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the Act, or the rules must prevail notwithstanding such inconsistency. This provision, however, has no applicability to the facts of the present case. If the notice under section 7(1) had been issued by the Custodian prior to the order of adjudication under the Provincial Insolvency Act, then on the insolvent's property being declared evacuee property it would have vested in the Custodian and not in the receiver by virtue of section 4, but as the property had already vested in the receiver before any action was taken under the Administration of Evacuee Property Act by the Custodian, it could not be declared to be evacuee property at all, nor could the receiver be divested of whatever had vested in him.

For all the reasons given above, this petition must succeed and the orders made by the Custodian Department that the entire property of Daulat Ram Surana, the insolvent, vests in the Custodian are hereby quashed by a writ of *Certiorari*. In view of the nature of the points involved the parties will be left to bear their own costs.

Falshaw, J.

FALSHAW, J.—I agree.

B. R. T.

APPELLATE CIVIL

Before Tek Chand and Shamsher Bahadur, JJ.

CHANDAN LAL JOURA,—*Appellant.*

versus

M/s AMIN CHAND-MOHAN LAL AND OTHERS,—*Respondents.*

Regular First Apeal No. 52 of 1954.

1960

April 18th

Negotiable Instruments Act (XXVI of 1881)—Section 118(a)—Presumption under—Indian Evidence Act (I of

1872)—Section 114—Presumption under—Difference between the two—Discharge of the burden of proof by defendant—Manner of—Presumption under section 118(a) of the Negotiable Instruments Act (XXVI of 1881)—Whether applies to parties to the instrument only or to third parties as well—Indian Partnership Act (IX of 1932)—Section 19—Position of a partner qua the firm and the other parties—Pronote signed by one of the partners on behalf of the firm—Whether binding on the firm and its other partners—Code of Civil Procedure (V of 1908)—Order 11, rule 21 and Order 17, rule 3—Striking out of defence for non-compliance—Whether justified—Benamidar—Suit by—Whether competent—Pleadings—Rule secundum allegata et probata—*Applicability of—Matters to be set out by the plaintiff in his plaint indicated.*

Held, that section 118(a) of the Negotiable Instruments Act, 1881, provides a special rule of evidence in the case of negotiable instruments contrary to the case of an ordinary contract. Party denying consideration has to prove want of consideration or, in other words, to rebut the presumption that the negotiable instrument was made or drawn for consideration. The statutory presumption in favour of there being consideration for every negotiable instrument continues unless it is rebutted.

Held, that the distinction between the language of section 114 of the Indian Evidence Act, and that of section 118(a) of the Negotiable Instruments Act is significant. The words "may presume" in section 114, Evidence Act, leave the matter to the discretion of the Court, either to make or refuse to make a presumption *inter alia* 'that a bill of exchange accepted or endorsed, was accepted or endorsed for good consideration",—*vide* illustration (c). The presumption is optional depending upon the Court's unrestricted discretion under section 114. Under this section, Court may not, but under section 118(a), Negotiable Instruments Act, the Court is bound to start with the presumption in favour of passing of consideration. Under section 114, Evidence Act, therefore, the Court has unfettered discretion to presume a fact, as proved, until it is disproved, or ignore such a presumption and call for proof of it. But when the statute requires, as in the case of section 118 of the Negotiable Instruments Act, that the

Court shall presume a fact, the Court has no option left, and it has to treat the fact as proved, until the party interested in disproving it has led evidence in support of its non-existence.

Held, that a defendant may discharge the burden of proof placed upon him under section 118(a) of the Negotiable Instruments Act, either by producing definite evidence, showing that consideration had not passed, or, by relying upon facts and circumstances of the case, and also by referring to the flaws in the evidence of the plaintiff and may then contend that the presumption has been rebutted. If the plaintiff goes into the witness-box, and the result of his evidence is, that he fails to establish the passing of consideration, and the Court is thus satisfied, that the plaintiff did not give the onsideration which he alleges, the defendant can certainly avail himself of the contrariety, and the provisions of section 118(a) are not thereby entrenched upon. But the burden of proof acquires importance only where, by reason of not discharging the burden which was put upon a party, it must eventually fail. Where, not only parties have joined issue, but have led evidence, the two versions can be gone into, with a view to determine which way the weight of the evidence turns. In such a case the abstract question of *onus probandi* loses its significance, as the Court determines the controversy, on the weight of the evidence led on the contested issue, and not upon the abstract question of burden of proof, which becomes purely academic. Of course, if the mind of the Judge, determining the suit, is left in doubt as to the point on which side the balance should lie in forming a conclusion, the doctrine of *onus probandi* will become a determining factor.

Held, that in the case of a pronote the executant admits consideration and it is for him to dislodge a presumption which his own admission on the face of the pronote carries, but when another person is neither the executant of the pronote nor its endorser or negotiator, he cannot be deemed to be in possession of the knowledge as to the passing of the consideration, or of the circumstances, under which, it may be deemed to have passed. It does not appear to have been the intention of section 118(a) to fasten liability on a person who was neither the maker

nor endorser, etc., of the instrument, and expect him to discharge the onus of proving failure of consideration, in order to escape the consequences of an adverse decision. In such a case the ordinary rule of common law should apply and the party seeking to enforce his claim against his opponent should establish, that the transaction, for which he is being held liable, was made for good consideration

Held, that every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner bind the firm and his partners, unless he in fact had no authority to act for the firm and the other person was aware of this. When a negotiable instrument is drawn by a partner in a trading firm, the other partner is not any the less liable, because his name does not appear on the face of the instrument. To such a relationship the maxim, *qui facit per alium facit per se,* applies and a person who does an act through another is deemed to do it himself.

Held, that the provisions of law contained in Order 17, rule 3, and Order 11, rule 21, Civil Procedure Code, are penal in their nature and must, therefore, be construed strictly. In view of the stringency of these provisions and of the drastic consequences that follow, they should be applied only when the facts admit of no doubt, and the conduct of the party at fault, cannot be excused. In a case where a party to a suit has paid the process-fee for summoning the witnesses and has done all that lay in its power to get the production of the documents, it is for the Court and its officers who are responsible for effecting service, to see that the witnesses attend with the documents called; and non-attendance of witnesses for want of service, or for refusal to be served, or for non-production of documents, does not justify the penalising of the party, in a case, where, the fault lay either with the process-serving agency or the witness summoned. Any adjournment resulting thereby, cannot be treated as "time granted to one party" within the meaning of Order 17, rule 3, Civil Procedure Code.

Held, that the provisions of Order 17, rule 3, Civil Procedure Code, do not justify the striking out of the defence. If defendant is at fault then all that the Court can

do is to decide the suit forthwith. There is no justification at all for striking out his defence even if the defendant had failed in any duty. For striking out the defendant's defence it has to be shown that the provisions of Order 11, rule 21, Civil Procedure Code, have been contravened. There are only three grounds upon which trial Court is justified in striking out the defence of the defendant namely, where there is refusal to answer interrogatories under rule 11, or there is refusal to make discovery of documents under rule 12, and lastly where there is refusal to allow inspection of documents under rule 18.

Held, that it is open to the *benamidar* to institute a suit for the recovery of the amount and he need not implead the real beneficiary, and a decree passed in favour of the *benamidar* will ensure to the benefit of the real lender. But it is not open to the *benamidar* to first join issue with the defendant on the question that he is the real creditor, and later on fling a surprise on the defendant and claim himself to be merely a *benamidar* for another, and then contend that the defendant has not been able to rebut the claim of the real beneficiary, the hitherto undisclosed principal. He must disclose his status as *benamidar* in the very first instance.

Held, that the courts have always insisted on the rule embodied in the phrase *secundum allegata et probata* in order to avoid prejudice to the defence as a result of the variance between the pleadings and the proof subsequently led. Not only this is a rule of logic but also of fairplay. The basis of this principle is, that a party should not be taken by surprise by the change of the case introduced by the opposite party. It is, however, true that every variance between pleadings and proof is not necessarily fatal and in the absence of any element of surprise or prejudice to the opposite party, the rule of *secundum allegata et probata* will not be enforced with rigour.

Held, that the first rule of pleadings is that the plaintiff should state his whole case in his pleadings, in other words, set forth in his pleadings all material facts on which he relies for his claim. The party is not to disclose the evidence by which he intends to prove his claim but the facts disclosed should be material and not misleading.

The disclosure has to be made of what are called the *allegata probanda,* i.e,. the facts which ought to be proved. It is the right of the defendant to know the outlines of the case which the plaintiff intends to make against him, and to bind him down to a definite story. It must contain such particulars as "to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case which he has to meet and to enable him to prepare for trial", for the law is that no amount of evidence can be looked into upon a plea not put forward.

First appeal from the decree of the Court of Shri Chetan Das Jain, Sub-Judge, 1st Class, Amritsar, dated the 12th day of December, 1953, dismissing the plaintiff's suit and leaving the parties to bear their own costs.

S. K. JAIN AND N. N. GOSWAMI, ADVOCATES, for the Appellant.

F. C. MITAL AND G. P. JAIN, ADVOCATES, for the Respondent No. 3.

NEMO for other respondents.

JUDGMENT

TEK CHAND, J.—This is plaintiff's appeal from the judgment and decree of Subordinate Judge, First Class, who dismissed his suit, which was for the recovery of Rs. 27,250 inclusive of interest, on the basis of a pronote for Rs. 25,000, dated 13th of May, 1949. There are three defendants in this case. Defendant No. 1 is the partnership firm Amin Chand-Mohan Lal, and defendants Nos. 2 and 3 are the two partners Mohan Lal Sayal, and Amin Chand Puri. According to the plaint, Mohan Lal defendant No. 2 had executed a pronote (P/A) for Rs. 25,000 in favour of the plaintiff at Amritsar on 13th of May, 1949, for cash received, and agreed to pay the amount on demand with interest at 3 per cent per annum. It was stated that the amount had not been paid despite repeated demands. On this basis it was prayed that a

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decree for Rs. 27,250 be passed in plaintiff's favour against the defendants with costs and future interest. The suit was filed on the last day of limitation.

Tek Chand, J.

Amin Chand, defendant No. 3, who is the principal contesting respondent before us, in his written statement, denied the above allegations and also raised a preliminary objection that the Court at Amritsar had no jurisdiction, as the alleged pronote was not executed at Amritsar. On merits, defendant No. 3 stated, that the pronote was never executed as alleged and even if execution was proved, he did not admit, that defendant No. 2 had any authority to borrow any loan or execute any pronote on behalf of the firm, as, under the terms of partnership, neither of the partners had any authority to raise a loan or execute a pronote. It was also pleaded that no cash was ever advanced by way of loan to the defendant and the partnership firm had been dissolved on 5th of May, 1950, and at the time of taking of the accounts there was no entry in the account books of the firm relating to the transaction in question.

It was then said, that the transaction was bogus and entered into without any consideration and with an ulterior object, and that further inquiries made by defendant No. 3 had revealed the following information. The defendant-firm used to supply to the military at Jullundur Cantonment certain articles on the basis of tender contracts entered into with "C.R.I.A.S.C., Jullundur Cantonment. These initials stand for 'Commander Royal Indian Army Supply Corps.'

In that office PW. 1 Sampuran Singh was a clerk who was known to wield a good deal of influence in the matter of securing contracts for the tenderers, because of his friendship with the

immediate officers concerned. Defendant Mohan Lal was on friendly terms with Sampuran Singh and the pronote appeared to have been executed by Mohan Lal in the name of the plaintiff as a *benamidar*, as the plaintiff was stated to be a relative of Sampuran Singh. The plaintiff had no means to pay the sum of Rs. 25,000. He had not advanced any sum and the partnership did not stand in need of borrowing any amount. The pronote was written in order to enable Sampuran Singh to make an illegal gain for himself. In the alternative, it was also averred that Mohan Lal defendant might have executed the pronote without consideration after the dissolution of their firm in order to wreak vengeance on defendant No. 3. The partnership never stood in need of any loan. The firm, it was alleged, had been dissolved since 5th of May, 1950, and a deed of dissolution had been executed.

Defendant No. 2 Mohan Lal also traversed the averments in the plaint. He added that in January, 1949, Sampuran Singh had assured him that he would help him in securing military contracts for the supply of potatoes and fruit at Ambala and onions at Jullundur, but Sampuran Singh had demanded a sum of Rs. 25,000 for securing the contracts. As the firm was not possessed of sufficient cash, Sampuran Singh got a pronote executed at Jullundur in favour of the plaintiff who was said to be his relative, for the illegal purpose of securing the contracts. At the time of the execution of the pronote no date had been entered. Sampuran Singh had agreed to get a contract for the supply of potatoes at Ambala for the period from 1st of April, 1949 to 30th of September, 1949, at higher rates tendered by the defendants and by getting the lower rates tendered by another firm Messrs. Shiva Brothers

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rejected. It was stated that the pronote had been executed with the object of getting tenders of the defendant-firm accepted and contract secured, but the condition was, that in case the contract was finally approved of and if the supply was made, the pronote amount would be paid on the completion of the contract from out of the profits thus accruing but not otherwise. This defendant stated that he never came into contact with the plaintiff who had never paid any money nor had he the means to do so.

The trial Court framed the following issues:—

(1) Has this Court jurisdiction to try the suit?

(2) Was the pronote in suit for Rs. 25,000 duly executed by Mohan Lal, defendant No. 2, as the proprietor and for the defendant firm No. 1, on 13th May, 1949, in favour of the plaintiff?

(3) If issue No. 2 is proved, was the pronote in suit without consideration?

(4) Is the defendant No. 3 not liable for the debt in suit, if so, how?

(5) Was the pronote in suit executed for any illegal purpose and against public policy? If so, how and to what effect on the suit?

(6) Is the plaintiff not entitled to the interest claimed? if so, how?

Later, two more issues were framed:—

6-A. Whether the suit is time barred ?

6-B. Was there any agreement between Mohan Lal, the executant of the pronote, and S. Sampuran Singh, that the pronote amount would be realised only, if the contract of the supply of potatoes was accepted?

As the issues were overlapping, the trial Court was of the view that the real controversy between the parties depended on answer to two questions:—

(a) Whether the pronote was executed by defendant No. 2 on his own behalf and on behalf of the firm on 13th of May, 1949, as alleged; and

(b) whether a sum of Rs. 25,000 was actually paid to defendant No. 2 or whether the pronote was passed by way of an illegal gratification for Sampuran Singh.

The trial Court came to the conclusion that the pronote had been executed by Mohan Lal on behalf of the firm. On the second question it was of the view that the pronote was without consideration and consequently dismissed the plaintiff's suit.

Though arguments have been addressed to us on a number of points, but the main controversy has centred round issue No. 3, as to the pronote being with or without consideration.

On behalf of the plaintiff-appellant, it was argued that in view of the provisions of section 118(a) of the Negotiable Instruments Act, it was for the defendants to rebut the presumption that the pronote was for consideration. Section 118(a) is as under:—

"Until the contrary is proved, the following presumptions shall be made :—

(a) that every negotiable instrument was made or drawn for consideration, and

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that every such instrument, when it has been accepted endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

* * * *."

This section provides a special rule of evidence in the case of negotiable instrument contrary to the case of an ordinary contract. Party denying consideration has to prove want of consideration or, in other words, to rebut the presumption that the negotiable instrument was made or drawn for consideration. The statutory presumption in favour of there being consideration for every negotiable instrument continues unless it is rebutted.

The distinction between the language of section 114 of the Indian Evidence Act, and that of section 118 (a) of the Negotiable Instruments Act is significant. The words "may presume" in section 114, Evidence Act, leave the matter to the discretion of the Court, either to make or refuse to make a presumption *inter alia* 'that a bill of exchange accepted or endorsed, was accepted or endorsed for good consideration',—*vide* illustration (c). The presumption is optional depending upon the Court's unrestricted discretion under section 114. Under this section, Court may not, but under section 118(a), Negotiable Instruments Act, the Court is bound to start with the presumption in favour of passing of consideration. Under section 114, Evidence Act, therefore, the Court has unfettered discretion to presume a fact, as proved, until it is disproved, or ignore such a presumption and call for proof of it. But when the statute requires, as in the case of section 118 of the Negotiable Instruments Act, that the Court shall presume a fact, the Court has no option left, and it has to treat the fact as proved, until

the party interested in disproving it has led evidence in support of its non-existence. On the basis of this, the appellant's counsel argues that the trial Court had struck out the evidence of defendant No. 1 and the evidence led by defendant No. 3 by itself is insufficient to discharge the onus placed upon him. He maintains, that whatever lacunae or contradictions there may be in the plaintiff's evidence on the question of passing of consideration, he cannot be non-suited on that ground, in the absence of convincing evidence led by the defendants to prove want of consideration.

In *Mst. Zohra Jan.* v. *Mst. Rajan Bibi* (1), it was held by a Division Bench of the Punjab Chief Court that although the initial presumption under section 118(a) of the Negotiable Instruments Act was that the promissory note was made for consideration, yet, having regard to the fact that the note itself stated that Rs. 30,000 was *borrowed in cash* without interest and the plaintiff was forced to admit that it was incorrect, it must be held that initial presumption had been rebutted, and that the onus had been shifted on to the plaintiff to prove that the promissory note was executed by the defendant for consideration.

Again, in *Siraj-ud-Din* v. *Mst. Champo* (2), Martineau, J., following the above decision, held that, where the statement of the plaintiff's agent with regard to consideration for the promissory note was entirely inconsistent with the plaintiff's allegation in his plaint, that was sufficient to shift the onus on to the plaintiff.

In *Sundar Singh* v. *Khushi Ram* (3), Tek Chand, J., also held that where, in a suit on a promissory note, plaintiff set up different stories as

(1) 48 P. R. 1915.
(2) III I. L. J. 439.
(3) A. I. R. 1927 Lah. 864.

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to consideration at different stages, the burden of proving consideration shifted on to him.

In this case the contention of the plaintiff in the plaint and even at the earlier stage of the trial was that he had paid Rs. 25,000 in cash to defendant No. 1. When the plaintiff appeared as P.W. 4, though in examination-in-chief he had said that he had paid Rs. 25,000 in cash to Mohan Lal on behalf of the firm, he took a complete somesault in the cross-examination, and said, that he had absolutely no proprietary right to the money, but was merely a *benamidar* of the pronote, that it was Sampuran Singh, P.W. 1, who had brought the money and had given it to him, and that he did not know Mohan Lal, the executant of the pronote. According to the three authorities referred to by me above, the initial presumption in view of the contradictions noticed above stands rebutted.

On behalf of the appellant, our attention has been drawn to a decision of the Privy Council in *Ch. Gur Narayan* v. *Sheolal Singh* (1), where it was held that a *benamidar* could institute a suit in respect of the property although the beneficial owner is no party to it. But this is no authority on the question of discharging of onus by the defendants, where there is important inconsistency in the matter of passing of consideration between plaintiff's case as set up in the plaint and as put forth in the evidence.

By a Division Bench of the Bombay High Court in *Tarmohammed Haji Abdul Rehman* v. *Tyeb Ebrahim Bharamchari* (2), the view expressed in th Punjab decisions referred to above was dissented from as not being in consonance

(1) A. I. R. 1918 P. C. 140.
(2) (1948) 51 Bom. L. R. 219.

with the plain language of section 118(a) of the Negotiable Instruments Act. It was, however, conceded that if a particular consideration is mentioned in a negotiable instrument, and consideration is found to be false and some other consideration is set up, that is a factor, which the Court would take into consideration in deciding whether the defendant had discharged the burden cast upon him under section 118(a).

A defendant may discharge the burden of proof placed upon him under section 118(a), either by producing definite evidence, showing that consideration had not passed, or, by relying upon facts and circumstances of the case, and also by referring to the flaws in the evidence of the plaintiff and may then contend that the presumption has been rebutted. If the plaintiff goes into the witness-box, and the result of his evidence is, that he fails to establish the passing of consideration, and the Court is thus satisfied, that the plaintiff did not give the consideration, which he alleges, the defendant can certainly avail himself of the contrariety and the provisions of section 118(a) are not thereby entrenched upon,—*vide Anumolu Narayana Rao* v. *Ghattaraju Venkatapayya* (1); *Muhammad Shafi Khan* v. *Muhammad Moazzam Ali Khan* (2), *and Bishambar Das* v. *Ismail* (3).

But the burden of proof, on which, considerable emphasis has been laid by the learned counsel for the appellant, acquires importance, only where, by reason of not discharging the burden which was put upon a party, it must eventually fail. Where, not only parties have joined issue, but have led evidence, the two versions can be gone into, with a view to determine, which way the weight of the evidence turns. In such a case

(1) A. I. R. 1937 Mad. 182 (187.
(2) A. I. R. 1923 All. 214.
(3) A. I. R. 1933 Lah. 1029.

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the abstract question of *onus probandi* loses its significance, as the Court determines the controversy, on the weight of the evidence led on the contested issue, and not upon the abstract question of burden of proof, which becomes purely academic. Of course, if the mind of the Judge, determining the suit, is left in doubt as to the point on which side the balance should fall in forming a conclusion, the doctrine of *onus probandi* will become a determining factor, *vide Yellappa Ramappa Naik* v. *Tippanna* (1), *and Narayan Bhagwantrao Gosavi Balajiwale* v. *Gopal Vinayak Gosavi* (2).

Mr. Faqir Chand Mital, learned counsel for the respondent (Amin Chand defendant No. 3), has contended that the special rule of evidence laid down in section 118(a) of the Negotiable Instruments Act, was intended to apply only as between the parties to the instrument or those claiming under them, and in other cases, the presumption can only be in accordance with the provisions of section 114, illustration (c) of the Evidence Act, and it is for the Court to apply the presumption or not according to the circumstances. He, therefore, argues that his client Amin Chand defendant No. 3, who was not an executant of the pronote, cannot be adversely affected by the rule of burden of proof, as contained in section 118(a) of the Negotiable Instruments Act. There is support for this proposition in the judgment of Varadachariar J. in *Anumolu Narayana Rao* v. *Ghattaraju Vekatapayya* (3). Reliance was also placed on the decision of the Privy Council in *Firm Sadasuk Janki Das* v. *Sir Kishen Pershad* (4).

(1) A. I. R. 1929 P. C. 8.
(2) A. I. R. 1960 S. C. 100 (105).
(3) A. I. R. 1937 Mad. 182 (185).
(4) A. I. R. 1918 P. C. 146.

Our attention was also drawn to a Full Bench decision reported in *Abdul Shakur* v. *Kotwaleshwar Prasad* (1), wherein Agarwala J. observed—

> "The presumption raised under section 118 occurs in chapter 13, which relates to special rules of evidence relating to negotiable instruments. Having regard to fact that the Act, itself codifies the law for the purposes of dealings relating to negotiable instruments, the presumptions embodied in section 118 must in their very nature have reference to parties to a negotiable instrument, and the presumption raised under the section must apply when the question arises between those parties". (page 365).

But this view was not shared by the other two Judges,—*vide* pages 370 and 389.

The view expressed by Varadachariar J. appears to be more in accord both with the *verba* and the *sententia legis*. In the case of a pronote the executant admits consideration and it is for him to dislodge a presumption, which his own admission on the face of the pronote carries, but when another person, who is neither the executant of the pronote nor is endorser or negotiator, he cannot be deemed to be in possession of the knowledge as to the passing of the consideration, or of the circumstances, under which, it may be deemed to have passed. It does not appear to have been the intention of section 118(a) to fasten liability on a person, who was neither the maker nor endorser, etc., of the instrument; and expect him to discharge the onus of

(1) I. L. R. (1956) 2 All. 347.

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proving failure of consideration, in order to escape the consequences of an adverse decision. In such a case the ordinary rule of common law should apply and the party seeking to enforce his claim against his opponent should establish, that the transaction, for which he is being held liable, was made for good consideration.

But for the purposes of this case, the controversy between the two views is more academic, than real. At the time of the execution of the pronote, Amin Chand admittedly was partner of Mohan Lal in the firm styled as Messrs. Amin Chand—Mohan Lal. The opening words of the pronote are—

> "We, Messrs. Amin Chand-Mohan Lal, contractors, residents of Ambala Cantonment, do hereby declare as under:—
>
> * *"

At the bottom of the pronote, Mohan Lal signed for Amin Chand-Mohan Lal. The receipt Exhibit P.B. is couched in similar language. In the eye of law, the pronote was executed by Mohan Lal, as representing himself and his partner Amin Chand and so long as Mohan Lal had a right to do so, both he and his partner Amin Chand would be deemed to be executants. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner bind the firm and his partners, unless he in fact had no authority to act for the firm and the other person was aware of this. When a negotiable instrument is drawn by a partner in a trading firm, the other partner is not any the less liable, because his name does not appear on the face of the instrument. *Vide Bunarsee Dass, executor of Roy Rampershad, and guardian of Damoduo Das, a minor,*

v. *Gholam Hossein etc.* (1), and *Moti Lal Manucha* v. *The Unao Commercial Bank* (2). To such a relationship the maxim, *qui facit par alium facit per se*, applies and a person, who does an act through another is deemed to do it himself. That being the position, Amin Chand's case is not governed by the rule enunciated by Varadachariar J. in *Anumolu Narayana Rao* v. *Ghattaraju Vekatapayya* (3).

The trial Court struck out the defence of Mohan Lal defendant-respondent and the learned counsel for Amin Chand defendant-respondent has also urged that as a result of striking out of the defence, which was contrary to law, his client has been materially prejudiced. This was done in the following circumstances:—

On the 10th of March, 1953, Amin Chand made an application under Order 11, rule 18, Civil Procedure Code, praying that the plaintiff might be ordered to allow inspection of his pass books, cash books, *kachi bahis* and *pakki bahis* from 1949 onwards, and of all accounts relating to Jaura Engineering Works, Putli Ghar, Messrs. D. L. Jaura and Sons, and to the business, which was carried on in the name of C. L. Jaura, Arms Merchants, Queens Road, Amritsar. It was stated in the application that inspection of these books was necessary for ascertaining whether the plaintiff had got the amount, which he was alleged to have advanced and from where it as procured. The object of the defendants was to show that the plaintiff was not in a financial position to advance the amount of the pronote as alleged. But the Subordinate Judge by his order

(1) 13 M. I. A. 358.
(2) 1930—32 Bom. L. R. 1571.
(3) A. I. R. 1937 Mad. 182 (187).

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dated 18th of March, 1953, rejected the petition on the ground that it was "most vague and indefinite". He, however, remarked that if details of the books sought to be examined were furnished, he would be willing to consider the matter on merits.

On 18th of March, 1953, the plaintiff produced his first witness, P.W. 1 Sampuran Singh, who described himself as attorney of Messrs. Kisan Brothers of Jullundur. In his examination-in-chief, he had stated that Rs. 25,000 were paid in his presence to the executant of the pronote by the plaintiff. Immediately on the conclusion of the examination-in-chief of this witness, Shri Gurdas Mal, Advocate, for defendant No. 2, expressed his inability to cross-examine the witness, for the reason, that the documents, which had been summoned from Messrs. Kisan Brothers, who were the employers of the witness, had not been received by the Court. The Subordinate Judge ordered that as he could not see any relevancy of the aforesaid documents at the time, he directed the counsel to cross-examine the witness. In the cross-examination that followed, P.W. 1 Sampuran Singh admitted that he was employed in the department of Commander Army Service Corps and was working under Lt.-Col. Jagjit Singh Chima. He admitted that the defendants were approved contractors for the supply of various articles to the troops.

After the witness had been cross-examined for a short while, statement of Shri Gurdas Mal and of Shri Hans Raj counsel for defendants 2 and 3 was again recorded. They had stated that they had filed a list of documents on 10th of January, 1953, which they had summoned from the persons mentioned in the list. They stated that they could proceed with the further cross-examination

of Sampuran Singh, only when the documents were received. The documents had been summoned to show that the witness, owing to his influence with Lt.-Col. Jagit Singh Chima, had got the tender of the defendant-firm recommended, and that the sum of Rs. 25,000 was to be paid to the witness by way of illegal gratification, and the witness had got the pronote executed not in his own name, but in that of the plaintiff. When this request was made, the trial Court burdened the defendants with Rs. 50, as conditional costs and directed them to take *dasti* processes to the military office concerned and to get the witnesses served. The defendants were directed to see that the documents wanted by them were produced by 7th of April, 1953, and the witness was required to appear on 23rd of April, 1953.

On 7th of April, 1953, which was not a date fixed for recording of any evidence, Mohan Lal defendant submitted an application, stating that he had called on the office of C.A.S.C., East Punjab area, Jullundur Cantonment, on 2nd of April, 1953, to serve summons on the record-keeper of the Commander Army Supply Corps—new designation of C.R.I.A.S.C.—to give evidence personally and to send documents in Court before 7th of April, 1953. It was stated that the record-keeper refused to accept the summons and wanted that the summons should be sent to that office by the Court through the General Officer Commanding, who alone could grant the necessary permission to the record-keeper to attend the Court with any official documents. For this reason, the applicant prayed, that the summons to the record-keeper be sent through the General Officer Commanding. On that date, the trial Court ordered that the defendant was to be blamed for want of promptness in not getting the witness served and the

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defendant was burdened with costs of Rs. 40. The defendant was directed to obtain the documents mentioned in the petition for 23rd of April, 1953.

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This order seems to me to be indefensible, particularly when service was being deliberately refused by the record-keeper, and failure to get the documents produced in Court, could not be attributed to any omission or want of promptness on the part of the defendant, who was doing his best to get service effected. This rather shows keenness on the part of the defendant and his counsel to get the documents produced, as it was expected, that the defence story would be borne out by the records of the Military Department. On 23rd of April, 1953, which was the date fixed for further cross-examination of the witness, the amount of costs was increased from Rs. 40 to Rs. 60. The Subordinate Judge discharged Sampuran Singh, so for as the cross-examination by Shri Gurdas Mal, was concerned, but required him to come on 5th of May, 1953, for being cross-examined by Shri Mital counsel for defendant No. 3. If, for cross-examination by counsel for defendant No. 3, the witness had to come on 5th of May, 1953, there was no point in enjoining counsel for defendant No. 2 from cross-examining him. On 5th of May, 1953, he counsel for defendant No. 2 stated that he would pay the costs only if the record-keeper of the military authorities appeared with the required documents. It seems that service was being deliberately avoided by the record-keeper in charge of the documents, which were required to be produced from the military authorities, and the Subordinate Judge, instead of insisting on the military authorities producing the documents, went on burdening the defendants with costs for no fault of theirs.

On 5th of May, 1953, an application was made by the plaintiff under Order 17, Rule, 3, and section 151, Civil Procedure Code, stating that as costs had not been paid in compliance with the orders of the Court, the defence should be struck out and his suit should be decreed. The Subordinate Judge, by his order, dated 6th of May, 1953, thought that in view of the provisions of Order 17, rule 3, Civil Procedure Code, he had no option but to strike out the defence of defendant No. 2 which accordingly he did.

The provisions of law contained in Order 17, rule 3, and Order 11, rule 21, Civil Procedure Code, are penal in their nature and must, therefore, be construed strictly. In view of the stringency of these provisions and of the drastic consequences that follow, they should be applied only when the facts admit of no doubt, and the conduct of the party at fault, cannot be excused. In a case where a party to a suit has paid the process-fee for summoning the witnesses and has done all that lay in its power to get the production of the documents, it is for the Court and is officers, who are responsible for effecting service, to see that the witnesses attend with the documents called; and non-attendance of witnesses for want of service, for refusal to be served, or for non-production of documents, does not justify the penalising of the party, in a case, where, the fault lay either with the process-serving agency or the witness summoned. Any adjournment resulting thereby, cannot be treated as "time granted to one party" within the meaning of Order 17, rule 3, Civil Procedure Code,—*vide Harjas Rai* v. *Narain Singh* (1), and *Karam Chand* v. *Jinda Ram* (2).

(1) 51 P. R. 1915.
(2) A. I. R. 1924 Lah. 404.

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The provisions of Order 17, rule 3, Civil Procedure Code, do not justify the striking out of the defence. If defendant is at fault then all that the Court can do is to decide the suit forthwith.

There is no justification at all for striking out his defence even if he had failed in any duty. For striking out the defendant's defence it has to be shown that the provisions of order 11, rule 21, Civil Procedure Code, have been contravened. There are only three grounds upon, which trial Court is justified in striking out the defence of the defendant, namely, where there is refusal to answer interrogatories under rule 11, or there is refusal to make discovery of documents under rule 12, and lastly where there is refusal to allow inspection of documents under rule 18. I do not think that any case has been made out for proceeding either under Order 11, rule 21, or under Order 17, rule 3. The result was, that the defence of Mohan Lal Defendant No. 2, has been materially prejudiced in consequence of the Court not insisting on the production of the documents required by the defendants and these documents, in view of what has been alleged would have had a considerable bearing on the case.

But a worse illegality has been committed by the trial Court against Defendant No. 3.

On 6th of May, 1953, the trial Court passed an order striking out the defence of Mohan Lal defendant No. 2. After this had been done, request was repeated by the counsel for defendant No. 3, that the documents, which had been summoned from the military might be ordered to be produced. The Sub-Judge thought that this request was belated and, therefore, allowed it subject to defendant No. 3 paying Rs. 150, as conditional costs. Defendant No. 3's counsel made a statement that the terms as to costs were onerous and

were not acceptable to his client. The case, however, was adjourned to 18th May, 1953., for the cross-examination of P.W. 1 by counsel for defendant No. 3, which had not yet begun. On the adjourned date, after the witness had been cross-examined on several matters, a request was made on behalf of defendant No. 3 that as in the meanwhile the record, which had been summoned from the military authorities, had been sent to the Court, the witness might be cross-examined on those documents without insisting on his client paying Rs. 150, as costs, but the Court despite the presence in Court of the witness and of the documents, which had been received from the military, refused the legitimate request to cross-examine the witness on the basis of the documents.

The case had been adjourned from 6th of May, 1953, to 18th of May, 1953, for the cross-examination of P.W. 1 by counsel for defendant No. 3. In the meanwhile the records of the military had been received in Court. Undoubtedly, Amin Chand's counsel had the right to cross-examine the witness, not only generally, but also tn the basis of the records, which had come. The cross-examination of the witness was not defened to 18th M ay for any reason connected with the documents not having been sent. The order abridging the party's right to cross-examine the plaintiff's principal witness, under the circumstances cannot be supported on any legal or rational ground and by Court's illegal refusal the case of defendant No. 3 has been prejudiced.

Ordinarily the erroneous shutting out of the defence by the trial Court would have justified an order for remand in this case, in order to enable the defendants to lead the evidence, which was wrongly excluded, but this necessity is obviated as

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in our view, on the consideration of such evidence as there is on the record and from other circumstances of the case, the suit merits dismissal.

The evidence and the circumstances on which reliance has been placed on behalf of the respondents to show, that consideration did not pass, may now be examined. The plaintiff has filed this suit on the last date of limitation without serving any notice of demand on the defendants prior to the institution of the suit. The plaint does not profess to disclose the real source from which the consideration came. It merely mentions that defendant No. 2 had executed this pronote in plaintiff's favour for Rs. 25,000 cash received and agreed to pay the amount on demand with interest at 3 per cent per annum. Defendant No. 3 in his written statement, dated 8th of August, 1952, has given detailed version as to how Sampuran Singh had given assurance that the defendants' tender at a higher figure would be accepted on account of his influence with the military authorities; and for these services he would be paid Rs. 25,000 out of the profits, which were expected to accure in consequence of the acceptance of the tender. In other words, it was clearly stated by defendant No. 3 on 8th of August, 1952, and by defendant No. 2 on 5th of December, 1952, that no consideration came from the plaintiff, who was a complete stranger. It is curious that the plaintiff did not seek permission of the Court to file a replication under Order 6, rule 5, Civil Procedure Code, in order to traverse the pleas in the written statement.

In this case, issues were framed by the trial Court on 5th of December, 1952, and supplementary issues were framed on 3rd of February, 1953, and evidence commenced on 18th of March, 1953. The plaintiff, who was fully aware of defendants'

version since 8th of August, 1952, never cared to seek amendment of his plaint, with a view to plead his changed version, which he disclosed for the first ti me when he entered the witness-box as P.W. 4 on 18th of May, 1953. The statement of P.W. 1 Sampuran Singh, was recorded in three instalments. On 18th of March, 1953, when he appeared for the first time he stated that Rs. 25,000 were paid in his presence to the executant by the plaintiff and he thus supported the plaint. P.W. 2 Baikunth Lal, was examined on 18th of March, 1953, and he said that he was present when the pronote was executed and the amount was paid by the plaintiff to Mohan Lal, defendant No. 2, in his presence and also in the presence of P.W. 1 Sampuran Singh. P.W. 3 Munshi Ram, who was also examined on the same date, stated in his cross-examination, that Sampuran Singh P.W. 1 had advanced Rs. 25,000 to Amin Chand (defendant No. 3) and Mohan Lal (defendant No. 2), but immediately corrected himself, and said, that the sum of Rs. 25,000 had been advanced by Chandan Lal Jaura, plaintiff to Amin Chand and Mohan Lal. It was never the plaintiff's case that this amount had been advanced to defendant No. 3 Amin Chand and his contention, throughout, had been that the payment was made to Mohan Lal. When cross-eamined, P.W. 3 Munshi Ram went on to say, that it was correct that Sampuran Singh had told him privately, that actually the money belonged to his mother-in-law.

Both P.W. 2 and P.W. 3 are thoroughly unreliable witnesses. P.W. 2 is admittedly an agent of Messrs. Kisan Brothers of which P.W. 1 Sampuran Singh, was attorney. Lt. Col. Jagjit Singh, Chima's father is the proprietor of this concern. In his statement in cross-examination recorded on 18th of May, 1953, when he was called for the

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second time, Sampuran Singh came out with a different story which was, that Mohan Lal defendant had borrowed on 4th of January, 1949, a sum of Rs. 15,000 from him, which amount he had got from his mother-in-law and had later returned that amount to her in February, 1949. As to consideration for Rs. 25,000 he stated that Rs. 15,000 were given by his mother-in-law, Rs. 6,000 by his mother, and Rs. 4,000 came from him. He admitted that the consideration really came from him and not from the plaintiff, but as the latter happened to be his "trusted friend" and he "did not desire to involve women into monetary transaction", so he got the pronote executed in favour of the plaintiff.

After the above statement, the plaintiff entered the witness-box as P.W. 4 on 18th of May, 1953. In his examination-in-chief he adhered to the version contained in the plaint and said, that the pronote had been executed in his favour by Mohan Lal on behalf of the firm, and that he had paid Rs. 25,000 in cash. In his cross-examination, he admitted for the first time, that he had no proprietary rights in the aforesaid money and was merely a *benami* holder of the pronote. He stated that Rs. 25,000 had been given to him by Sampuran Singh P.W. 1 and he did not know wherefrom Sampuran Singh had brought the money. He admitted, that he did not know Mohan Lal, the executant of the pronote. He said that as he was merely a *benamidar*, he had not given any notice to the defendants before institution of the suit. He also said, that the lender of the money, i.e., Sampuran Singh, happened to be a Government servant, and as he was unwilling to get the pronote executed in his favour, and also did not want to bring the names of the ladies in the pronote, it was, executed in plaintiff's favour.

What the plaintiff revealed for the first time in cross-examination on 18th of May, 1953, he could have disclosed in the plaint, but he deliberately adhered to his earlier version even when he was examined-in-chief. Similarly, Sampuran Singh in his first statement, dated 18th of March, 1953, struck to the first position taken by the plaintiff, namely, that Rs. 25,000 were paid in cash by the plaintiff to the executant. It was during the course of his cross-examination on 18th of May, 1953, when he appeared for the second time, that he came out with the story that the consideration for the pronote had come from him, his mother and his mother-in-law. Despite this statement, the plaintiff, who followed Sampuran Singh on 18th of May, 1953, clung to his earlier story while being examined in chief. It was only in his cross-examination that he came out with the new version.

It cannot be denied that it is open to the *benamidar* to institute a suit for the recovery of the amount and he need not implead the real beneficiary, and a decree passed in favour of the *benamidar* will enure to the benefit of the real lender. But in this case the plaintiff falsely persisted in giving himself out as the real owner, and suppressed the fact, that the consideration had come from Sampuran Singh. Similarly, Sampuran Singh P.W. 1 up to the stage of his examination-in-chief had taken the position that Rs. 25,000 were paid by the plaintiff, and did not disclose, that the money had really come from him, his mother, and his mother-in-law. Both Sampuran Singh and the plaintiff thus forfeit their claim to being considered as witnesses of truth.

The defendants being kept under the impression that the plaintiff was claiming to have

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advanced the amount of the pronote from his own resources, were anxious to show that he was not in a financial position to advance such a large amount, and with that object in view had summoned the account books of the three concerns, in which the plaintiff was interested, by means of an application under Order 11, rule 18, Civil Procedure Code, made on 11th of March, 1953. The plaintiff submitted a written reply on 18th of March, 1953, objecting to the production of the documents, but he did not in that reply state, as he should have, that he was a mere *benamidar* and no consideration had come from him; but it had come from Sampuran Singh and his female relatives. On the assumption that the subsequent version of the plaintiff is true, the plaintiff is guilty of both *expressio falsi* and *suppressio veri.*

The variance between the pleadings, and the proof subsequently led, has certainly caused prejudice to the defence. According to the pronote, Rs. 25,000 was received from Chandan Lal Jaura, plaintiff, and in the very first paragraph of the plaint it was stated that defendant No. 2, as one of the proprietors of the firm, defendant No. 1, had executed the pronote "for cash received". The defendant, naturally, to disprove this allegation had called for plaintiff's accounts and pass-books in order to show that he was not in possession of money, which he could advance on the pronote as alleged by him. The plaintiff adhered to this stand in his examination-in-chief when he appeared as P.W. 4. It was in cross-examination that he said that he was merely a *benami* holder of the pronote for Sampuran Singh, who had given him the money, that he did not know, wherefrom he had brought the money, and that the executant was not known to him. During the course of his cross-examination on 18h of May, 1953, Sampuran Singh, disclosed that the money had been

provided by his mother, mother-in-law and himself. If this fact had been stated in the plaint, the defendant would not have tried to look for evidence as to the financial status of the plaintiff, but he would have gone in search of evidence to show that Sampuran Singh and his two female relations had no means to advance such a large amount. As a result of variance between pleadings and proof, the defendant could not suddenly discover and produce evidence to disprove the story subsequently set out. As a result of the false pleadings, the defendants were deliberately put on a false scent. Courts have always deprecated such tactics and have insisted on the rule embodied in the phrase *secundum allegata et probata.* Not only this is a rule of logic, but also of fair-play. As observed by Lord Westbury J. in *Eshenchunder Singh* v. *Shamachurn* (1)—

> "This case is one of considerable importance, and their Lordships desire to take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. * * It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove * They desire to have the rule observed, that the state of facts, and the equities and ground of relief originally

(1) 11 Moo Ind. App. 7 (20, 23 and 24)

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alleged and pleaded by the plaintiff, shall not be departed from".

The basis of this principle is, that a party should not be taken by surprise by the change of the case introduced by the opposite party. It was observed in *Nabadwipendra*, v. *Madhu Sudan* (1)—

> "The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, first to appraise the defendant, distinctly and specifically, of the case he is called upon to answer so that he may properly make his defence and may not be taken by surprise, and secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations.

It is true, that every variance between pleadings and proof is not necessarily fatal; and in the absence of any element of surprise or prejudice to the opposite party, the rule of *secundum allegata et robata* will not be enforced with rigour.

The first rule of pleadings is that the plaintiff should state his whole case in his pleadings, in other words, set forth in his pleadings all material facts on which he relies for his claim. The party is not to disclose the evidence by which he intends to prove his claim, but the facts disclosed should be material and not misleading. The disclosure has to be made of what are called the *allegata probanda*, i.e., the facts, which ought to be proved. It is the right of the defendant to know the outlines to the case, which the plaintiff intends to make against him, and to bind him down to a definite story. It must contain such particulars as "to fill

(1) 16 I. C. 741 (742).

in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case, which he has to meet and to enable him to prepare for trial". *Vide Bruce* v. *Odhams Press Limited* (1), Per Scott L. J., and *Lever Brothers* v. *Bell* (2).

In this case not only the material facts had been concealed, but wrong facts had been alleged, and the law is, that no amount of evidence can be looked into upon a plea not put forward,—*vide Siddik Mohamed Shah* v. *Mt. Saran* (3), *Messrs. Watkins Mayor and Co.* v. *Jullundur Electric Supply Company Limited* (4); and *S. Bhupindar Singh* v *Chanan Singh* (5).

The learned counsel for the appellant has strived to meet this argument by drawing our attention to the provisions of Order 6, rule 13, Civil Procedure Code, which provide—

> "Neither party need in any pleading allege any matter of fact, which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (e.g., consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim)".

But in this case, the plaintiff definitely alleged that the pronote had been executed in his favour "for cash received". The plaintiff thus sued on the cash consideration coming from him and this was

(1) (1936) 52 T. L. R. 224 (228).
(2) (1931) I. K. B. 557.
(3) [1955] S. C. R. 152, 160.
(4) A. I. R. 1955 Punj. 133.
(5) A. I. R. 1950 E. P. 256.

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the substantive ground of claim, which later on was completely varied.

Another consequence as to variance between the pleadings and proof in this case is, that the presumption under section 118(a) of the Negotiable Instruments Act, stands rebutted. The defendants under this special rule of evidence had to disprove that the consideration had not passed. The moment the plaintiff as P.W. 4 stated that he had no proprietary rights to the aforesaid money, and he did not give the money, which was brought from somewhere by Sampuran Singh, who was the real lender, the defendants stood absolved from disproving, that the plaintiff had provided the cash consideration as alleged in the pronote and the plaint. The moment the plaintiff as his own witness detailed an entirely different story regarding the passing of consideration, he, *eo instante* took upon himself the burden of proving, that consideration, different from that, which had been alleged in the pronote, had in reality passed in this case. Thus the plaintiff by his own act relieved the defendants from the burden cast upon them by section 118(a) of the Negotiable Instruments Act.

There is no gainsaying the fact that a *benamidar* can sue without impleading the beneficiary,—*vide Lachmi Chand* v. *Madan Lal Khemka* (1), *Sarajoo Pd.* v. *Smt. Rampayari Devi* (2). But these authorities, do nowhere lay down, that the plaintiff may first join issue with the defendant on the question that he is the real creditor, and later on fling a surprise on the defendant and claim himself to be merely a *benamidar* for another, and then contend, that the defendant has not been able

(1) A. I. R. 1947 All. 52.
(2) A. I. R. 1956 Pat. 493.

to rebut the claim of the real beneficiary, the hitherto undisclosed principal. If the plaintiff wanted to take his stand as a *benamidar*, then he should not have concealed his status as such, and ought not to have taken his stand on the plea, that he had provided the cash consideration for the pro-note.

The next question is whether the subsequent story as given by Sampuran Singh and the plaintiff in their respective cross-examinations is true or false. To this extent the defence version is corroborated by Sampuran Singh and the other witnesses for the plaintiff that Sampuran Singh, was the attorney of Messrs. Kisan Brothers, whose proprietor was the father of Lt. Col. Jagjit Singh Chima, who was the military officer, who had to accept or reject the tenders offered by the defendants. Sampuran Singh, admits having been employed in the office of Commander Army Service Corps, Jullundur, and that he was working under Lt. Col. J. S. Chima. He also admitted that the defendants were the approved contractors for the supply of various articles to the troops, but his memory failed him when he was asked if the defendant-firm had offered a tender for the supply of potatoes for Ambala from 1st of April to 30th of September, 1949. He also could not recall to his mind, that another firm Shiva Brothers had also applied for the aforesaid tender of potatoes. He knew Mohan Lal, since 1946, as he was a military contractor and the witness was a clerk in the office of C.A.S.C. He also admitted that he was getting a salary of Rs. 275 per mensem, while at Lahore and when he opted for India in 1947, he was getting only Rs. 210 per month and was a typist in the office of Lt. Col. J.S. Chima. According to him, Rs. 15,000 were advanced by his mother-in-law, Rs. 6,000 by his mother, and Rs. 4,000 were contributed by him. He admitted, that neither he

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had kept his money in any Bank, nor his mother had any Bank account. He admitted that his moher-in-law was a widow since, 1922 and her husband as an employee in Shri Panja Sahib Gurdwara. When he was killed, the Shromani Akali Gurdwara Committee had fixed a pension of Rs. 17 per mensem for his mother-in-law, which she had been getting since 1922. Later on, this pension had been increased to Rs. 26 per mensem. He stated that his mother-in-law was not poor, nevertheless, she accepted this pension. She used to live with him and it was suggested that on the partition of the country she had brought her jewellery from Gujranwala, but he did not know in which locker, it had been deposited or to whom it had been sold, when, for how much, or on how many occasions. He said that he had been kept by his mother-in-law ever since his marriage as *Ghar Jawaie* or *khana damad.* But his ignorance as to how, when and for how much the jewellery was disposed of, does not admit of any reasonable explanation. He admitted that he had been spending at the rate of Rs. 200 per mensem and it is inconceivable that he could have amassed Rs. 4,000 at that rate of expenditure. He denies having maintained any accounts or having kept his money in any Bank. Though there stands to his credit in the books of Messrs. Kisan Brothers a sum of Rs. 15,000, he denies having invested anything with that firm and has stated that Kisan Brothers had borrowed Rs. 15,000 from a friend of his through him, and therefore, he (Sampuran Singh), and not his friend, was being shown as the lender of the money. No light has been thrown by him as to how his mother happened to possess Rs. 6,000 and as to where she had kept this amount.

Regarding the amount of Rs. 15,000 said to have been given to him by his mother-in-law, the

suggestion of the learned counsel for the respondent is, that she is a penniless woman, living on the charity of the Gurdwara Committee, who have been giving her a pension first of Rs. 17 per mensem and then of Rs. 26 per mensem, and that she was a person of no means and could not contribute Rs. 15,000 as alleged. Moreover, there could be no temptation to advance a large sum on a pronote at a small interest of 3 per cent per annum when better interest could be earned elsewhere. It was also argued that it was unlikely that such a large amount would have been advanced *benami* without taking reasonable safeguards against the *benamidar*. Admittedly no document was taken from the plaintiff evidencing receipt of Rs. 25,000 by him from Sampuran Singh.

Reliance has been placed upon the current account of Shrimati Harnam Kaur, mother-in-law of Sampuran Singh, in the Punjab National Bank, Limited, Jullundur City. A copy of a statement of this account is Exhibit P.W. 5/1. It shows that Rs. 6,000 was deposited on September 8, 1948, and another sum of Rs. 16,000 on November 26, 1948. On 4th of January, 1949, a sum of Rs. 15,000 was drawn by means of cheque No. 771572 favouring self" (Exhibit P.W. 5/2). Sampuran Singh had stated, that this amount of Rs. 15,000 had been advanced by his mother-in-law to Mohan Lal defendant No. 2 by endorsing the cheque in his favour and this money had been paid back by Mohan Lal in February, 1949. This amount has never been credited either in February, 1949, or later on in the account of Shrimati Harnam Kaur. The suggestion of the learned counsel for the respondents is, that the amount in the Bank in the name of Shrimati Harnam Kaur really represents Sampuran Singh's share of bribes and it was kept in the name of Shrimati Harnam Kaur, though

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actually belonging to Sampuran Singh. It was also suggested that Rs. 15,000 were never advanced to defendant Mohan Lal, but were withdrawn from th Bank and invested in Messrs. Kisan Brothers in whose books the sum stood in the name of Sampuran Singh. The suggestion of the defence counsel appears to be more plausible, but even on the assumption, that the statement of Sampuran Singh, with regard to an earlier loan of Rs. 15,000 having been advanced by his mother-in-law to Mohan Lal was true, it could not from that fact be concluded, that the consideration for this pronote also had come from Shrimati Harnam Kaur.

The next argument advanced on behalf of the respondents is that they did not stand in need of Rs. 25,000 for depositing the security on their contracts with the military on 13th of May, 1949, as on that day no securities could be taken from the military contractors by the military department. It has been admitted by Sampuran Singh in cross-examination that it was absolutely necessary, that whosoever wanted to take a contract from the military, he had to submit the tender before 31st of March of the financial year, and the acceptance of the contract would be conveyed to the contractor before 1st of April, from which date the supply would have to be made. He also stated that if a contractor were to fail to deposit the security within twenty days of the acceptance of the contract, then the contract would be cancelled. In view of this it has rightly been argued that no question of depositing of any security arose on 13th of May, 1949.

In this case out of the two defendants, Amin Chand defendant No. 3 has appeared as his own witness. Amin Chand as D.W. 3 has stated that

Sampuran Singh, had friendly relations with Lt. Col. J.S. Chima, and negotiations with the contractors were usually conducted by Sampuran Singh. It was customary for Sampuran Singh to demand one-fourth to one-fifth of the estimated profits from the contractors before orders were placed with the military and the payment used to be either made in cash or a pronote used to be executed in his favour or in favour of some of his friends. The plaintiff's counsel did not choose to cross-examine Amin Chand on this part of his statement. Amin Chand denied that his firm had borrowed any money from the plaintiff and said that no money was ever credited in the name of the plaintiff in their firm's account books. He also denied there being any entry of the amount of the pronote in their account books, but as the account books of the defendant-firm have not been produced in this case, no significance can be attached to his *ipse dixit*. In cross-examination Amin Chand stated that whenever his firm required money, their practice was to hand over their bills to the Punjab National Bank and to get advances from the Bank against those bills. He stated that he never had any occasion to borrow money from any other person in conection with their business. He said that he had entered into partnership with Mohan Lal and a deed of partnership, Exhibit D. 1, had been executed between them and their partnership had been dissolved by Exhibit D. 2, which was signed by them. The reason for non-production of the books of partnership, given at the Bar is that they were retained by Mohan Lal. Mohan Lal neither appeared as a witness for himself nor was he called by Amin Chand. This no doubt is an inexcusable omission on the part of the defence. But on the basis of non-appearance in the witness-box of Mohan Lal defendant No. 2, the plaintiff cannot reasonably ask that his suit

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Tek Chand, J.

should be decreed. From the failure of Mohan Lal to appear as his witness, it cannot be assumed that the pronote must have been executed for consideration. There is also a similar omission on the part of the plaintiff as neither Shrimati Harnam Kaur, nor the mother of Sampuran Singh, stepped into the witness-box to support the story that they had paid the amounts of Rs. 15,000 and Rs. 6,000 respectively.

In view of what has been discussed above, it appears to be a just and reasonable inference, that the pronote was without consideration; and that the consideration did not pass either in accordance with the story as set out at first in the plaint, i.e., from the plaintiff, or, from Sampuran Singh, his mother or mother-in-law, as per subsequent version. The contention raised on behalf of Amin Chand defendant No. 3 appears to be nearer the truth.

The learned counsel for the appellant has drawn our attention to Exhibit P.C., as according to him this letter written by Mohan Lal, defendant and addressed to Sampuran Singh, shows that he admitted his liability to pay the amount in question. This is a letter dated 6th of June, 1950, addressed to "Dear Sardar Sahib", in which he has stated that the condition of business was deteriorating, and that he had not got any particular business in hand. He then said "I will do your work gradually as my state of affairs has worsened. * * * *

Please rest assured your work would be done". From this the learned counsel for the plaintiff wants us to conclude that Mohan Lal admitted his liability under the pronote and admitted his helplessness to pay the amount, but promised to do so. This document at its best is ambiguous and

it is not clear, whether it in fact was addressed to Sampuran Singh, or that it was signed by Mohan Lal. But assuming that Mohan Lal had written this letter to Sampuran Singh, it is not at all clear that the reference is to the promissory note in question or to the illegal gratification promised. Instead of writing that he would "do your work", he would have clearly referred to the loan taken by him on the pronote. These words can equally refer to some illegal gratification promised or to some other matter. This letter cannot be treated as an admission on the part of Mohan Lal acknowledging his liability under the pronote.

After giving my anxious thought to all the points canvassed before us in this case, I am satisfied that there is no merit in the plaintiff's appeal, which fails and is dismissed with costs. The cross-objections, which relate to costs are allowed.

SHAMSHER BAHADUR, J.—I entirely agree.

B.R.T.

APPELLATE CIVIL.

Before P. C. Pandit, J.

BIR INDER NATH,—*Appellant.*

versus

UNION OF INDIA,—*Respondent.*

Regular Second Apeal No. 284 of 1955

1960

April 19th

Indian Post Office Act (VI of 1898)—Section 47—Amount of money order paid to the right person after the amount had been attached by a court—Whether can be recovered as arrears of land revenue.

Held, that it cannot be said in the present case that the money order was meant for some body else or the