu Dayal Vs. Tula Ram, and held that where Plaintiff proves identity of Defendant's thumb impression on the pro-note but Defendant pleads that it was taken on a blank paper, Courts are not bound to raise presumption of due execution in Plaintiffs favour. It was further held that where the law places the onus on the Plaintiff to

prove that the document is duly executed, the onus cannot be discharged by merely proving the identity of a thumb impression, but it must be further proved that the thumb impression was given on the document after it had been written out and completed. If the evidence adduced by the Plaintiff is unreliable or if there is no evidence then no onus is necessarily thrown on the Defendant merely by reason of the fact that the Defendant asserts that the thumb impression is his.

19. From all that has been stated above, it follows that duty is cast on the Courts to keep in mind the strict rule of law in respect of onus, where the executant happens to be ignorant and illiterate. Mere illiteracy, without ignorance, will, of course, not be enough. A shrewd man of the world with business instincts and acumen may be illiterate, but he will not affix his mark to a document without taking special precautions to ensure that he has a true and accurate knowledge of the contents of that document. A rustic from a village, both ignorant and illiterate, stands on a different footing. He is in a position of special disadvantage and is likely to be dominated by the will of a shrewd literate man carrying on his business in the town, and why in ail probability put his thumb impression on a document prepared by the latter, relying on him so far as the contents of the document are concerned. In such a case, it must be further proved that the thumb impression was given on the document by the Defendant after learning the contents which had been explained to him.

In the case before me the Defendant is both ignorant and illiterate; otherwise he would never have put his thumb impression on a document, every term of which placed him at a very great disadvantage. When the Defendant admitted only some of the conditions but not the harsher ones embodied in the document, it was the duty of the Plaintiff to have proved execution of the document. In the written statement, the Defendant Petitioner clearly mentioned that he had not stipulated for supplying 17 Chhataks milk for a seer. The learned Small Causes Court Judge while decreeing the suit, strangely enough, observed as to this point as follows:

17 chatak dudh lekar 16 chatak jama karna awaji pi 1 me yaha karar nyaya poorna hain. Wacii ka kathari hain ki dudh napte samaya fes: foarn: ka ek chatak kata jata hain, yaha kisi pralcar anyaya poorna widit nahi hota.

20. I have carefully gone through the statement of the Plaintiff non-applicant in this case, but I have not been able nor Mrs. Gandhe has been able; to trace the particular passage in the testimony of the Plaintiff to this effect. In fact, there is nothing on the record which may incline me to the view that anything of the sort was deposed by any witness in the Court below. Even in the agreement (Ex. P-1) this usage of trade has not even been referred to. A usage of trade must be specifically alleged and proved. A court is not entitled to base its decision on conjectures and surmises so far as usage of trade is concerned. The Plaintiff has not been able even to state the name of the scribe of the agreement Ex. P-1 and the execution of the document remains unproved. I have already stated above that the Khata Ex. P-3 and Ex. P-4 cannot be held to have been proved in the

absence of Ramchandra's statement. Whatever money has been shown to have been deposited either as cash or as price of milk supplied, would amount to more than Rs. 300/-. If allowance is made in the amounts by adjusting one chhatak per seer of milk and if the sum of Rs. 76-5-6 which had been wrongly deducted on the basis of bad quality of milk is added to the amount alleged to have been paid by the Defendant, it will be seen that the Plaintiff non-applicant had already received from the Defendant a sum much more than Rs. 300/- plus interest, whatever the rate of interest might have been.

In my opinion, the trial Court has in this case misdirected itself by casting the burden of proof wrongly, by not drawing correct inferences from the documents on which the suit was based by basing its findings not on evidence but on conjectures or assumptions for which there is nothing in fact to support and by overlooking the important principles of law of Evidence; and this has contributed to gross miscarriage of justice in this case. I would, therefore, allow this revision petition, set aside the decree and judgment of the Small Cause Court and dismiss the Plaintiff's suit. The Defendant Petitioner will be entitled to his costs both here as well as in the Court below.