

(1906) 09 BOM CK 0011

In the Bombay High Court

Case No : Original Civil Suit No. 670 of 1898

Raghavji Vizpal

APPELLANT

Vs

Narandas Parmanandas

RESPONDENT

Date of Decision : 25-09-1906

Acts Referred:

Citation : (1906) 8 BOMLR 921

Hon'ble Judges : Chandavarkar, J

Bench : Single Bench

Judgement

Chandavarkar, J.—This suit is brought by a firm trading under the name and style of Raising Amerchand for the declaration of a lien or charge upon five Government Promissory Notes, each of the nominal value of Rs. 1000, and upon all interest payable in respect thereof for the sum of Rs. 6124-7-9 and further interest due to the firm on account of moneys lent to the first defendant, Narandas Parmanandas. The plaintiffs also pray that the defendants may be ordered to indorse the said Notes so as to enable the plaintiffs to sell them and apply the sale proceeds towards satisfaction of the claim.

2. The said Notes stand in the name of one Fulkore Bai, deceased, step-mother of the first defendant, as survivor of Parmanand Virji. The plaintiff's case is shortly this :-The plaintiffs having advanced Rs. 46,000 to the first defendant in March 1893, the latter as securities for the loan deposited the title deeds of his house in Bazar Gate Street, certain ornaments and the Notes in question. The plaintiffs allege that the pledge of the Notes was made by the first defendant with the knowledge and consent of Fulkore Bai. They further state that in April or May 1894 by an agreement between the plaintiffs and the first defendant the Notes were alloated to secure payment of Rs. 5,000 out of the loan of Rs. 46,000.

3. The first defendant denies the pledge of the Notes and his defence is that the Notes were kept by him with the plaintiffs for safe custody.

4. The second defendant, Ramcooverbai, wife of the first defendant, claims the Notes as hers on the strength of a will of Fulkore Bai.

5. There can be no doubt upon the evidence that the first defendant did pledge the Notes with the plaintiffs and that his story that he merely gave them to the latter for safe custody is untrue. In the first place, no issue was raised to try the question about the deposit for custody. Mr. Jinnah who has appeared as counsel for the first defendant as well as the second defendant and has conducted the case with his usual ability, conceded during argument that he could not rely upon the first defendant's evidence in support of the alleged deposit for safe custody. The evidence of the first plaintiff, Raghavji, in support of the pledge by the first defendant, is supported by the statement made by the first defendant in his Schedule to the petition for insolvency which he filed in 1894 (see Ex. G). There he distinctly stated that the Notes were mortgaged to the plaintiffs.

6. The issues on which the parties have gone to trial resolve themselves into the following questions:-

(1) Did Fulkore Bai know of and consent to the pledge ?

(2) If she did, had she authority to consent to the pledge ?

(3) If she had no authority, is it open to the defendants to plead and rely upon her want of authority, having regard to the case made in the second defendant's written statement that she had an absolute title to the Notes ?

(4) If it is open, are the plaintiffs protected by the provisions of Section 178 of the Indian Contract Act ?

(5) If they are, was Fulkore Bai a surety in respect of the pledge ?

(6) If she was a surety, was there a variation of the contract between the plaintiffs and the first defendant so as to discharge her u/s 133 of the Indian Contract Act ?

7. In support of the plaintiff's case that Fulkore Bai consented to the pledge, there is the evidence of the first plaintiff, Raghavji, which has not been shaken in cross-examination. The defendants have examined the first defendant, who indeed denies that Fulkore Bai ever gave her consent; but having regard to the material contradictions in his deposition and his antecedents I must decline to treat him as a reliable witness unless he is corroborated by other evidence of unimpeachable Character- The surrounding circumstances and the probabilities are in favour of Raghavji's version. Raghavji states that he lived in the same house where the first defendant and Fulkore Bai lived and that he knew the latter. The first defendant admits that. According to Raghavji, the pledge took place at the end of March 1893. Though the first defendant "denies the pledge, he admits this much that he made over the Notes to the plaintiffs at the end of March 1893 with the knowledge and consent of Fulkore Bai while going with her on pilgrimage; and he says that upon that occasion he also borrowed Rs. 5500

from the plaintiff's firm. He returned with Fulkore Bai from the pilgrimage after about a month or two. If the Notes had been deposited for safe custody because the defendant and Fulkore Bai were going on pilgrimage, it is singular that even after they had returned, the Notes were allowed by both of them to remain with the plaintiffs though the special purpose for the plaintiff's custody had ceased to exist. The first defendant no doubt explains that he asked Raghavji from time to time to return the Notes but that Raghavji simply promised and never returned them. This story appears to me highly improbable-all the more so because the first defendant had admitted that after his and Fulkore Bai's return from the pilgrimage, the Notes were taken by him and a man of the plaintiffs in May 1893 to the Public Debt Office for the drawing of interest, that the plaintiffs paid interest so drawn to Fulkore Bai and that the Notes after that returned to and remained in plaintiffs' possession. Why were they allowed to go back to the plaintiffs after they had been given to the first defendant and Fulkore Bai to draw interest ? It was not that Fulkore Bai did not know that the Notes were in plaintiffs' possession. On the other hand, the first defendant, admits that they went into their possession with her knowledge and consent. When, however, the first defendant sought the protection of the Insolvents' Court in November 1894 Fulkore Bai claimed the Notes, alleging in her Solicitor's letter (Ex. 3) that till then she had not known that the first defendant had made over the Notes to the plaintiffs. The plaintiffs in reply set up their present case of a pledge (see Ex. 4). This was in November 1894. Fulkore Bai died on the 8th of October 1895. And she took no steps to establish her allegation and recover the Notes from the plaintiffs. The defendant states that she did nothing because "Raghavji told her that everything would be cleared up." But not a single question was put to Raghavji as to that in cross-examination.

8. The only circumstances on which the defendants rely in support of their case are these. The first defendant states that Fulkore Bai could write; and it is argued that if Fulkore Bai had consented to the pledge she would have made an endorsement in her own handwriting to that effect on the Notes instead of allowing the first defendant to make such endorsement on her behalf. But there is no evidence beyond the first defendant's that Fulkore Bai could write; and to her will she admittedly put her mark. The fact that the plaintiffs took no writing from her in token of her consent is not, in my opinion, of any weight, because they had the Notes themselves-a more valuable proof than any document executed by a woman who could not write. Mr. Jinnah laid much stress on the plaintiff's omission to put the entry of March 1894 in evidence and contended that if Fulkore Bai had consented to the pledge, particulars mentioning the fact of that consent would have appeared in that entry. I presume that the entry mentions no such fact; but it does not follow on that account that there was no pledge and no consent. The only other point in favour of the defendant's case is that arising out of the scored out Gujarati endorsements on the Notes. The first defendant admits that the endorsements were made by him. According to Raghavji, they were made by the first defendant at the instance of Fulkore Bai at

the end of March 1893 when the Notes were pledged; and the first defendant took the opportunity of scoring them out behind the back and without the knowledge of plaintiffs men when the Notes were handed over to him in May 1893 for the drawing of interest. The first defendant tells a different story. He says that after he had come out of jail on the 27th or 28th of October 1894 and taken the benefit of the Insolvent Debtor's Act, one Khetsey, who was then manager of the plaintiff's firm, and one Hirachand, who was then Killedar of the firm, asked him to make the endorsements and threatened to beat him and make him over to the Police if he did not; that owing to their threats and pressure, he wrote the endorsements in question on the 6th of November 1894; that the very next day he informed his solicitor Mr. Roughton of it: that upon the solicitor's advice he was going to file information against Khetsey and Hirachand but Hirachand requested him not to take that extreme step and consented to the cancellation of the endorsements; and that they were accordingly scored out. The difficulty in the way of believing this story of the first defendant does not lie merely in that he is an unsatisfactory witness. His case is one of coercion and it must be proved by clear evidence. I attach no importance to the fact that the first defendant did not put this story to Raghavji when the latter was cross-examined by the former during the hearing of this suit before Tyabji J. There he was not represented by counsel and he cross-examined Raghavji himself. But the story he did suggest in his cross-examination of Raghavji is material. The story there suggested was that two months after the Notes had been deposited for safe-custody by the plaintiffs, the defendant had written the endorsements and that they were struck out by Raghavji because the other Moonim of the plaintiffs said that the signature would not do.

9. The point, however, which has been pressed strongly by Mr. Jinnah is that if, as Raghavji states, the endorsements had been made at the time of the pledge on the 30th of March 1893, in the face of such irregular endorsements, the Public Debt Office would not have allowed interest to be drawn in May 1893, And in support of that the Head Clerk of that office has been examined. He relies upon Rule No. 224 of the Civil Account Code, which is as follows:-"Every erasure in an endorsement should be accompanied by an explanation in writing to be produced by the proprietor of the Note at the time of its presentation at the District Officer's Office, and every cancellation of an endorsement should be made under the signature of the proprietor of the Note for the time being." Now, the Head Clerk admits that in case of the male proprietor of a Note the office accepts his initials for a cancellation; but he says that it is otherwise if the proprietor is a female. In her case, he says, her signature for the cancellation must bear two attestations made before a Justice of the Peace or a Magistrate, or a Treasury Officer. He cannot point out, however, any rule to that effect other than the rule just cited. So far as I can see, there are only two rules bearing on the question. Rule No. 187 requires the signature of "a native female" to an endorsement to be attested by the signatures of two respectable witnesses ; whereas Rule 224, which relates to the cancellation of such endorsement, requires no such

attestation. In the present case there was no legal endorsement at all to call into play the operation of Rule No. 224, because such endorsements as were did not conform to the requirements of Rule No. 187. And where an imperfect, and therefore legally inoperative, endorsement is made, it has only to be scored out without the necessity of any signature to such cancellation. That appears to me to be the clear effect of the rules. Why the cancellation of such an endorsement which the Public Debt Office cannot, according to Rule No. 187, recognise, should require the signature and attestations I fail to see. The common sense of it shows it does not; nor is there anything in the rules compelling a signature and attestations in such a case.

10. The evidence of the Head Clerk is not so clear and definite as to the rules and practice as to enable me to prefer it to the evidence of Raghavji, the probabilities and the surrounding circumstances with which I have already dealt. And, above all, if what the first defendant says is true, viz. that the endorsements were made under pressure, and that they were scored out because he threatened the plaintiff's men with a criminal prosecution in the Police Court, why did he not take advantage of the occasion to ask those men to return the Notes to him as well, since according to him there was no pledge whether with or without Pulkore Bai's consent ? If it is true that they consented to the. cancellation of the endorsements because they were threatened with a prosecution, it is natural to suppose that with the fear of that threat before them they would have also consented to return the Notes to the first defendant. And yet the fact is admitted that in spite of it all the Notes were all the same quietly allowed to remain with the plaintiffs. I see no reason to doubt the statement of Raghavji that the cancellation must have been made by the first defendant when he took the Notes to draw interest in May 1893.

11. Upon the whole, I have arrived at the conclusion that the first defendant pledged the Notes with the full knowledge and consent of Pulkore Bai.

12. The next question, then, is whether Pulkore Bai had authority to give such consent. But before I come to that question, will deal with the contention of the plaintiff's counsel that having regard to the pleadings, it is not open to the defendants to raise any question as to Fulkore Bai's want of authority to make the pledge. In the written statement of the second defendant it was alleged that Fulkore Bai had the Notes absolutely bequeathed to her by a will of her husband Parmanandas Virji. But at the hearing the case set up for her was "that under that will she got no absolute title to the Notes but that her sole right was to the interest thereon as long as she lived and to dispose of the Notes in favour of any one she liked by a will. This is a defence inconsistent with that raised in the written statement. Generally speaking, the rule of law is that a plaintiff ought not to be allowed to set up inconsistent cases or pleas. (1888) ILR 15 684 (P.C.) (Privy Council) and Iyyappa v. Rama Lakshamma I L R (1890) 13 Mad. 549 . But here we are concerned with a defendant and as to that there is the decision of Sargent C.J. and Fulton J. in Parshotam Bhaishankar v. Rupal Zunjar (1895)

P.J. 1895 that a defendant may be allowed to make an alternative case at the hearing under special circumstances. And the special circumstances here are that the second defendant Ramcoover Bai was not herself a party to the transaction of pledge on which the plaintiffs sue; she had no personal knowledge of it; and inconsistent defences must be allowed in the case of a defendant so situated. (See *Narayanasami v. Ramasami* I L R (1890) 14 Mad. 172 . Moreover, as was held by Marriot J in *Chova Kura v. Isa bin Khalifa* I L R (1875) 1 Bom. 209 the rule is that the state of facts and the ground of relief originally alleged and pleaded by a plaintiff shall not be departed from and that he is not entitled to relief on facts and documents not stated or referred to by him in his pleadings. That rule is equally applicable to a defendant. Here the second defendant does rely on Parmanand's will in her written statement. It is true that she there construes the Will to have given an absolute title to the Notes to Fulkore Bai, whereas she now says it was but a limited interest. But where a party relies on a document in support of his claim or defence, the mere fact that he in support of that claim or defence put a wrong construction on it is no reasonable ground for depriving him of the right he has on a proper construction of the document. In *Bai Rukhmini v. Maneklal Bapubhai* (1889) P.J. 1889 Sargent C.J. and Candy J. held that where a party claims under a document, the fact that the party put a wrong construction and claimed a right on the basis of it should not debar him from succeeding on a proper construction of the document.

13. I hold, therefore, that the defence in question is open to the second defendant. The plaintiffs have not been prejudiced by it in any way. They have been allowed to raise issues and give evidence in answer to that defence.

14. Had then Fulkore Bai an absolute title to the Notes or only a right to the interest thereon with a power of appointment by Will ? The evidence shows that the Notes were given to her by her husband at the time of her marriage, that during the lifetime of both the Notes stood in their joint names, and that, on the husband's death, they were transferred to her name solely as the survivor of her husband. In his Will (Ex. 10) the husband recites the fact that the Notes stand in his and his wife's names jointly because an agreement was entered into with her at the time of her marriage. The Will then recites that in respect of the said Notes, "the full right of ownership belongs to" his wife. The testator then goes on to direct that after his death the Notes must be placed as a deposit in some Bank, that his wife may use the interest thereon in her lifetime, but that she should not use the principal sum in any way, that she can make a gift of the Notes to take effect on her death after provision made for her funeral rites and other ceremonies thereout. The official translation says: "After that what may remain as the residue shall duly be given as a "present" and on the margin the official translator has appended a note to the effect that the will does not state to whom the present is to be made. That is true but it is not stated because the above quoted sentence when read in the Gujarati original clearly shows that the testator meant that Fulkore Bai, his wife, should make a present of the Notes by a Will. The terms of the Will in this respect are similar to those of the Will which

the Privy Council had to construe in (1897) L.R. 24 I.A. 93 (Privy Council) . In that case their Lordships held that where a testator gives by his will the income of certain property to a certain person for life with a power to give the property by a will to whomsoever that person pleases, such person takes a life interest in the income of the property and any one who takes under the latter's will takes the property from the first testator. The only requisite condition for a legal and valid exercise of the power is that the donee taking under the will executed in exercise of the power should be a person who was in existence actually or in contemplation of law at the time of the first testator's death. In the present case Ful-kore Bai in exercise of the power conferred upon her had given the Notes to the second defendant Ramcooverbai; and it is not suggested that Ramcoorbai was not alive at time of Parmanand's death.

15. Fulkore Bai having under her husband's Will taken but a limited estate in the Notes, which entitled her only to the interest thereon, had no right to alienate the Notes by way of pledge or otherwise. But the Notes are negotiable instruments; they stood in her name; her possession of them was juridical. Any person, therefore, taking the Notes from her for value and in good faith would get a good and unimpeachable title to the Notes. Whoever is the holder of a negotiable instrument " has power to give title to any person honestly acquiring it " (per Abbot C.J. in *Gorgier v. Mievill* (1824) 3 B & C. 47. "It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled to secure a good title to yourself to inquire into the nature of his title or the extent of his authority". Further, it is undoubted law that " negligence does not invalidate the title of a person taking a negotiable instrument in good faith and for value." (per Lord Herschell in *London Joint Stock Bank v. Charles James Simmons* [1892] A. C 201.

16. The test of good faith in such cases is this : "Regard to the facts of which the taker of such instruments had notice is most material whether he took in good faith. If there be anything which excites suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry." (per Lord Herschell in *London Joint Stock Bank v. Simmons* [1892] A.C. 201. Of any circumstances calculated to excite suspicion in the mind of Raghavji when the Notes were pledged by the first defendant with Fulkore Bai's consent, there is no proof in the present case. Raghavji swears that he did not know when the pledge transaction took place, that Fulkore Bai derived her title under her husband's Will, and that he never heard of the Will. The first defendant deposes to the contrary and states that he had made over the probate of the Will to Raghavji at the time of the mortgage of the Bazar Gate Street house. But before Tyabji J. the first defendant had affirmed that the probate was at Porbander; before me he says he gave it to Raghavji. It must indeed be presumed that Raghavji must have investigated the title before the mortgage of the house; but it does not necessarily follow from that that the Will must have

been one of the documents given to Raghavji for investigation of title. The first defendant was Parmanand's son and heir according to Hindu law, who would be presumed to have inherited his property in the ordinary course of succession, quite apart from any Will. Nor does the statement in the plaint that the Notes originally belonged to Parmanandas amount to an admission that Fulkore Bai derived her title to them under a Will. In the Notes she is described as the survivor of Parmanandas. That means that the Notes originally were held by her jointly with him and that on his death they became hers. I hold, therefore, that the plaintiffs have acted in good faith and honestly believed that the Notes belonged to her and that she had the right to pledge them and to consent to a pledge of them.

17. But, lastly, it was urged that Fulkore Bai pledged the Notes as a surety for the first defendant and that the contract between the first defendant and the plaintiffs by which the Notes were allocated as securities for Rs. 5000, was a variance in the terms of the original contract without Fulkore Bai's consent, which u/s 133 of the Indian Contract Act, discharged her from the suretyship. This argument rests on the assumption that Fulkore Bai in consenting to the pledge of the Notes by the first defendant became a surety for him. But a contract of guarantee means that the surety agrees to pay the debt of the principal debtor, if the latter fails to pay. There is no allegation, no proof that Fulkore Bai agreed to anything of the kind. What the plaintiffs have all along alleged and have now proved is that she allowed the first defendant to pledge the Notes that is, to treat them as his. There was never any contract by her to perform the promise or discharge the liability of the first defendant in case of his default. What happened was that the first defendant brought the title deeds of his house, certain ornaments and these Notes to the plaintiffs, and asked them to take these as securities for his debt of Rs. 46,000. The plaintiffs, perceiving that the Notes stood in the name of Fulkore Bai, refused to accept them as securities without her consent. She consented to a pledge of the Notes by the first defendant and, at her instance, the latter signed an endorsement on the Notes. That endorsement was no doubt irregular but it is evidence so far that Fulkore Bai parted with the Notes in favour of the first defendant so as to enable the latter to pledge them to the plaintiffs as part securities for his debts. The subsequent receipt of the interest drawn by Fulkore Bai shows that she merely reserved her right to the interest so long as the transaction of pledge by the first defendant was in force. The case is simply one of the holder of a negotiable instrument giving it to another with authority to that other to raise money upon it for his own purposes. In such a case the holder is estopped from setting up his right to the title deeds or the property adversely to those who have lent money on the security of the title deeds and the faith of the authority of the owner. And the real owner of such Notes is estopped because by allowing the Notes to stand in the name of the holder he has so acted as to clothe the latter with apparent authority to sell or pledge and he is "precluded as against those who were induced bond fide to act on the faith of that authority from denying that he had

given such an authority. The result as to them was the same as if he had given it." (Cole v. North Western Bank (1875) L.R. 10 C.P. 354 . Section 133 of the Indian Contract Act has no application here.