Privy Council Appeal No. 155 of 1923.

Lala Tulsi Ram - - - - - - - - *Appellant*

v.

Ram Saran Das - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 2ND DECEMBER, 1924.

Present at the Hearing:

LORD SUMNER.
LORD CARSON.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD SUMNER.]

The appellant sued upon a promissory note made by the respondent and he lost in the High Court the decree, which he had recovered at the trial. Curiously enough the main question is, whether he discharged the onus of proving that the note had been lost without his default, so as to entitle him to give secondary evidence of its contents.

According to the practice, either the original note or a copy of it had to be attached to the plaint. It was stated, both in the plaint and in the list of documents accompanying it, that the note exhibited was the original. This was on 14th February, 1917. Next day the plaintiff's pleader received notice from the Court officials, that he must amend his list and pay a further process fee. He went to the office to make these defects good and, apparently, had access at least to the list of documents, if not to the other papers. Thereafter the officials, probably on the same day, served the defendant with the plaint

and so gave him the opportunity of learning that the original document had been filed in court, but what action he took thereon, if any, is matter of conjecture.

On the 1st March, 1917, an application by the plaintiff for attachment before judgment came before the District Judge. The defendant's pleader looked at the file and was heard by the plaintiff's pleader to say that the note was forged. On this the plaintiff's pleader also looked at the file, and at once applied to the judge, saying that the original note had been abstracted and a false one substituted and asking him to hold an inquiry into the circumstances of this change. The District Judge then examined sundry officials but the result was negative, for they did not incriminate either themselves or one another. When the trial came on the plaintiff's pleader asked to be allowed to put in, as secondary evidence of the note, a photograph of it taken some little time before, and, as his statement was accepted that he filed the original with the plaint and had nothing to do with the substitution, the photograph was let in. Witnesses were then called on both sides. The defendant did not deny that he had made a note for the alleged amount, Rs. 8,000, but he said that it contained no provision for interest. The photograph concluded with the words " with interest @ Rs. 5/- p.c. p.m." The words " with interest " appear from the photograph to have been written by the same hand as the rest of the body of the note, but at a later time and in part of the space originally left for the stamp and the signature, and the letters " @ Rs. 5/- p.c. p.m." seem to have been written at the same time as the body of the note and by the same hand *currente calamo*. In the event the Trial Judge found for the genuineness of the note as shown in the photograph and gave a decree for the amount of the principal, but reduced the interest from the exorbitant rate of 60 per cent. to a mere 6 per cent. per annum.

The High Court held on appeal that the plaintiff had failed to prove the actual attachment of the original note to the plaint, when it was filed. If so, the evidence given by his pleader was false, and false almost certainly to his knowledge, and the plaintiff neither showed that, owing to its loss or otherwise, he was unable to produce it for a reason not arising from default or neglect on his part, nor indeed that it was lost at all. (Evidence Act, 1882, Section 65 (*c*).) Accordingly, as the claim on the note could not succeed without either the note itself or secondary evidence of its contents (Section 91), and no alternative cause of action was pleaded or relied on, the suit necessarily failed.

Their Lordships are unable to adopt this conclusion. The plaintiff's pleader gave positive evidence that he attached the note itself to the plaint, and that it was subsequently abstracted, and there was no direct evidence to the contrary. Mistake on his part was unlikely, for he was a young man, just beginning practice

and anything but busy, and he acted as his own clerk. To have stated twice over in the documents filed that the original note was exhibited, and then to have exhibited a document, which bore no resemblance to the original as shown in the photograph, and was not even an exact copy of its wording, was wantonly and without reason to prepare for himself difficulties at the trial. The Trial Judge was critical of this pleader's evidence and in some respects discredited it, but this statement at any rate he accepted and their Lordships think that, so far, his view should prevail. How, when and at whose hands the subsequent substitution took place is matter of surmise only. If the statement of Neki Ram, a temporary clerk in the Court offices, can be accepted, he numbered the substituted document with the serial number, which it was found, when produced, to bear on February 22nd or 23rd. This at any rate narrows down the time of the change to the period between 16th February and 22nd February, but that is all that is known. It may be taken as certain that the change was made with criminal intent, and it is almost certain that someone in the Court offices was privy to it, if he were not the actual perpetrator at the instigation of the guilty litigant, but, even if that guilty litigant were the plaintiff, the original exhibition of the note itself must be taken to have been proved.

It has next to be considered whether the onus of proving loss in the Court offices, without default on the plaintiff's part (for here neglect obviously does not arise) was properly discharged. There is no positive evidence at all against the plaintiff's pleader, who, if any one on the plaintiff's side, would appear to be the guilty party, except that on 16th February he had the opportunity of manipulating the documents, if the whole of those lodged the day before were, as is most likely, handed to him then but even so he could not have made the change without some official's connivance and, if he was minded to do so, he could not have failed to see that honesty would be the better policy. The changeling could deceive no one ; it challenged suspicion and was certain to recoil upon himself.

On the other hand, there is even less ground for implicating the defendant's pleader. His statement to the Court, which was in no way shaken, was that he called the document a forgery as soon as he saw it, not because he knew that the disappearance of the original had already been brought about, but because the document exhibited mentioned interest and he knew from his client that none had been stipulated for. It was not shown that the defendant himself had meddled in the matter or visited the Court offices at all. The change took place and that is all that is known. Except that the motive was criminal and the plot equally tortuous and futile, their Lordships can form no opinion about what was actually done. As the original document was placed in the custody of the law, their Lordships do not think that the onus of proof required the plaintiff to show how it was

afterwards made away with, or to satisfy the Court that the defendant was more likely to have been guilty than himself. His denial of any participation in the act, if believed, was enough.

From this the rest follows. Admissible evidence of the contents of the note was forthcoming. As photographed, it contained originally provision for interest, and the interpolation of the words " with interest " would not, within the provisions of the Indian Act, amount to a material alteration avoiding the note, for it was intended that interest should be paid and the rate was sufficiently expressed already (Negotiable Instruments Act, Section 87). Accordingly, their Lordships do not think themselves warranted in disturbing the conclusion of the learned Trial Judge. The advantage, which he enjoyed, of seeing the witness and noting his demeanour was greater in the case of the plaintiff's pleader than it is with many Indian witnesses, for the pleader was a professional man with University degrees, whose mind could be more certainly read by the learned Judge, than if the question had arisen with a mere ryot or a mahajan.

Their Lordships will accordingly humbly advise His Majesty that the judgment of the Trial Judge ought to be restored and the appeal allowed with costs here and below.

In the Privy Council.

LALA TULSI RAM

v.

RAM SARAN DAS.

DELIVERED BY LORD SUMNER.

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